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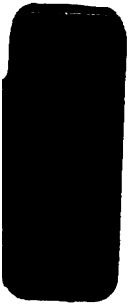
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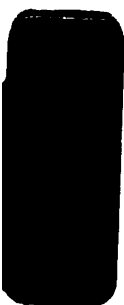
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THE
PACIFIC REPORTER,

VOLUME 14,

CONTAINING

ALL THE DECISIONS OF THE SUPREME COURTS

OF

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Idaho, Montana, Washington, Wyoming,
Utah, and New Mexico.

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UNION PAC. RY. CO. v. HENRY.
(*Supreme Court of Kansas. May 6, 1887.*)

1. NEGLIGENCE—RAILROAD CROSSING—INSTRUCTION.

In an action against a railway company for damages to a team and omnibus injured at a public street crossing in a city, where the railway company was liable for ordinary negligence, and the injury caused by its negligence, and the court instructed the jury that if they found the plaintiff was not guilty of contributory negligence, or, if negligent, that his negligence was slight, and did not directly contribute to the injury, to find for the plaintiff, *held* not error.¹

2. DAMAGES—EVIDENCE OF—INSTRUCTION.

Where plaintiff introduced two witnesses to prove his damages, and, before resting his case, declared that there were yet other witnesses to prove damages if the defendant intended to dispute the amount so proven, and counsel for defendant announced that defendant would introduce no testimony on the question of damages, and no further evidence is given, *held* not error for the court to instruct the jury that, if they found for the plaintiff, he was entitled to recover the amount as shown by the undisputed testimony of plaintiff.

3. NEGLIGENCE—RAILROAD CROSSING—EVIDENCE.

Where an injury was caused by a railway company by backing a freight train on the public street of a city, on a dark night, and no flag-man was present at the crossing, that fact is competent to be submitted to the jury, where it is also shown that no one was on the rear end of the train, and no signal or warning was given before backing the train.

4. SAME—INSTRUCTIONS.

Where the court in charging the jury defines the different degrees of negligence, and instructs the jury that the only question for them to determine is the negligence of the respective parties, and that, if they find from the evidence that the defendant had done wrong and caused the injury, a *prima facie* case for compensation was made out, *held*, that the use of the word "wrong" was equivalent to "negligence," and was not misleading.

(*Syllabus by Cogston, C.*)

Error to district court, Clay county.

James A. Henry brought this action against the Union Pacific Railway Company to recover damages sustained by the backing up of a train of cars over his omnibus and team, at Clay Center, Kansas. Plaintiff alleged the fact to be that on December 5, 1883, he was the owner of an omnibus and team of horses used by him in conveying passengers from the railway depot to plain-

¹Respecting what constitutes negligence in crossing a railroad track, see *Kelly v. Pennsylvania R. Co.*, (Pa.) 8 Atl. Rep. 856, and note.

tiff's hotel, and that on said day he had in his employ one Watrous in charge as driver of said team; that said driver drove to the defendant's depot to receive passengers to arrive on the 7:30 p. m. train; that said train was the regular evening train, and composed of freight cars and one passenger coach, the passenger coach being on the rear of the train. After the train arrived, and the passengers were received, the driver started to drive to the hotel, and to do so he had to drive about one block parallel with the defendant's railway track, to the Fifth-street crossing, where he would have to cross the track. About the time he started from the depot the defendant's train commenced to back up towards the Fifth-street crossing, and stopped with the passenger coach standing about one-third in the street. The driver waited until the train stopped, when he started across the track. At this point there is also a side track, and, when between the two tracks, a loose car came down on the side track in the rear of the team, which frightened the horses, and before the driver could control them, they backed the omnibus against the rear end of the passenger coach, and before he could get disengaged from the coach the train again began backing up, pushing the omnibus and team before it for about 50 feet, and finally ran the omnibus and team down, damaging the omnibus, and killing one of the horses. Plaintiff claimed damages to the amount of \$499. All of which allegations the defendant denied, and alleged that the accident complained of by plaintiff was caused by the negligence of the plaintiff or his employe. Trial by jury. Verdict, special findings, and judgment for the plaintiff for \$391.50, and costs. The defendant brings the case here.

A. L. Williams, J. P. Usher, and Chas. Monroe, for plaintiff in error. J. S. Walker and Harkness & Godard, for defendant in error.

CLOGSTON, C. The principal complaint made by the defendant, plaintiff in error, is in the instructions the court gave to the jury. The record in this case discloses but two issues over which there was any controversy at the trial: *First*, was the injury caused by the negligence of the defendant? *Second*, was the plaintiff guilty of contributory negligence directly causing the injury? The findings of fact by the jury being in favor of the plaintiff, and against the defendant, on both of these propositions, and the evidence tending to support all of said findings, and said findings being consistent with the general verdict, we will therefore not examine the evidence further than to ascertain if the instructions complained of are correct under the evidence given.

Plaintiff complains of the first instruction given by the court, which is as follows: "This is an action brought by the plaintiff to recover damages from the defendant for injuries to the property of plaintiff sustained in a collision between the omnibus and horses of the plaintiff and the railway train of the defendant. There is no controversy as to the fact that the collision occurred; that it occurred in the city of Clay Center, at and upon the crossing of Fifth street and the railway track of the defendant; and no controversy as to the amount of damages sustained by the property of the plaintiff; the only question in the case for the determination of the jury being as to the negligence or want of due care of the respective parties, or their employes, and the amount, if any, that the plaintiff is entitled to recover, as shown by his undisputed testimony."

And the counsel particularly complain of these words in the instructions, "And the amount, if any, that the plaintiff is entitled to recover, as shown by his undisputed testimony;" insisting that this part of the instructions is not supported by the evidence. We see no error in this charge. The evidence as to the extent of the damages sustained was not disputed, and the attention of counsel was called to this fact at the trial. Plaintiff's attorneys announced that they had a number of witnesses to establish the damages by,

if the defendant expected to controvert this question; and counsel for the defendant stated in reply that they would not offer testimony on that question. In the face of this, can counsel say that the jury had a right to disregard the testimony of the plaintiff and his employe Watrous upon this question of damages? If counsel desired to insist upon this proposition, they ought to have made no admissions that kept plaintiff from introducing the remainder of the evidence tending to show the damages claimed; but, having done so, we think the question of damages was admitted, and that the court gave the proper instructions.

Counsel also complain of the second instruction given by the court, which is as follows: "(2) In considering this case, you will first determine whether the defendant or its employes were guilty of negligence in the operation and management of its road and train which resulted in the injuries complained of. If you determine this question in the negative, you need not inquire further, but return a verdict for defendant. If you determine that there was such negligence, you will then inquire further whether there was contributory negligence, on the part of plaintiff or his employe, such that, under other instructions given in this case, he ought not to recover. If you find there was such contributory negligence on the part of the plaintiff or his employe, you will return a verdict for the defendant. If, however, you find that the defendant was guilty of either ordinary or gross negligence, and that the plaintiff was not guilty of contributory negligence, or, if negligent, that his negligence was slight, and did not contribute directly to cause the injuries complained of, you will then find for the plaintiff, and assess his damages at such sum as you believe from the evidence he has sustained."

Counsel insists that this instruction, in relation to the negligence of the plaintiff or his employe, was misleading and erroneous. Plaintiff in error does not contend that his instruction, as an abstract proposition of law, is not correct, but that, under the facts of this case, it was misleading; that, if the driver of the team was negligent at all, it did contribute directly to the injury. This would be true, taken as shown by the testimony offered by the defendant alone. Taking it for granted that the train never stopped backing until after the accident, and that the driver drove his team on the crossing in front of a moving train, this instruction might be misleading; but the testimony offered by plaintiff that the train was standing still; that the driver had no notice that the train would move further backward, and without warning of danger he drove on the crossing,—and this crossing a public one, as free to the plaintiff as to defendant; when not occupied by the defendant's train, the plaintiff might cross,—and when his team became unmanageable on the crossing, it then became the duty of the defendant to use more than ordinary care to prevent the injury. Slight negligence on the part of the driver, under such circumstances, would not relieve the defendant from liability. *Leavenworth, L. & G. Ry. Co. v. Rice*, 10 Kan. 426; *Sawyer v. Sauer*, Id. 466; *Union Pac. Ry. Co. v. Rowllins*, 5 Kan. 167; *Kansas Pac. Ry. Co. v. Peavey*, 29 Kan. 169.

Plaintiff also complains of the third instruction given by the court, which is as follows: "(3) The triple distinction of slight, ordinary, and gross negligence is recognized by the law, and apply to this case. Negligence is a want of due diligence. Slight negligence is merely the failure to exercise great or extraordinary care. Ordinary or common negligence is a want of that degree of care which an ordinary prudent man would ordinarily exercise under like circumstances. Gross negligence is the want of slight diligence. If you find, therefore, from the evidence, that defendant company has done wrong, and caused an injury thereby, a *prima facie* case for compensation is made out, unless you further find that the negligence of the plaintiff or his employe contributed directly to the injury complained of, when in such case the law declines to apportion the damages, and leaves the injured party without compensation. The degree of diligence required of plaintiff and his employe in

this case was such as a man of ordinary prudence would have exercised under similar circumstances; and, as to the question of negligence on the part of either plaintiff or defendant, it is a question of fact for the jury to determine, from all the evidence in the case."

In this instruction the word "wrong," complained of, is entitled to a different construction than that given to it by counsel. These instructions must be taken together. While this word "wrong," in its broad sense, includes every injury to another, independent of the motives causing the injury, yet, taken as used in this instruction, it meant, and could mean, nothing but that kind of wrong the court was defining to the jury in defining "negligence;" that it was the failure to exercise great or extraordinary care, or a want of that care which an ordinary prudent man would ordinarily exercise, or it is the want of slight diligence, and the failure to take this kind of care, where others are liable to injury, was the wrong the court was charging the jury that an injury caused thereby was a *prima facie* case of compensation made out. The jury had already been instructed. The only question for them to consider was the negligence or want of care by the respective parties. This instruction could not mislead the jury. Judge BREWER, in *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 50, said: "But if it is shown that a party has done wrong, and caused injury thereby, is not a *prima facie* case for compensation made? Logically, the wrong-doer should always compensate, and the wrong and the injury always entitle to relief. When the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation." That case is conclusive of this.

Objections are also made to the following instruction: "(4) The jury are instructed that, in considering the circumstances of this case, it is proper for them to take into consideration the fact that at the time of the accident the night was dark, defendant company had no flag-man at the crossing at the time of the accident complained of, and the further fact that the defendant's train was moving backwards at the time."

Counsel for plaintiff, in their brief, speculate as to the duty of a flag-man at a crossing, and insist as the driver of the team knew as much of the movements of the train as a flag-man would have known, that the fact that there was no flag-man at the crossing was immaterial. The evidence in this case does not disclose what a flag-man's duty would be. The authorities cited by counsel define some of the duties of a flag-man, but we think they have omitted some of the duties which, if discharged, would have in this case prevented the injury. If a flag-man had been at the crossing, he would have known, or it would have doubtless been a part of his employment to have known, that the purpose of backing this train was to take cars out from the side track, and to do this that the train must back up beyond Fifth-street crossing; and he would not have permitted teams to have crossed in front of the train that would immediately back up to accomplish the purpose for which it was backing. The evidence shows that the night was dark, and no one was stationed at the crossing to warn persons that the train would still move further backward; and we cannot presume that the driver of the omnibus, whose duty it was to convey passengers from the depot to the hotel, had that knowledge of the moving train. Upon this state of facts, we see no error in the instructions. *Kansas Pac. Ry. Co. v. Richardson*, 25 Kan. 409; *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 49.

There are other objections to the charge of the court, but no specific objections are urged to them. On the whole, we are of the opinion that the learned court has very fairly and intelligently instructed the jury on the law applicable to the facts in this case; and, while the evidence is not clear as to the negligence of the defendant, yet, taken together, we do not feel warranted in saying the court committed any error in submitting the question of negligence

to the jury. We therefore recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

KANSAS CITY, L. & S. K. RY. CO. v. BOLSON.

(*Supreme Court of Kansas. May 6, 1887.*)

1. RAILROAD COMPANIES—STOCK-KILLING CASES—EVIDENCE.

Where an action is brought in justice's court, under section 30, c. 84, Comp. Laws 1885, against a railway company for the killing of stock, and no answer is filed or appearance made by the defendant before the justice of the peace, and the defendant appeals to the district court, on the trial in the district court it is not necessary for the plaintiff to prove that the railway company is a corporation to entitle him to recover. The proof that the defendant was a railway company operating said railway at the time of the injury, under section 30, is sufficient.

2. SAME—EVIDENCE OF NEGLIGENCE.

Where the only proof to establish negligence of the defendant in killing stock is the fact that the place where stock was run over and killed by a moving freight train was at a point on the track where the persons in charge and operating said train could have seen the cow in time to have stopped the train, and the fact that the train was moving faster than the regular schedule time for such trains, in the absence of all showing when the cow went upon the track, is not sufficient evidence to establish negligence on the part of the defendant to entitle the plaintiff to recover.

(*Syllabus by Clogston, C.*)

Error to district court, Montgomery county.

Defendant in error, plaintiff below, brought this action in justice's court against the plaintiff in error to recover damages alleged for the killing of a cow by the defendant, plaintiff in error, in the operation of its railroad through Montgomery county, Kansas. The defendant made no appearance before the justice of the peace, and judgment was rendered for the plaintiff. The defendant appealed to the district court, whereupon plaintiff obtained leave of the court to file amended bill of particulars. Defendant was not required to and did not file any answer. Trial at the December, 1884, term of the district court by jury, and judgment for plaintiff. The defendant brings the case to this court for review.

Geo. R. Peck, A. B. Clark, and A. A. Hurd, for plaintiff in error. *J. D. McCue*, for defendant in error.

CLOGSTON, C. The defendant in error has filed no brief, and therefore we cannot say upon what theory the defendant claimed that the judgment ought to be sustained. The plaintiff in error claims—*First*, that there is no evidence shown in the record to prove that the defendant is a corporation; and, *second*, that there is a failure to prove that the injury complained of was caused by the negligence of the defendant, or its agents or servants.

As to the first of these propositions we think the learned counsel is in error; and we first suggest this question: Was it necessary for the plaintiff to prove that the defendant was a corporation, under his bill of particulars, to entitle him to recover? The statute under which this action was brought is as follows: "Every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay to the owner the full value of each and every animal killed, and all damages to each and every animal wounded by the engine or cars of such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not." Section 5205, Comp. Laws 1885. This statute makes the distinction between railway companies and railway corporations, and makes both liable for damages for stock killed or injured in the operation of the road; and the legisla-

ture, when it framed this section, doubtless thought, as counsel suggests, that a partnership or individual might operate a railroad without being incorporated; and, if they did, they ought to be liable as well as if they were incorporated. In this case, while the plaintiff alleged in his bill of particulars that the Kansas City, Lawrence & Southern Kansas Railway Company was a corporation, would this description of the defendant prevent him from recovering, provided he brought his action against the right railway company defendant? He brought his action against the company that was in fact operating the road, but described it as being a corporation; and his failure to make that proof that the company was incorporated, we think, under his bill of particulars, was immaterial. He established the fact that the train of cars that committed the injury was operated by the agents and servants of the Kansas City, Lawrence & Southern Kansas Railway Company. Again, the defendant made no appearance in justice's court, but, after judgment against them, appealed to the district court. Who appealed? What company or corporation? Whoever it was it was the defendant; and, although it had been described as a corporation, yet it was the company that was sued that was appealing, and in the name of the Kansas City, Lawrence & Southern Kansas Railway Company removed said cause to the district court, and to this court; thereby admitting its existence either as a corporation or a railway company operating that line of road; and, it having done this, it is unnecessary for the plaintiff to prove more. But, should we be mistaken in this proposition, we think the record shows evidence sufficient to submit this question to the jury; and the jury on this evidence, as shown by the record, was warranted in finding the defendant to be a corporation. Witness Phelps testified that the defendant was in the possession of the right of way, and had been ever since the road was built, some 12 years or more. And on the cross-examination of witness Hastings the following questions were asked and answered: "Question. Do you know that the Southern Kansas Railway Company is a corporation different from the Kansas City, Lawrence & Southern corporation? Answer. I do not; I understand they are the same identical road. Q. Do you know what a corporation is; can they be the same? A. I understand that they are the same." This evidence not only admits that the Kansas City, Lawrence & Southern Kansas Railway Company is a corporation, but it as well proves this fact by the witness. It is true, perhaps, that this was not the proper way to prove a corporation, but the defendant made the proof, and they cannot be heard now to say that the proof was incompetent.

As to the second proposition, we think the learned counsel is correct. The record shows no negligence on the part of the defendant, its agents or servants, in managing the train at the time of the injury complained of; and we can well see why the trial court might hesitate in submitting this question to the jury, or even submit it at all. The evidence relied on, or at least the only evidence offered for the purpose of showing negligence, was that the place where the cow was killed was at a point on the road where the engineer could have seen the cow for a distance sufficient for him to have stopped the train, and prevented the injury. This claim is clearly shown by the evidence; but there was a total failure on the part of the plaintiff to show when the cow went upon the track. The section men testified that, when the cars came by them where they were at work, about 150 yards from the place where the cow was run over, a whistle sounded the danger signal, and they looked up, and saw the cow on the track. This was the first they had seen of her. The engineer testified that the train was within 150 yards from the place where they struck the cow when she came on the track, and that he whistled for brakes and reversed his engine, and gave the alarm whistle for stock. The conductor in charge of the train testified that the signal for brakes was promptly responded to. Now, this evidence was undisputed. What more could the train men have done to have prevented this injury? It is also true that the train

was running somewhat faster than the regular schedule time, but this fact alone is not sufficient to warrant the jury in finding defendant guilty of negligence, for the regulation in relation to the operation and running of freight trains is made by the railway company for their own convenience, and they have a right to run their trains at such rate of speed as to them seems advisable and their business demands.

There is one other question shown by the record we feel called upon to mention, although not complained of. That is the instructions of the court in withholding from the jury the question of demand provided for in section 5206, Comp. Laws 1885, and in substantially instructing the jury that, before they could find for the plaintiff, they must find that the injury complained of was caused by the negligence of the defendant. We think the evidence of a demand, as shown by the record, was sufficient to raise a question of fact, and ought to have been submitted to the jury; and as this question was not so submitted, and as the defendant has a right to have this question submitted and determined by the jury, we cannot direct a judgment of the findings of fact, as would otherwise be done by affirming the judgment.

It is recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

MISSOURI PAC. RY. CO. v. PEREGOY, Adm'x, etc.

(*Supreme Court of Kansas. May 6, 1887.*)

1. MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANT.

Where an ignorant boy, 17 years old, an apprentice in a machine-shop, was directed by the foreman in charge to obey the call and direction of W., another employe, engaged in drilling an engine frame, which work required a skilled mechanic to safely handle, and W., being also an unskilled apprentice, negligently removed the clamp that was provided to hold the frame from falling, and in that position attempted to move the engine frame, directed the boy to move the trestle further under the frame, when it fell and killed the boy, *held*, that W. and the boy were not fellow-servants, and that the negligence of W. was the negligence of the employer.¹

2. SAME—DANGEROUS LABOR.

Where such foreman directs an unskilled apprentice to do work that requires a skilled mechanic to perform, and directed him to call to his assistance other employes also ignorant of said work, and said work is dangerous, and such danger is known to the foreman, and is unknown to such employes, and no notice is given to them of the danger, and failed to give them instructions which, if given and followed, would have prevented the accident, and one is killed while at said work, the employer is liable in an action for damages.²

(*Syllabus by Clogston, C.*)

Error from Labette county.

This action was commenced October 4, 1883, in the district court of Labette county, by Elizabeth Peregoy, administratrix of James Peregoy, deceased, defendant in error, against the Missouri Pacific Railway Company, plaintiff in error, to recover damages for the killing of her son, the said James Peregoy, who was an apprentice employed in the defendant's railway machine-shops at Parsons, Kansas, where he had been so employed for about two months. One Gottlieb Wirth was also an apprentice employed in said shops, and on the day of the accident Wirth was drilling an engine frame, a large frame of iron, weighing about 2,000 pounds. The frame was standing on

¹ As to the liability of the master to his servant for negligence of a servant of superior grade, see *Pittsburgh, C. & St. L. R. Co. v. Adams*, (Ind.) 5 N. E. Rep. 197.

² As to the duties of master to caution an inexperienced servant, see *Prentiss v. Kent Furniture Manuf'g Co.*, (Mich.) 30 N. W. Rep. 109; *Missouri Pac. R. Co. v. Callbreath*, (Tex.) 1 S. W. Rep. 622, and note. As to the duty of the master to employ skillful servants, see *Buckley v. Gould & Curry Silver Min. Co.*, 14 Fed. Rep. 840, and note.

edge, one end resting on the drill-plate, and the other on a trestle. It was necessary for Wirth to move the frame, and for that purpose he called Perego and another employe to assist him in moving the frame, and also to move the trestle under the frame nearer the drill. Wirth and the other person attempted to lift the frame with a bar, and Wirth directed Perego to move the trestle, which he attempted to do. The frame fell and struck Perego, and killed him instantly. Wirth was directed by one Wood, who was foreman in that part of the shops, and had charge of the machine operated by Wirth, to call on Perego for help in moving the frame, and Perego was directed to assist whenever called upon. One Haynes was master mechanic, and in general charge of the shops. Both Wirth and Perego were boys about 17 years old, and had never worked in machine-shops, except in defendant's for a short time, and the work on this frame was the only experience each had ever had in handling engine frames or other heavy pieces of iron, and neither were instructed by persons in charge of the work that the handling of said frames was dangerous, or that it required great care and attention to avoid accidents. At the time the frame fell, the clamp provided to hold the frame had been removed by Wirth. Both Haynes and Wood had been at the drill while Wirth was drilling when the clamp was not fastened to hold the frame, and made no direction to Wirth about fastening the clamp on, to secure the frame from falling. Trial by jury, and findings of fact and verdict for the plaintiff for \$3,000. The defendant brings the case to this court for review.

David Kelso, for plaintiff in error. *Kimball & Osgood*, for defendant in error.

CLOGSTON, C. There is no substantial dispute in this case about the facts, but only as to the mixed questions of law and fact. Plaintiff in error assigns many errors, which we will try to take up in their order, but first will say that many of the errors complained of are covered and cured by the general rule that where the findings of fact are consistent with each other, and consistent with the general verdict, and are supported by some evidence, that the court will not disturb or set aside the judgment founded thereon; and this rule will dispose of the first error suggested by the learned counsel for the defendant, that there was an entire absence of evidence to support the findings of the jury "that it was necessary to remove the clamp to move the engine frame." On this question there was testimony,—the evidence of Wirth that he could not move the frame where he wanted it without taking off the clamp. Haynes and Wood had been there a short time before when the clamp was off, and had made no order or direction about putting the clamp on; and Haynes testified that by putting on another clamp on the other side of the frame the frame could have been moved without danger of falling, but nowhere was it shown that other clamps were furnished, or that Wirth was instructed about putting them on; while Wirth testified that no other clamp was furnished to put on the other side; while there was some other evidence tending to show that the frame could have been moved without taking off the clamp; that by loosening the burr the frame could not fall, yet could be moved. To weigh and determine this testimony was the proper province of the jury. They having found in favor of the plaintiff, their finding will not be disturbed. *American Bridge Co. v. Murphy*, 13 Kan. 35; *Railroad Co. v. Doyle*, 18 Kan. 58.

The learned counsel also complains of this instruction given by the court to the jury: "If Wirth was vested with full power to command the services of the deceased, an directed what he should do and how he should do it, and the whole management thereof and the direction of the deceased were vested in said Wirth, the defendant and superior servants reserving no discretion in themselves as to the direction of the work, then the act of Wirth is the act of the defendant, and not of a fellow-servant." In this instruction we see no

error. The evidence in support of it was that Wirth was instructed to call to his assistance the deceased; and this direction was from Wood, the foreman, who was in the immediate control of the machinery and the men in that part of the shop. And Peregoy was directed to obey that call from Wirth, and do as he was directed. This was the admitted relation between Wirth and the deceased. Wood, who was placed in the control of the men there at work by the defendant, delegated a part of that authority to Wirth, and Wirth, under and by virtue of that authority, directed the deceased to move the trestle, in doing which he lost his life. And, as to the liability of the employer, it made no difference if Wirth knew that the clamp ought to be put on before attempting to move the trestle. If he did know this, and neglected and omitted doing so, such negligence was the negligence of the employer. We concede the general rule to be that the negligence of a fellow-servant is one of the risks assumed by the employe, and for which the employer is not liable; but there are exceptions to this general rule; and where the employer places an employe under the control and direction of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes him to extraordinary peril, of the existence and extent of which he is not advised, the master is liable; and we think this case comes within the exceptions to the general rule. Here the employer placed deceased under the direction and control of a co-laborer, and is ordered by him to move a trestle, to do which would place him under the engine frame, a place of hazard and danger, of which he was entirely ignorant.

Justice VALENTINE, in *Kansas Pac. Ry. Co. v. Salmon*, says: "These officers, agents, or servants of the company, upon whom such powers are bestowed, are what we would designate as the higher or superior officers, agents, or servants of the company, and these higher officers, agents, or servants cannot with any degree of propriety be termed fellow-servants with the other employes who do not possess any such extensive powers, and who have no choice but to obey such superior officers, agents, or servants. Such higher officers, agents, or servants must be deemed, in all cases where they act within the scope of their authority, to act for their principal, in the place of their principal, and in fact to be the principal." *Kansas Pac. Ry. Co. v. Salmon*, 14 Kan. 512. *Thompson v. Chicago, M. & St. P. R. Co.*, 4 McCrary, 629, 14 Fed. Rep. 564, and cases cited; *Dowling v. Allen*, 74 Mo. 13; *Railway Co. v. Ranney*, 37 Ohio St. 670.

Counsel insists that this judgment cannot be sustained unless the defendant knew that Wirth was incompetent, and on this point the court instructed the jury as follows: "And for the purpose of determining whether or not it was known, it will be necessary for you to take into consideration what the agents and servants and employes of the defendant knew, or might have known by the exercise of ordinary and reasonable care on their part, from the number of times they were present when he was at work." The evidence in support of this, and under which this instruction was given, was that Haynes, the master mechanic, and Wood, foreman of that part of the shop, knew that Wirth was an apprentice, and that he had never been put to such work before, and that he was a mere boy; had seen him working that day, drilling on the engine frame in question with the clamp off; and the further proof that it required a skilled mechanic to safely do the work so as to avoid accidents. The defendant, through their agents Haynes and Wood, did know that Wirth was unskilled, and with this knowledge placed him in charge of work that required skill and practice to successfully and safely handle. But counsel insists that this instruction comes within the case of *Solomon Ry. Co. v. Jones*, 30 Kan. 601, 2 Pac. Rep. 657. In that case damages were claimed for injuries received by an employe or servant by the breaking of a handle of a hand car, and the evidence showed that on the day previous this car collided with another hand car, and that these hand cars were in use by a large number of hands. All

except three were co-laborers. Some of these employes testified to having noticed the defect in the car after the collision, but this knowledge was not known by the railroad company, and was not brought to the knowledge of such agents as would be knowledge of the company. The instructions, being general, were considered error; while in this case the language is almost identical with that case, but based upon a different state of facts.

In this case the incompetency and inexperience of Wirth was well known to those to whom notice was notice to the defendant. So the fact, also, of the manner in which the engine frame was handled, being known by the master mechanic in charge, this knowledge was a notice to the defendant also. While it is true that one of the foremen of the blacksmith shop, an employe in a different department of the shops, a short time before the accident happened, noticed the negligent manner in which Wirth was handling the frame, and called his attention to such negligence; but this foreman had no authority in this part of the shop, and this notice was not notice to the company. And while this instruction was general in its nature, yet, framed upon the facts in this case, we cannot see how the jury could be misled. The actual notice having been given and shown and brought home to such agents of the defendant, they were bound to take notice, and a failure to do so was the failure of the defendant.

Again, defendant complains of this instruction given by the court: "The employer has no right to put the servant to task of the risks of which the servant is ignorant, unless notice is given to put the servant on his guard." We see no error in this. Here the defendant was putting Wirth to work for the first time drilling and handling an engine frame, with full knowledge that to do that work well, and prevent accidents, it required skilled and careful mechanics to do it. Yet, with this knowledge, they put an inexperienced boy, 17 years old, to do it, and gave him the authority to demand the help of others of less experience than himself, and gave neither warning nor instruction that, if followed, would have prevented the accident. The foreman knew, or might have known by the exercise of ordinary care, that this inexperience in handling such machinery would result in an accident. And it became the duty of the defendant to have given warning to Wirth of the dangerous character of the work they were placing under his control, and given him instructions. But even having done this, we cannot see that this would have excused the defendant under the facts as shown and admitted in this case. The query is, can a railroad company put inexperienced and ignorant apprentices in places of great danger, where the work can only be safely done by experienced and skilled mechanics, and give them warning and instructions, and after an accident say they took the risk incident to their employment with knowledge, and be thereby relieved from damages? *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 Amer. & Eng. Ry. Cas. 408; *Parkhurst v. Johnson*, 50 Mich. 70, 15 N. W. Rep. 107; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Railroad Co. v. Doyle*, 18 Kan. 58; *Yeaton v. Boston & L. Ry. Corp.*, 135 Mass. 421; *Sullivan v. India Manuf'g Co.*, 113 Mass. 396.

Again, counsel for the defendant complains that evidence of poverty and dependence of the next of kin was improperly admitted. If the claim for damages by the plaintiff was alone claimed for the services of deceased during his minority, this claim would be good; for in that event it would make no difference what her pecuniary condition was, her damages would be compensation for his earnings. But in this case plaintiff claimed that, beyond this, she relied upon the deceased for support beyond his majority. And to determine what damages she was entitled to recover, evidence was properly admitted to show her health, prospects, and pecuniary condition; for without this proof no estimate could be made. And all evidence tending to show her need and prospects of receiving assistance from deceased, her dependence upon him, his ability to contribute, and his willingness to do so, were all proper to

be submitted to the jury; and we can see no other way in which she could show that she needed his assistance. And counsel will not contend that if the plaintiff was shown to be healthy and in good pecuniary circumstances, and not dependent, that the measure of her damages would be the same as under the circumstances shown in this case. *Potter v. Chicago & N. W. Ry. Co.*, 21 Wis. 373; *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 443; *Even v. Chicago & N. W. Ry. Co.*, 38 Wis. 613.

Again, counsel complain that the damages recovered were excessive. There is no fixed rule to determine compensation in case of death caused by the negligence of another. Each particular case must stand on the facts of that case, and in every such case the jury may give such damages as they may think apportionate to the injuries resulting from such death; and the rule, as laid down in *Potter v. Chicago & N. W. Ry. Co.*, 22 Wis. 615, we think a correct rule in this case: "That courts will not set aside the verdict for excessive damages unless they are so excessive as to be evidence of prejudice, partiality, or corruption in the jury." And, after a careful consideration of this case, we cannot say the amount awarded was excessive. And in conclusion, while we have not noticed all the errors complained of, we think the substantial complaints have been examined, and we find no errors in the record which we can correct.

It is recommended that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

ROWE v. COUNTY OF KERN. (No. 11,869.)

(*Supreme Court of California. May 25, 1887.*)

OFFICE AND OFFICER—COMPENSATION—COLLECTOR OF TAXES.

The tax collector of a county cannot recover, on a *quantum meruit*, from the county for services performed in the collection of county licenses, either by virtue of his office, or as a private individual, although the order imposing such licenses is passed after his term of office has begun, where the board of supervisors has made no provision for his pay for the collection of such licenses, where they have never authorized him to collect the same in any other capacity than as tax collector; and where both the supervisors and the tax collector supposed it to be his duty as such officer to collect the county license, and did not expect that he would receive any pay except as tax collector.

Department 1. Appeal from superior court, Kern county.

J. W. Freeman and *B. Brundage*, for appellant. *Taylor & Holl*, for respondent.

McKINSTRY, J. The action is upon the *quantum meruit* to recover the reasonable value of services alleged to have been performed in collecting county license taxes. The board of supervisors passed an order requiring all persons engaged in enumerated business and occupations to pay a license tax. If, when the board passed that ordinance, the duty at once attached to and was imposed upon the plaintiff, as tax collector, to collect the county license taxes, it was a duty to be performed without additional compensation; since the board of supervisors did not fix or determine the compensation to be paid, or provide that any compensation should be paid, to the tax collector for his services in collecting county licenses. There is no implied obligation on the part of municipal or *quasi* municipal corporations which obliges them to make compensation to officers of the municipality, unless the right to it is expressly given by law, ordinance, or contract. Such officers are deemed to have accepted their offices with knowledge of the provisions of the charter or law. 1 Dill. Mun. Corp. (3d Ed.) 230.

If it was the duty of plaintiff, as tax collector, to collect the county licenses, he knew, when he accepted the office of tax collector, that the county super-

visors might pass a license ordinance, and that it remained with the supervisors in their legislative capacity (if, indeed, they had any power in the premises) to provide, or not to provide, fees or compensation for the service of collecting the licenses. Moreover, this action was not brought by the plaintiff as tax collector. His counsel insist that it was no part of his duty as tax collector to collect the county license taxes. But if the tax collector, as such, had nothing to do with respect to county license taxes, and the sole power of appointing a collector of such license taxes was in the board of supervisors, the supervisors of Kern county never, by ordinance or resolution, appointed the plaintiff license collector, or provided for his appointment, or authorized him to collect the same. The plaintiff, as a private person, could not, simply by inducing the payment of license taxes to himself, and then paying into the treasury the amount so received by him, establish a contract relation between himself and the county, from which could arise an implied promise to pay him for his services as having been performed for the county.

Whether the tax collector is *ex officio* collector of county licenses, or the county license collector must be a separate officer nominated by the supervisors, the collector of licenses is a county officer, clothed with public responsibilities, and invested with a public character. If the board of supervisors had formally appointed the plaintiff collector of county license taxes, without providing any salary or fees for the office, he could not, as we have seen, have claimed compensation after performing services, because he would have taken the office with knowledge that he was to receive no fees or salary. If the plaintiff voluntarily assumed public functions which there was no officer to perform, he can have no better claim to compensation than if the office had been created, and he had been duly appointed to fill it. Further, the fact seems to be that both the individual members of the board of supervisors and the plaintiff himself supposed it to be his duty as tax collector to collect the county license taxes, and did not suppose or expect he would receive any compensation for such service, except as tax collector. If the plaintiff may now say he did not perform the service as tax collector he must be treated as a mere volunteer. Thus, if any implied promise to pay the value of the services could arise *prima facie* out of the performance of the service, the presumption of promise to pay was overcome by proof of the circumstances showing that plaintiff did not expect any compensation, except as tax collector, but showing the contrary. Order reversed.

We concur: TEMPLE, J.; PATERSON, J.

72 Cal. 322

FURLONG and others v. COONEY and others. (No. 9,674.)

(Supreme Court of California. May 21, 1887.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—OFFER OF SETTLEMENT.

The defendant, in an action of ejectment, had been in the open, exclusive, and notorious occupancy of the strip of land in controversy, claiming it as a portion of his lot, from 1850 to 1876, when it was discovered by a survey that it belonged to the lot of the plaintiff. As soon as the facts of the survey were made known to the defendant, he offered to buy the claim of the plaintiff, rather than have any trouble. Held, that the defendant had become invested with a perfect title to the land in controversy under the statute of limitations, which his offer to buy out plaintiff's claim did not invalidate.

2. ACTIONS—JOINDER—EJECTMENT.

Under the California Code, the plaintiff, in an action of ejectment, cannot join a claim for damages done by the defendant to other property than that sued for.

Commissioners' decision. Appeal from superior court, San Francisco.

B. McKime, for respondents. *M. Cooney*, for appellants.

BELOCHER, C. C. The controversy in this case is about a strip of land 68 feet 9 inches long and from 4 to 13 inches wide. The strip is a part of 50-vara lot No. 186, which is situated on the side of Telegraph Hill, in the city of San Francisco, and is bounded on the north by Union street, and on the west by Montgomery street. The plaintiffs claim title to the strip under an alcalde grant of the lot, and through sundry mesne conveyances from the grantee, and the defendants claim title to it under the statute of limitations. The case was tried before a jury, and the plaintiffs recovered a verdict, on which judgment was entered for the possession of the strip in question, and damages in the sum of \$300 for the withholding thereof. The defendants moved for a new trial, and now prosecute this appeal from the judgment and an order denying their motion.

The material facts of the case, as disclosed by the evidence, are as follows:

In 1850, John J. Cooney, the husband of the defendant Hannah Cooney, became the owner of a part of lot 186, bounded on the north by Union street, and extending back southerly 68½ feet, and having its western line parallel with Montgomery street, and distant therefrom 68½ feet. In 1851 Cooney had his lot surveyed out, and then built a two-story house thereon. The house faced on Union street, and from its south-west corner he built a fence back to his rear line, and then around, so that with the house the lot was wholly inclosed. Subsequently he built a one-story dining-room and kitchen at the end of his house, leaving then about 15 feet of the rear portion of his lot uncovered by buildings. The west line of the dining-room and kitchen was four inches further west than the corresponding line of the main house, and the roof extended out five inches further. From the time of its construction until his death, in 1879, Cooney resided with his family continuously in this house, and since his death his widow has resided in it. During all the time of his residence there Cooney claimed to own all the land covered by his buildings and improvements, and, so far as appears, his ownership was never questioned or disputed until 1876, when the plaintiffs became the owners of the lot lying west of and adjacent to his property.

A few years after Cooney erected his house, one O'Connor built a two-story house on the lot now owned by the plaintiffs, placing it back from Union street, so that the front line of it was only a few inches north of the rear line of Cooney's main building. Prior to 1876 that lot was owned and occupied by several different parties, one of whom, E. B. Mastick, was called as a witness for the plaintiffs, and he was the only one of them called by either side. He testified that he knew the lot from 1853 to 1864, and that he bought it and was in the use of it for five or six years, and built a barn there. "I never had the place surveyed. I supposed that the Cooney houses were east of my easterly line,—the easterly line of this land in controversy. No question arose about it when I lived there. When I bought the lot, Mr. Cooney's buildings were standing on the west line of his lot, where they stood during all the years I was there. We never had any dispute about our lines of land. They were good neighbors. Mr. Cooney's house was, I think, a two-story in front and one-story in rear, and a high board fence extended from his kitchen to the rear of the lot south. It was all inclosed. It was in that way all the time I was there." And on cross-examination, he said: "When I bought my lot I saw the Cooney buildings and fence there. Mr. Cooney occupied these premises and buildings with his family from 1853 to 1864. To my own knowledge he was in actual possession of the ground all that time. I never disturbed him, nor did he disturb me. The house now called Furlong house formed the inclosure on the east, and the Cooney fence was to the rear. *Question.* Did you during all that period, from 1853 to 1864, acquiesce in the possession by John J. Cooney of all this land inclosed and built upon by him? *Answer.* Yes, sir; I never knew of their being beyond the line."

The defendant Hannah Cooney was called as a witness for defendants, and

testified, among other things, that she began to live on the lot in 1850, and had resided there ever since. "My husband and family occupied the land and premises upon which our buildings and fences now stand since 1850 to the time of his death, continuously, without any interruption by anybody until Mr. Furlong interfered with us. * * * He did not hold this strip of land under anybody. He claimed it in his own right. He occupied it as his home and for his family during all those years, and he held it as his own. * * * Mr. O'Connor built this Furlong house where it stands. The eaves of my kitchen and the main house were just the same when he built his house as they are now. * * * We did not know we were off our line, and did not know until after survey made in June, 1876. * * * I believe my husband had a survey made in early times,—I think it was in 1851,—and according to the survey we built our house there. I recollect his making a survey. We lived on this property before we put up our building. We had a tent there before that."

Another witness was called for defendants who had owned and lived upon the lot adjoining on the south the Cooney and Furlong lots for about 30 years. He testified that he had known these lots since 1851, and as to the times when and the persons by whom the improvements thereon were erected and occupied, and then said: "I never heard any of the former owners of the Furlong lot dispute Mr. Cooney's right to occupy this land upon which his buildings stood. I never heard any one dispute Mr. Cooney's right to occupy the land in dispute, and upon which his buildings have stood since 1851. Hudson occupied the adjoining lot at one time as owner. He never disputed Cooney's right to it. His right to it was never questioned by the owners before Furlong. I never heard any controversy between them—Cooney and Furlong's predecessors—as to this boundary line. There never was any claim made, to my knowledge, by any owner before Furlong for anything east of the Furlong house; they never claimed east of that. Mr. Cooney always, since 1851, to the time of his death, claimed all the land upon which his buildings stand to be his property." And on cross-examination, he said: "I did hear Mr. Cooney speak of this property; of course I did. He said he owned it. He claimed it all, because he had a survey made in 1850 or 1851. When he built his house he told me so. When I bought my lot he told me that the lot was his lot. I never heard him say anything about thirteen inches of land on Furlong lot. He did not know that he was on the Furlong lot."

In June, 1876, after the plaintiffs purchased their lot, they had it surveyed, and then for the first time discovered that Cooney's main building extended over their line four inches, his dining-room and kitchen eight inches, the roof reaching out five inches still further, and that the fence in the rear was over the line four inches. Thomas Furlong, one of the plaintiffs, testified that after making this discovery he at once notified Cooney of it, and that, after looking at the surveyor's lines and conversing upon the subject for about an hour, Cooney said he "did not want any man's land, and that he would fix it, and would pay whatever the land was worth,—the value he would leave to arbitration. * * * He told me in June, 1876, if he had any land belonging to anybody he would leave it to arbitration; he would rather compromise than have any trouble." And in July, 1879, "he made the proposition to me to purchase the strip of land upon which his buildings encroached. * * * He said he did not desire to go to law; that he wanted to settle matters. * * * He then told me he had so much trouble about the land that he would rather fix it in some way. He said his buildings were upon it, and he supposed he was on his own land." The witness further testified that the first intimation Cooney ever gave him that he claimed any adverse interest in this strip of land was in February, 1877, and from that time until July, 1879, he was not on friendly terms with Cooney. Mrs. Furlong testified that she heard the conversation in July, 1879, and that her "husband then told him

that he was on a part of our land, and he [Mr. Cooney] seemed surprised. He said he was willing to leave it to arbitration; but nothing was ever done about it."

1. The action was commenced in April, 1881, and the first question is, "Did John J. Cooney acquire title to the demanded premises by adverse possession, under the operation of the statute of limitations?" It is, of course, settled law that, to constitute an adverse possession of land, so as to set and keep the statute of limitations in motion, the occupation of the one claiming to hold adversely must be open, visible, notorious, and exclusive, and must be retained under a claim of right to hold against the owner, and the owner must have knowledge, or the means of knowledge, of such occupation and claim of right. *Thompson v. Pioche*, 44 Cal. 508; *Thompson v. Felton*, 54 Cal. 547. Here the testimony shows, without conflict, that Cooney's occupation of the strip of land in controversy met all these requirements. For 25 years his occupation of it was open, visible, notorious, and exclusive. He claimed it, too, as his own during all that time, and the true owners had knowledge, or the means of knowledge, of his occupation and claim.

But it is urged on behalf of respondents that Cooney's statements, made to Furlong in June, 1876, and July, 1879, were, in effect, admissions that plaintiffs' title was good, and that he had not so claimed and occupied the property as to give him any right or title thereto under the statute. We do not think the statements referred to can have the effect claimed for them. They only show that he did not want any trouble or suit about the matter, and was willing to buy his peace. By his adverse occupancy he had already become invested with a perfect title, which could only be divested by a conveyance, or an adverse occupancy against him for five years; and by offering to buy out the plaintiffs' claim of title he did not thereby make good their title, or in any way render invalid his own title. *Arrington v. Liscom*, 34 Cal. 365; *Canon v. Stockmon*, 36 Cal. 535.

In both these cases it was held that an adverse possession of land for the period prescribed by the statute of limitations not only bars the remedy, but practically extinguishes the right of the party having the true paper title, and vests a perfect title in the adverse holder. And in the last case an instruction in the following words was asked by the defendant, and refused: "A party in possession of premises, claiming to own the same, may buy his peace by purchasing any outstanding title, or claim of title, without admitting such title, or claim of title, to be valid." Of this, the court said: "We have no doubt that the instruction refused correctly states the law on the point. A party may very well deny the validity of an adverse claim or title, and yet choose to buy his peace at a small price, rather than be at great expense and annoyance in litigating it. And such is, doubtless, often the wiser course. It is notorious that, in the confusion of titles to land in this state, it is a matter of every-day experience to buy up not one only, but many, adverse claims, even where the party buying believes he has, and actually has, the better title. To adopt any other principle than that embraced in the instruction refused would, in this state, be to deprive a very large portion of the holders of real estate, if not all of them, who stand in need of it, of all benefit of the statute of limitations. A party is not bound to admit, and does not necessarily admit, title in another, because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession, and protect himself from litigation, in any lawful mode that appears to him most advantageous or desirable."

2. The only other question which need be considered relates to the damages awarded the plaintiffs. In their complaint the plaintiffs alleged that the value of the rents and profits of the property sued for was \$1 per month, and for this they prayed judgment in the sum of \$49. They also alleged that they had been damaged by the withholding of the property in the sum of \$5,000,

and for this they prayed judgment. The answer denied that the value of the rents and profits was any sum greater than 20 cents per month, and denied that the plaintiffs had been damaged by the withholding of the property in the sum of \$5,000, or in any sum whatever. No proof was offered as to the value of the rents and profits, but it was attempted to be shown that the plaintiffs' house on their adjacent land had been damaged very considerably by the obstruction by defendants of its lights, etc. Under our Code the plaintiff may unite in the same complaint a claim to recover specific real property with damages for the withholding thereof, or for waste committed thereon and the rents and profits of the same. Section 427, Civil Code Proc. The measure of damages caused by the wrongful occupation of real property, in a case like this, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action, and the costs, if any, of recovering the possession. Interest may also be allowed when necessary to a complete indemnity. Sections 3287, 3334, Civil Code; *Haggin v. Clark*, 51 Cal. 112; *Vandervoort v. Gould*, 36 N. Y. 646.

But a claim for damages done by the defendants to other lands or property of the plaintiffs cannot be joined in an action like this. If such damages have been sustained, they must be sued for separately. Here the damages given the plaintiffs were clearly in excess of the value of the use of the demanded premises for five years before the action was brought, with interest thereon; and besides they were admittedly for injuries done to other property.

It follows, in our opinion, that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 330

NOBLE v. DESMOND. (No. 9,465.)

(Supreme Court of California. May 21, 1887.)

SHERIFF—LIABILITY FOR NEGLIGENCE.

The sheriff seized a lot of cattle belonging to one B. under a writ of attachment against B. One G. claimed the cattle, brought replevin against the sheriff, and, after executing the usual affidavit and undertaking with sureties, the cattle were delivered up to him. The sheriff took no steps to find out whether G.'s sureties were sufficient, nor did he compel them to justify. G. sold the cattle and left the state. The attachment creditor recovered judgment against B., but never could collect anything on it. Judgment was given in the replevin suit against G. and his sureties, but this also could not be enforced. The attachment creditor brought suit against the sheriff on his official bond. *Held*, that the sheriff was clearly negligent, and that the suit would lie.

Department 2. Appeal from superior court, city and county of San Francisco.

Clitus Barber, for appellant. *Stetson & Houghton*, for respondent.

THORNTON, J. In an action brought by plaintiff against one Bruce an attachment was regularly sued out and placed in the hands of the defendant as sheriff of the city and county of San Francisco, who levied it upon a lot of cattle as the property of Bruce, and took them into his possession. One Goss claimed the property, and sued the defendant in an action of claim and delivery, usually with us styled replevin, to recover the cattle seized under the writ. Goss made affidavit, and executed the usual undertaking with sureties, as required by the statute, (Code Civil Proc. §§ 510-519,) and upon the receipt of the affidavit, undertaking, and requisite notice, the coroner took the cattle

from the possession of the defendant. The latter did not execute the counter-undertaking, as required by section 514, Code Civil Proc., nor did he give notice that he excepted to the sufficiency of the sureties, (see section 513, Code Civil Proc.,) and the coroner delivered the cattle to Goss. It appears that Goss, not long after receiving possession of the property, sold it, and left the state. The action brought by Goss was tried, and the usual judgment in replevin passed for the defendant. The plaintiff herein recovered judgment against Bruce, on which he has been unable to make anything. Bruce had no other property at the time the attachment was sued out except the cattle above mentioned. The judgment against Goss has not been enforced, nor any part of it paid or satisfied.

It is claimed that Goss, and the sureties on the undertaking given by him, were insolvent when it was executed, and still continue insolvent; that the sheriff (Desmond) failed to except to the sufficiency of the sureties on the undertaking; that the sheriff did not reclaim, or attempt to reclaim, the property levied on, and did not notify either plaintiff or his attorneys of the commencement of the action against him by Goss, or that any undertaking had been given by Goss.

The evidence tends to show that the sureties were insufficient at the time they executed the undertaking, and the jury must have found such to be the fact in rendering a verdict for plaintiff. On the evidence appearing in the statement, we cannot say that it was insufficient to sustain the verdict. It was for the jury to say what weight the evidence was entitled to; and, as it tended to show that the sureties were insolvent at the time mentioned, we cannot interfere with the judgment or order in this case on that ground. That the sheriff did not except to the sureties or give a counter-bond is not disputed. And we are of opinion that the plaintiff knew nothing of the action brought by Goss, or of his having executed the undertaking above mentioned, until after the property had been delivered to Goss, when it was too late to except to the sureties, or execute a counter-undertaking.

It is argued that the defendant did nothing and omitted nothing in his capacity as sheriff for which he is responsible. In our opinion, the evidence shows negligence in the sheriff for which he is clearly responsible. When the sheriff seized the cattle under the writ of attachment, he was bound to hold them to satisfy any judgment which might be recovered in the action of Noble against Bruce. The measure of his obligation in regard to the property seized is that of a person of ordinary discretion and judgment in respect to his own property; that is, he is bound to use such care and diligence as a person of ordinary prudence might reasonably be expected to use in regard to his own property. *Jones v. McGuirk*, 51 Ill. 382. See the cases cited in *Shear. & R. Neg.* § 530, and notes.

The undertaking given in this case is intended by the law as standing in place of the property taken under it,—as the equivalent of it. See *Swezey v. Lott*, 21 N. Y. 483. It is conditioned for the return of the property taken to the defendant, if return thereof be adjudged, and for the payment to the defendant of such sum as may from any cause be recovered in the action against plaintiff. The sheriff is holding the property for another and is acting for another. He is to be regarded as an agent, and a paid agent of the plaintiff for whom he was acting. He is bound, in regard to the undertaking given to him as the equivalent of the property, to see that it is valuable; to act as an agent or a bailee for hire might reasonably be expected to act under the circumstances. Such agent or bailee would be expected to use every means to have his principal or bailor protected. It would be reasonable to expect him to inquire into the sufficiency of the sureties, and to use every reasonable mode of ascertaining whether they were or not solvent. If the plaintiff in the action in which he had seized the property, or his attorney, could be seen or communicated with, an agent of ordinary prudence would inform them,

or one of them that they might aid in ascertaining the condition of the sureties in point of responsibility.

In this case we are of opinion that the sheriff was clearly negligent in accepting the undertaking in question without taking the steps to find out whether the sureties were sufficient. At any rate, he should have compelled them to justify, which he totally neglected to do. It does not appear that he made any inquiry as to the pecuniary condition of the sureties, and we are convinced that if the sureties had been held to justify, that they would have been rejected as insufficient. The sheriff did not come up to the obligation of care and diligence required by law. He was therefore guilty of negligence in the discharge of the duties required of him by law, for which he and his sureties are responsible.

We find no error in the record, and the judgment and order are affirmed.

We think it proper to say that, feeling some doubt on the point whether the appeal should be dismissed on account of the language of the stipulation in regard to the transcript, we do not pass on the motion; and, as we conclude to affirm the judgment and order, it is unnecessary to pass on it. Ordered as above.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

72 Cal. 450

ALLEN v. COUNTY OF SAN BERNARDINO. (No. 11,683.)

(Supreme Court of California. June 4, 1887.)

DISTRICT AND PROSECUTING ATTORNEY—AUTHORITY—SPECIAL COUNSEL—DISMISSAL OF APPEAL.

As between the board of supervisors of a county and the district attorney, on the one hand, and an attorney claiming to be special counsel for the county, on the other, the former are superior in authority, and have a right to control all proceedings in a case to which the county is a party. An appeal taken by the county will therefore be dismissed on motion of the district attorney, made by direction of a resolution of the board, over the objection of such special counsel.

Department 1. Appeal from superior court, San Bernardino county.

Legare Allen, respondent, brought this action, as county recorder, to recover a money judgment against appellant, and the facts are as follows, viz.: The respondent from the first day of January, 1885, up to the first day of February, 1886, received the sum of \$5,186.50 for official services as county recorder of the appellant, in the way of fees collected by him for recording instruments of writing, (and not as salary,) and then paid the same into appellant's treasury. Respondent asks to recover back a portion of said sum so paid over, to-wit, \$301, for the reason this latter amount was received by him from diverse persons for recording, in his said office of county recorder, notices of location of mining claims, and that the law did not require him to record such notices, and, if recorded, did not require him to pay said sum into the county treasury. Plaintiff recovered judgment, from which, and an order denying new trial, these appeals are taken by the county.

John L. Campbell and Chas. R. Gray, for appellant. Harris & Allen, for respondent.

BY THE COURT. The board of supervisors, by resolution, directed the district attorney to ask this court to dismiss the appeal herein. The motion was made accordingly; counsel who had appeared specially in the court below for defendant objecting to the granting of the motion. As between the board of supervisors and district attorney, on the one hand, and an attorney claiming to be special counsel for defendant, on the other, the former are superior in authority, and have a right to control all proceedings in a case to which the

county is a party; at least, in the absence of an objection by the attorney general. It is therefore ordered that the appeal herein be, and the same is hereby, dismissed.

72 Cal. 355

WALLACE v. MAPLES. (No. 11,539.)

(Supreme Court of California. May 25, 1887.)

REPLEVIN—CROPS—CONTRACT.

Article 7 of a contract relating to the farming of certain lands provided that the title to the crops raised by M., the farmer, should remain in W., the owner of the land, until M. had performed the covenants in article 8. That article contained an agreement by W. to deliver four-fifths of the crop to M. "upon the full performance by him of all the stipulations and covenants in this article above specified." Held, in claim and delivery by W. for the whole crop on the ground of a breach of covenants contained in other articles, that the covenants in articles 7 and 8 were independent of those broken, and that M., having fully complied therewith, was entitled to four-fifths of the crop.

Department 2. Appeal from superior court, Tulare county.

Brown & Daggett, for Wallace, appellant. *Atwell & Bradley* and *A. B. Hunt*, for Maples, respondent.

McFARLAND, J. This is an action to recover certain wheat or its value. The sheriff took possession of the property under the statute, and delivered it to plaintiff. Defendant answered, denying plaintiff's right to the wheat, averred ownership in himself, and claimed a return of the property or its value. The case was tried without a jury, and the court found in favor of defendant, and gave him judgment for the return of 4,860 sacks of wheat, or \$7,985.20, found to be its value. Plaintiff appealed from the judgment, and from an order denying a new trial.

The litigation arose out of a long, written contract between the parties about the farming of certain lands belonging to plaintiff. The contract is formally divided into 12 articles, numbered consecutively from "article 1 to article 12." The main drift of the contract is as follows: Defendant was to have possession of the lands, to be farmed and cultivated by him, for the term of four years from October 1, 1884. He was to cultivate all of said lands each season in a skillful and thorough manner, in alfalfa, corn, and wheat, at his own expense, and also to harvest, thresh, and sack the crops of corn and wheat. He was to give certain alfalfa and alfalfa seed to plaintiff. He was to pay all assessments on certain stock of water companies which furnished water for irrigating the land, and he was to do certain other things not important to be here mentioned. At the end of the harvest, and after the corn and wheat were sacked, defendant, upon certain conditions being complied with, was to have four-fifths of the grain, and plaintiff was to have one-fifth.

During the first year of the term, defendant failed to perform some parts of his contract. The main failures relied on by plaintiff are—*First*, that he failed to pay a small part of the assessments due on the water stock; and, *second*, that a part of the land was not cultivated, or, at least, was not cultivated in a "skillful and thorough manner." And plaintiff assumed that, on account of these breaches of the contract, defendant forfeited—or rather never acquired any interest in—the wheat which he raised on the lands. Upon this theory, after defendant had harvested, threshed, and sacked the wheat raised that year, and delivered one-fifth to plaintiff, and had hauled the other four-fifths to a warehouse as his own, she commenced this action, and took possession of it all.

The main question to be determined in the case is whether the covenants of articles 7 and 8 of the contract are independent covenants, or whether all the covenants are mutual and dependent. The parts of the contract which respondent failed to comply with, as above stated, are not contained in said

articles 7 and 8. Article 7 provides that all the wheat and corn shall be the property of appellant, and that respondent shall have no right or authority to sell or dispose of it "until all the stipulations and covenants contained in article 8 *hereof* are fully performed by said party of the second part." The first part of article 8 contains covenants of respondent that he will mark one-fifth of the grain, when sacked, in a particular manner, and deliver it at a warehouse to be designated by appellant; that he will then pay appellant certain moneys for loans and advances, with interest; and that he will also pay appellant all moneys due on account of sales of her alfalfa hay and seed, etc. Respondent fully complied with all his covenants contained in said article 8. The article then proceeds as follows: "And said party of the first part [appellant] agrees that upon the full performance by said party of the second part [respondent] of all the stipulations and covenants in this article above specified, but not otherwise, she will deliver to said party of the second part, to have and to hold as his property, four-fifths of each crop of wheat and corn produced upon said lands while the same are cultivated by said party of the second part under this agreement, which said four-fifths of said crop shall be delivered to said party of the second part on the land when the same is threshed and put in sacks, and which four-fifths of said crops said party of the second part agrees to take and receive as his compensation for his labor and expense in cultivating said lands to corn and wheat under this agreement."

It seems to us clear that the provisions of articles 7 and 8 are independent covenants; and that upon a full compliance with them respondent became the owner of four-fifths of the wheat. Of course, if respondent violated any of his covenants not contained in said two articles, appellant has her remedy in an action to recover whatever damages she has sustained by such violation.

There is nothing in the point that appellant did not "deliver" the wheat in contest to respondent. Respondent already had the actual possession of both the land and the wheat, and there was no further act of delivery to be done by appellant.

Judgment and order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

72 Cal. 313

TOBELMAN and others v. HILDEBRANDT and others. (No. 9,597.)

(*Supreme Court of California.* May 20, 1887.)

1. JUDGMENT—ESTOPPEL—EXECUTORS AND ADMINISTRATORS.

Under Code Civil Proc. Cal. § 1637, providing that the settlement of the account of an executor, and the allowance thereof by the court, is conclusive against all persons, not under disabilities, in any way interested in the estate, heirs at law are estopped by a decree allowing the final account of their ancestor's executor, and ordering distribution, to bring an action against the executor to recover the amount of a promissory note alleged to have been given by him in payment of land which he bought of the testator, and by him fraudulently destroyed, when the note was omitted from his inventory, and the heirs had knowledge at that time of the fraudulent destruction set out in their complaint.

2. JUDGMENT—COLLATERAL ATTACK—COURTS OF PROBATE.

Under the law of California, an order of a probate court allowing the final account of an executor is a final settlement and adjudication of the matter of which it assumes to dispose, and it cannot, therefore, be collaterally impeached or attacked in the same or any other court by the parties thereto, or those in privity with them.

Commissioners' decision. Department 2.

Appeal from superior court, city and county of San Francisco.

J. C. Bates, for Tobelman and others, appellants. *A. H. Longborough*, for Hildebrandt and another, respondents.

SEARLS, C. This is an action to recover upon a promissory note alleged to have been made by defendant Hildebrandt to August Tittel, the testator of

plaintiffs. Judgment of nonsuit was rendered, from which, and from an order denying a new trial, plaintiffs appeal. The complaint alleges that on the twentieth day of August, 1866, August Tittel, in consideration of \$18,000, sold and conveyed to defendant, Hildebrandt, a lot of land on Sutter street, San Francisco; that defendant paid in cash \$3,000, and made his promissory note for the sum of \$10,000, the residue of the purchase price of said lot; that this promissory note was, with other papers of Tittel, placed in an iron safe, to which defendant had access, and that defendant was the confidential agent of Tittel.

August Tittel departed this life February 1, 1868, leaving a last will under which defendant Hildebrandt was appointed executor. The will was duly admitted to probate, and administered upon by the defendant as executor, who filed an inventory, and ultimately rendered his final account, which was approved, and a decree made distributing the estate. The note in question was not included in the inventory, and, the complaint charges, was fraudulently destroyed by the defendant and omitted from the inventory, with the fraudulent intent of cheating plaintiffs, who are beneficiaries under the will. The answer denies making the note, and all allegations relating thereto.

At the trial plaintiffs sought to prove, by plaintiff Margaret Tobelman, conversation between August Tittel, deceased, and his wife, including declarations of the former in his own favor, touching the existence of the promissory note in suit. The court sustained an objection to the testimony. These declarations were hearsay and clearly incompetent.

The motion for a nonsuit was based upon the following ground: "The complaint, containing a copy of decree settling a final account, is final and conclusive as to the parties, and cannot be disturbed, except by a direct proceeding." According to the allegations of the complaint, defendant filed his final account, and prayed for a decree of distribution of the estate, which was granted; and the decree, a copy of which is attached to the complaint, and made a part thereof, was duly signed and filed January 4, 1882. "The settlement of the account, and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate." Code Civil Proc. § 1637. Section 1908 of the same Code declares that the judgment or order of a court, having jurisdiction as to the administration of an estate, is conclusive. *Reynolds v. Brumaght*, 54 Cal. 254; *Tebbets v. Tilton*, 24 N. H. 120; *Grady v. Porter*, 53 Cal. 680; *Estate of Stott*, 52 Cal. 403.

The plaintiffs herein appeared in the probate court and filed objections to the final account of defendant as executor. They do not aver in their complaint that they were ignorant of the facts constituting the alleged fraud on the part of the defendant, at the time the executor's account was settled, and the evidence shows that they were aware of such facts long prior thereto. The decrees and orders of a probate court, made in the exercise of jurisdiction conferred upon it by law, are as final and conclusive as the judgments, decrees, or orders of any other court. The character and finality of *res adjudicata* attach to the decisions of probate courts, irrespective of the nature of the issue determined, provided the court had jurisdiction to determine it. *Freem. Judgm.* § 319a. It follows that an order of a probate court allowing or disallowing a final account is a final settlement and adjudication of the matter of which it assumes to dispose, and it cannot thereafter be collaterally attacked or impeached in the same or any other court by the parties thereto, or those in privity with them. The decree of a probate court settling the account of an administrator may be attacked for fraud or mistake like other judgments.

It was said in *Griffith v. Godey*, 113 U. S. 98, 5 Sup. Ct. Rep. 383: "If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate, may require, even if the probate court might, in such case, open its decree, and ad-

minister upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition of it, is a general and always existing ground for the interposition of equity."

The evidence, as before stated, shows affirmatively that plaintiffs were aware of the facts constituting the alleged fraud, long prior to the settlement of the final account of the administrator. This being so, and there being no impediment to the investigation in the probate court, plaintiffs are concluded by the action of such court. For this reason, and for the further reason that there was no sufficient evidence to support a verdict in favor of plaintiffs, had such verdict been rendered, the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 371

HEILBRON and others v. HEINLEN and others. (No. 11,566.)

(Supreme Court of California. May 28, 1887.)

TRESPASS—QUARE CLAUSUM—EVIDENCE.

In an action of trespass *quare clausum*, defendant, without pleading the statute of limitations, offered evidence of his own occupation of the close for 15 years. *Held* that, the question being one of possession, and not of title, such evidence was admissible.

Commissioners' decision. Department 2.

Appeal from superior court, Fresno county.

G. A. Heinlen and Atwell & Bradley, for appellants. D. S. Terry, for respondents.

BELCHER, C. C. This is an action to recover damages for trespass upon real property. It is alleged in the complaint that for more than two years last past the plaintiffs have been seized and possessed of all that certain tract of land in the counties of Fresno and Tulare known as the "Rancho Laguna de Tache," containing about 48,000 acres, and for which a patent, dated March 6, 1866, was issued by the United States to Manuel Castro; that on the seventeenth day of December, 1883, the plaintiffs were engaged in constructing a fence of posts and wire along the right bank of Kings river, which is the southern boundary of the *rancho*, and had completed the fence for a great part of said line; that on the day named the defendants, without right, and against the will of plaintiffs, cut and destroyed the said fence for a distance of about one and a half miles on sections 30 and 31, in township 18 S., range 20 E., and on a portion of section 36, in township 18 S., range 19 E., and also cut and destroyed the posts which had been set by plaintiffs for the purpose of building a fence for a distance of about two and one-half miles on sections 1 and 2, in township 19 S., range 19 E.

The defendants, by their answer, deny that the plaintiffs are or ever were seized or possessed, or entitled to the possession, of the lands described in their complaint; deny that the plaintiffs at the time named, or at any time, were engaged in constructing or had constructed any fence along the right bank of Kings river; and deny that at any time, they, or either of them, ever cut or destroyed any fence, for any distance, on any sections in any township or range, or cut or destroyed any posts on any sections in any township or range, or at all, upon any lands of plaintiffs, or any or either of them, or that the posts or fence alleged to have been cut or destroyed were situate upon any lands of the plaintiffs, or either of them.

At the trial the plaintiffs introduced in evidence the patent, with the map

attached thereto, from the United States to Castro; deeds from Castro, conveying the whole *rancho* to Jeremiah Clark; and a lease of the whole *rancho*, dated May 1, 1880, from Clark to the plaintiffs for a term of 10 years. They then called a witness to prove the building of the fence, and setting of the posts along the right bank of Kings river on the sections named, and that the fence and posts were cut and destroyed by certain parties, who said they were in the employment of defendants.

The defendants then called several witnesses, some of whom had lived near and known Kings river, and the sections of land named in the complaint, since 1857, and others for shorter periods, who testified that the fence constructed and posts planted by the plaintiffs were not upon the right or north bank of that river, but upon the bank of a slough which commences on the south side of the river in section 30, township 18 S., range 20 E., and runs thence south of the river, and at a considerable distance from it, to section 12, township 19 S., range 19 E.; that the slough has never carried any water except in times of high water, and is and always has been known as "Button Willow Slough." The defendants then introduced in evidence swamp-land certificates of purchase and patents from the state, conveying to the defendant, John Heinlen all the lands lying between the river and slough, and on which the fence and posts were placed, except that part thereof lying in section 30, township 18 S., range 20 E., and for that they introduced a similar patent to Justin Esrey.

The defendants then offered to prove by competent witnesses that for the last 10 or 15 years they had been in the quiet and peaceable possession of all the land described in their patents and certificates of purchase, and that they had continuously used and occupied it, by farming a portion of it, and grazing stock upon it. The plaintiffs objected to this testimony, upon the ground that the defendants had not pleaded the statute of limitations, and therefore it was incompetent and inadmissible under the pleadings. The court sustained the objection, the defendants reserving an exception; and this presents the principal question for consideration in the case.

It will be observed that the plaintiffs claimed to be tenants of the property, and that they offered no proofs to show that they had ever taken or been in the actual possession of it. And that they did not claim possession is shown by statements made by their counsel during the progress of the trial, as follows: "We don't rely upon anything but strict legal right. We don't claim by virtue of possession." The question, then, is, what must a tenant show in order to maintain an action of trespass *quare clausum*?

In *Pollock v. Cummings*, 38 Cal. 685, the court says: "In an action of trespass upon real property, the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises; and his *right* to the possession is not involved unless the defendant tenders an issue upon that fact; and in such case, as was said in *Holman v. Taylor*, 31 Cal. 338, the right of recovery depends both upon possession in fact and the right of possession."

In *Uttendorfer v. Saegers*, 50 Cal. 496, the defendant pleaded a general denial, and the court said: "The action is trespass *quare clausum*. Its *gravamen* is the alleged possession of the plaintiff at the time of the entry of the defendant. In this view the offer of the defendant to show that a tenant of the plaintiff, and not the plaintiff himself, was in the actual possession at the time of the alleged trespass should have been allowed."

In *Raffetto v. Fiori*, 50 Cal. 363, the plaintiffs obtained a patent for mining ground, and brought an action of trespass against the defendants for working the ground, and taking gold therefrom. The defendants were in possession of the ground, claiming title thereto before the patent was issued, and when the action was brought and tried, it was held that the action of trespass could not be maintained. There have been several other analogous cases in this

state where it was held that the owner of land could not maintain replevin for crops harvested therefrom by one in the adverse possession of the land; the court saying that the title to real property could not thus be tried in a personal action. *Page v. Fowler*, 87 Cal. 100; *Page v. Fowler*, 89 Cal. 412; *Pennybecker v. McDougal*, 46 Cal. 661.

In Greenleaf on Evidence (section 613) it is said: "Though the right of property may and often does come into controversy in this action, [trespass,] yet the gist of the action is the injury done to plaintiff's possession. The substance of the declaration, therefore, is that the defendant has forcibly and wrongfully injured property in the possession of the plaintiff, and under the general issue the plaintiff must prove (1) that the property was in his possession at the time of the injury, and this rightly as against the defendant; and (2) that the injury was committed by defendant with force."

There are many other authorities to the same effect, but they need not be cited.

Here the defendants denied the plaintiffs' possession of the *locus in quo*, and offered to show their want of possession by proving that defendants had been in possession of the land, using it for farming and grazing purposes for 10 or 15 years. The object was not to prove title in the defendants under the statute of limitations, and it was not necessary that the statute should have been pleaded in order to make the testimony admissible.

In our opinion, the court erred in excluding the offered testimony, and the judgment and order should therefore be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

72 Cal. 376

HEILBRON and others v. HEINLEN and others. (No. 11,551.)

(Supreme Court of California. May 28, 1887.)

1. PLEADING—AMENDMENT—EJECTMENT.

Plaintiffs in ejectment may be permitted to amend the number of the range described in their complaint. Such amendment corrects a mistake, and does not substitute a new cause of action.

2. EJECTMENT—EVIDENCE—INSTRUCTIONS.

In an action of ejectment, where defendants claimed title by adverse possession, and there was evidence to support that defense, an instruction ignoring such defense, and directing the jury to find for the plaintiff if he established the title set up by him, *held* erroneous.

3. LIMITATION OF ACTIONS—ADVERSE POSSESSION—STATUTES.

The amendment to section 325, Code Civil Proc. Cal., made April 1, 1878, which requires proof of occupation, claim, and payment of all taxes for five years, to establish adverse possession of real property, does not affect adverse holdings prior to the date of its passage.

Commissioners' decision. Department 2.

Appeal from superior court, Fresno county.

G. A. Heinlen, for appellants. D. S. Terry, for respondents.

BELCHER, C. C. This is an action to recover possession of a tract of land in Fresno county, which is alleged to be a part of the Rancho Laguna de Tache, and is described as "that portion of the north-west quarter of section 36, township 18 south, range 19 east, which lies north of King's river." The complaint is in the usual form for actions of ejectment. The answer denies the plaintiffs' seizin, or right to the possession of the land, and sets up the statute of limitations. The case was tried by a jury, and the verdict

and judgment were in favor of plaintiffs. The defendants moved for a new trial, and, their motion being denied, appealed from the judgment and order.

As originally filed, the complaint described the land sued for as in range *twenty* east. Shortly afterwards plaintiffs' counsel asked and were permitted, against the objections of defendants, to amend the complaint, by striking out the word "twenty" in the description of the range, and inserting in the place thereof the word "nineteen." It is claimed that the court erred in permitting this amendment to be made, as it substituted a new and different cause of action. We see no error in the ruling. A mistake had evidently been made in describing the land sought to be recovered, and it was not an abuse of the court's discretion to allow it to be corrected. Section 473, Code Civil Proc.

At the trial the plaintiffs introduced in evidence a patent from the United States to Manuel Castro, dated March 6, 1866, for about 48,000 acres of land, known as the Rancho Laguna de Tache, and deeds from Castro conveying all his right, title, and interest in the *rancho* to Jeremiah Clark, and a lease of the *rancho*, dated May 1, 1880, for 10 years from Clark to the plaintiffs, with the privilege of purchasing the property at any time during the term. They then called witnesses to prove that the demanded premises were included within the boundaries of the grant as fixed by the patent. In support of the issues tendered by them the defendants called witnesses to prove that the demanded premises were not within the calls of the Castro patent; that the land was swamp land, and was sold as such by the state in 1861, and that the defendant John Heinlen had been occupying and claiming it adversely to the plaintiffs and their grantor for more than 10 years before the commencement of the action.

At the request of the plaintiffs, the court instructed the jury as follows: "The jury are instructed that in no case can adverse possession be considered established under the provision of any section of the Code of Civil Procedure of California, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and that the party or persons, their predecessors and grantors, have paid all state and county taxes assessed upon said land."

"If the jury believe, from the evidence, that the land in controversy is within the boundaries of the survey attached to the patent from the United States to Manuel Castro, and that Jeremiah Clark has succeeded to the title of Manuel Castro, and that the plaintiffs hold under title derived from Jeremiah Clark, then you will find a verdict for the plaintiffs."

These instructions were misleading and erroneous. The first is in the language of the amendment made on the first of April, 1878, to section 325 of the Code of Civil Procedure. But it has been held that that amendment was not retroactive, and did not at all affect adverse holdings prior to the date of its passage. *Sharp v. Blankenship*, 59 Cal. 288; *Johnson v. Brown*, 63 Cal. 391. The second took from the jury all right to consider the defendants' claim of title under the statute of limitations, and, in effect, told them to find a verdict for the plaintiffs. The principal question at the trial was whether the defendant John Heinlen did or did not have adverse possession, under a claim of right, commencing as early as 1872, and continuing for more than five years, and there was testimony upon that question, we think, which should have been submitted to the jury.

It is objected for the respondents that the appellants have not filed a printed transcript, properly authenticated as required by the rules of this court; that the transcript contains numerous interlineations and writings in the margin of pages, and it does not appear when or by whom such interlineations and marginal writings were made; and that the statement on motion for new trial, found in the transcript, is not shown to have been agreed to by counsel, or settled by the judge. It is sufficient to say, as to the first part of this ob-

jection, that, in considering the points here discussed, we have looked only to the printed transcript, which is properly certified by the clerk to be correct, and not to the interlineations and writings on the margins of pages; and, as to the last part of it, that the statement on motion for new trial was properly settled and certified by the judge who tried the case.

It follows that the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

73 Cal. 367

COHN v. PARCELS, City Tax Collector of the City of Los Angeles.
(No. 11,845.)

(Supreme Court of California. May 28, 1887.)

1. EQUITY—PARTIES—ASSESSMENTS.

By the charter of the city of Los Angeles, when land is condemned for the widening of a street, the damages are paid by the holders of property adjacent to the street to be widened, and in no event is the city liable for such damages. *Held*, in an action brought against the tax collector of Los Angeles to restrain him from a sale of plaintiff's property in payment of damages claimed to be due from plaintiff under the said provision of the city charter, that the city was not a necessary party defendant to the action.

2. MUNICIPAL CORPORATIONS—STREETS—CREATION OF.

A tract of land in Los Angeles was set apart by ordinance as a public square. For some time the whole tract was used as such, but afterwards a fence was erected, which inclosed the greater part of it, but left out a strip of land between the fence and the lot of C. The public used this strip of land for a long time as a passageway for vehicles and animals, but it was never declared by any ordinance of the city to be a street, or ever graded by authority of the city. *Held*, that the strip of land in question was not a public street, and that damages assessed upon C. for the widening of it as a street were improper.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

J. C. Daly and Williams & McKinley, for appellants. Howard & Scott, for respondent.

BELCHER, C. C. It is provided by the charter of the city of Los Angeles that, when land has been condemned for the widening or extension of a street, the damages shall be paid by the holders of the property fronting on and adjacent to the street to be extended or widened, and that assessments shall be levied on the property in a certain manner to raise the amount needed; and "in case any street crosses the line of or forms a junction with any street so laid out, extended, or improved, * * * the land on the corners formed by said intersection or junction shall be assessed" for an additional sum. Under the provisions of the charter, proceedings were regularly taken by the city authorities to widen and extend Main street. The plaintiff owned a lot fronting on that street, which was assessed for an additional sum of \$213.78 on account of a supposed frontage on another street "forming a junction with" Main street. The defendant was about to sell the plaintiff's lot to pay this additional assessment, when this action was commenced to restrain the sale, upon the ground that the assessment was improperly made, and the sale would cast a cloud upon the plaintiff's title. The defendant demurred to the complaint upon the ground that, in collecting the assessment, he was acting in his official capacity as the agent and servant of the city of Los Angeles, and the city should have been joined as a party defendant. The court overruled the demurrer, and this ruling is assigned as error.

We think the demurrer was properly overruled. There have been many similar cases in this state brought against collectors of taxes and assessments, but the point here presented does not appear to have been made in any of them.

In support of their contention, counsel for appellant cite *Gilmore v. Fox*, 10 Kan. 509. That was an action to restrain the sale of real property for an assessment, and it was held that the city was a necessary party defendant. The decision was, however, based upon the ground that the money, when collected, would belong to the city, which was liable for the payment of the damages in case the assessments were not collected. That case is not in point here, for the reason that under its charter the city of Los Angeles was not made liable for the payment of the damages in any event, and the money, if collected, would have gone into a special fund, to be paid out to the parties entitled to it. The city had therefore no such interest in the case as to make it a necessary party.

At the trial the case was submitted upon an agreed statement of facts, and the only question made in regard to the validity of the assessment was as to whether plaintiff's lot fronted on a street forming a junction with Main street. Plaintiff recovered judgment, and from that, and an order denying a new trial, defendant appealed.

It appears from the agreed statement of facts that the strip of land which is claimed by appellant to be a street, and to form a junction with Main street, is a part of a tract which was owned by the pueblo of Los Angeles, and prior to 1846 was laid out by the authorities of the pueblo as a public plaza, and on the twentieth of December, 1856, was, by an ordinance of the city of Los Angeles, declared to be a public square. For some time after the passage of the ordinance, all of the land so set apart was open and used as a public square; but prior to 1872 a fence was erected which inclosed the greater part of it, leaving out Main street to the west, (which had theretofore been set apart as a public street,) and also leaving out a strip along the north line of plaintiff's lot eight feet wide. In 1872 this fence was changed and made elliptical in form, and was so placed that, at its nearest point, it was distant from the plaintiff's lot 70½ feet. The ground within the inclosure has always been used as a public park, and the strip between the elliptical fence and the plaintiff's lot has since been used by the general public for passing and repassing on foot, and with vehicles and animals, but has never been declared, by any ordinance or resolution of the city, to be a street, nor has it ever been graded under authority of the city.

Upon these facts, did the strip of land in question become a public street? We do not see how it can be rightfully claimed that it did. As well might it be said, if the square had never been inclosed, and the public had been permitted to pass and repass, on foot and with vehicles and animals, diagonally across it, that the ways so used were thereby made streets of the city. Being a part of the land dedicated as a public square, the strip must be held, we think, to remain such until its character and use shall be changed by some official and authoritative action.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 462

MILLER v. DUNN, State Comptroller. (No. 11,288.)

(Supreme Court of California. June 6, 1887.)

CONSTITUTIONAL LAW—APPROPRIATIONS—NON-ENFORCEABLE CLAIM.

An act to appropriate money to pay the indebtedness incurred by the state of California under "An act to promote drainage," which was afterwards declared uncon-

stitutional, is not itself unconstitutional under article 4, § 32, Const. Cal., forbidding the legislature to pay claims against the state under an agreement made without express authority of law. *TEMPLE, J.*, dissenting.

In bank. Appeal from superior court, Sacramento county.

D. M. Delmas, for appellant. *A. L. Hart, W. C. Belcher, and James A. Waymire*, for respondent.

PATERSON, J. In 1880 the legislature passed an act entitled "An act to promote drainage," which was approved by the governor April 23, 1880. St. 1880, p. 123. In the passage of this act all the proceedings necessary to the effective enactment of a law by the legislature were had; and it was regularly and duly approved by the governor. According to the provisions of this act, "drainage district No. 1" was regularly organized, and public work under it commenced. The directors of the district, after proposals for bids, let contracts to different parties to do various parts of the work, as they were expressly authorized by the act to do. Respondent, among others, took two such contracts, and the amount involved in this action is for work and labor done and materials furnished under such contracts. There is no question as to the justness of his claims; but after he had done the work, and furnished the materials under his contracts, and before he had received his pay therefor, sued for in this action, this court, in an action brought against the directors of said district, decided that said "act to promote drainage" was unconstitutional. All proceedings under said act ceased, and the state comptroller refused to pay any more claims under it.

This being the situation, and some just claims acquired under the act remaining unpaid, the legislature passed an act approved March 10, 1885, (St. 1885, p. 78,) entitled "An act to appropriate money to pay the indebtedness incurred under an act entitled, 'An act to promote drainage,' approved April 23, 1880." This act expressly requires the comptroller to draw his warrants in favor of certain audited claims which accrued under said act of 1880; and plaintiff's demand here sued for is admitted to be one of such claims. The appellant comptroller refused to draw his warrants for respondent's claims; and this proceeding in *mandamus* was instituted to compel him to do so. The court below granted a peremptory writ, and the comptroller appeals.

The judgment of the court below should be affirmed. It is claimed by appellant that the act of April 23, 1880, having been held to be unconstitutional in the case of *People v. Parks*, 58 Cal. 624, was void *ab initio*, the same to all intents and purposes as if it had never been enacted,—a pure nullity; that an unconstitutional law is no law at all for any purpose, and that the word "law" in article 4, § 32, was used in its full sense,—*i. e.*, a *valid constitutional law*. On the other hand, it is contended by respondent that the word "law" in its popular sense is a statute passed by the legislature and approved by the executive, and it is in this sense that the word was employed in section 32.

It is useless to attempt to apply iron-clad rules of interpretation to any phrase or word used in a constitution. Especially is this true of a word which has a technical as well as a popular meaning. There is no word in the language which, in its popular and technical application, takes a wider or more diversified signification than the word "law." Its use in both regards is illimitable. In determining the office of words used in a constitution, the object is to give effect to the intent of the people adopting it. *Cooley, Const. Lim.* (5th Ed.) § 66. And, "where a word having a technical as well as a popular meaning is used in the constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates or the text suggests that it is used in its technical sense." *Weill v. Kenfield*, 54 Cal. 111; *Sprague v. Norway*, 31 Cal. 173. Words used in a constitution should be construed in the sense in which they were employed. They "must be taken in their ordinary and common acceptance, because they are presumed to have been so

understood by the framers, and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judged of it by the meaning apparent on its face according to the general use of the words employed where they do not appear to have been used in a legal or technical sense." *Manly v. State*, 7 Md. 135. The term "law," as used in its popular sense and in its common acceptance by "those for whom laws are made," it may be admitted, includes the whole body or system of rules of conduct, including the decisions of courts as well as legislative acts, but it certainly does not include that refined, technical, and astute idea claimed by appellant which recognizes nothing within the meaning of the term which is not constitutionally and technically perfect.

In addition to considering the independent, technical, and popular meanings of a word used in an act or constitution, we may look at other sections of the same instrument for the sense in which the word is used, as an aid to determine whether it has been used in its popular sense in the particular provision under consideration. *People v. Eddy*, 43 Cal. 331. A word repeatedly used in a statute will bear the same meaning throughout the instrument unless it is apparent that another meaning is intended. *Pitte v. Shipley*, 46 Cal. 154; *Hoag v. Howard*, 55 Cal. 564. Upon an examination of the provisions of the constitution in which the word "law" is used, it will be found, in a majority of instances, that it has been employed in the sense of a statute, bill, or legislative enactment, regardless of the constitutionality or validity of the act. Thus it is said: "No law shall be *passed* to restrain or abridge the liberty of speech or of the press," (section 9, art. 1;) "no *ex post facto* law shall ever be *passed*," (section 16, art. 1;) "the enacting clause of *every law* shall be as follows," (section 1, art. 4;) "the legislature shall not *pass* local or special laws in any of the following cases," etc., (section 25, art. 4;) "the legislature shall not *pass* any laws permitting the leasing * * * of any franchise," (section 10, art. 12.) When speaking of certain requisites of a valid law, however, the framers of the constitution did not use the words "statute" and "law" interchangeably. Thus it is provided that "no *bill* shall become a *law* without the concurrence," etc., (section 15, art. 4;) "every bill which may have passed the legislature shall, before it becomes a *law*, be presented to the governor," (section 16, art. 4.)

Again, it is provided that "the making of profit out of county, city, or other public money, or using the same for any purpose *not authorized by law*, * * * shall be a felony." Can it be said that those who framed and adopted the constitution intended to use the word "law" in this section to mean a law absolutely unimpeachable on any ground? That every officer should handle and place the moneys intrusted to him at his peril, no matter how fair and regular the law directing him may be on its face? If yea, "then, indeed," as was said in *St. Louis & S. F. R. Co. v. Evans & Howard Brick Co.*, 85 Mo. 307, "are the rights of the citizen to be sacrificed on the altar of mistake, and the statute is to be made a veritable pit-fall and snare."

And so it is with respect to section 32. If it places a citizen who has dealt with the state, under circumstances like those in the case at bar, beyond the pale of legislative relief for acts done by him prior to discovering the invalidity of the law, it will be very unsafe for any one to deal with our officers unless he be possessed of that superhuman intuition or mediate intelligence which alone can tell how the question of the validity of such an act may be raised and determined after he has performed the work. Of course there is no moral obligation on the part of the state which can be enforced upon equitable principles, nor does the good faith of the party dealing with the state cut any figure in the case if, in fact, the work was done "without express authority of law;" for this provision was placed in the constitution to cut off

all claims based upon mere good faith and equity. There was a feeling, which had been long suffering, that there should be some inhibition to prevent the legislature from allowing the payment of extra compensation to officers who, subsequent to their election or appointment, discovered that the regular salary was insufficient, and also to prevent relief bills in favor of those who had dealt with state and municipal officers acting without *express* authorization from any source, or under palpably unauthorized and invalid contracts, and who were constantly asking the legislature to consider their misfortunes in pity, and regard them as deserving subjects of public benevolence. All this was doubtless well understood, and the phrase "without express authority of law" was used in view of the judicial and legislative history of the state; and yet it is by no means clear that it was intended to prevent the payment of a just claim, expressly authorized by an act in due form, duly passed and approved, and within the scope of lawful legislation, simply because, after the work has been done, the court may upon great deliberation and searching investigation declare the act for some reason—such as defect in title or wrongful delegation of power—unconstitutional.

The case of *Nouques v. Douglass*, 7 Cal. 65, relied on by appellant, is unlike the case at bar. In that case, and in *People v. Johnson*, 6 Cal. 499, the legislature had contracted a debt admitted to be in excess of the \$300,000 limit specified in the constitution, and the court held that, until the claim was legalized by being submitted to a vote of the people, it could not be paid. There is no doubt as to the correctness of the decision in those cases. The constitutional inhibition contained in article 8 of the old constitution was so clear that the conclusion, as said by the court, was "most obvious." The meaning of words similar to those in question here were not involved in that case. The court had no doubt as to the meaning of the language used in article 8; and, if we could say the same of section 32, which is before us, we should, of course, apply the same rule.

But it follows, we think, from what has been said, that the meaning contended for by appellant is not *necessarily* implied in the language of section 32; and, if there be a fair doubt as to the true construction of that section, we should refrain from declaring that the legislature and the governor have exceeded their authority in the passage and approval of the act of March 10, 1885, appropriating money to pay the indebtedness incurred under the so-called drainage act of April 23, 1880. The doctrine has been so often enunciated—it has passed into an aphorism—that statutes will not be declared unconstitutional if there is a fair doubt as to their validity. The judicial department will not hesitate to interfere with the work of a co-ordinate branch of the government when the latter goes beyond its constitutional limitations, but the ground of interference must be plain and substantial.

Again, it is not a universal rule, as claimed by appellant, that an unconstitutional law is void *ab initio* and absolutely wanting in all binding force, and a nullity. There is at least an exception, viz., that an act duly passed or approved has the force of law to protect citizens dealing with public officers under its provisions up to the time that it is declared unconstitutional. *Sessums v. Botts*, 34 Tex. 335. And, if a decision that an act is unconstitutional be afterwards overruled, the statute will be deemed to be valid for the whole period. *Pierce v. Pierce*, 46 Ind. 86. It has been held that an act creating an office, though unconstitutional, is sufficient to give color of title, and that an officer acting under it is an officer *de facto*. *Duff's Appeal*, 56 Pa. St. 436; *Clark v. Com.*, 29 Pa. St. 129. But, whether this be supported by the weight of authority or not, "nothing is better settled," it is said in *State v. Douglass*, 50 Mo. 596, "than that the acts of an officer *de facto* (although his title may be bad) are valid so far as they concern the public, or the rights of third persons who have an interest in the things done. Without this rule the business of a community could not be transacted. * * *

sion of business till every officer's right *de jure* was established." *State v. Carroll*, 38 Conn. 462; *Harbaugh v. Winsor*, 38 Mo. 327; *Wilcox v. Smith*, 5 Wend. 221; *People v. Salomon*, 54 Ill. 39; *Ex parte Strang*, 21 Ohio St. 610.

It must be remembered that the act of April 23, 1880, was *judicially* declared unconstitutional solely on the ground that, under article 3 of the constitution, the legislature could not delegate to *executive officers* such legislative powers as it had attempted to confer by that act. This was the only ground upon which the minds of a majority of the members of the court met. *People v. Parks*, 58 Cal. 645. It has never been claimed seriously that the work contemplated by the act was beyond the power of the legislature to provide for in some manner. If the legislature had defined the boundaries of the several districts, instead of delegating the power to the judgment of the governor, surveyor general, and state engineer, and had provided, in the manner it did provide, for the appointment of the three directors who were authorized to let, and who did in fact let, the contracts for the work, the result might have been different. The act has not been declared to be and is not necessarily unconstitutional in all of its parts. It is true, this court held that the directors had no authority to contract, but the creation of the office of director by the act, the appointment by the governor of three directors, and the ostensible authority conferred upon them by the act to contract, furnish some color of right to do the thing attempted by them.

I do not wish to be understood as saying that the directors were officers *de facto* with color of authority sufficient to bind the state, notwithstanding the unconstitutionality of the act under which the contract was let, and without regard to the provisions of section 32 as to "express authority of law." I cite the cases upon the effect of the acts of officers *de facto* simply to show that an unconstitutional law is not always and for all purposes a nullity so far as the rights of a citizen are concerned, and refer to the history of the case simply in illustration of my conclusion that, after a citizen has dealt with the state under circumstances like those shown here, the case does not come within the purview of section 32, and the legislature is not prohibited thereby from authorizing the payment to him of such reasonable sums as shall to it seem proper. It is unnecessary to say whether in all cases an act duly passed and approved would be "express authority of law" within the meaning of that section. There may be statutes palpably violative of principles so plain and well understood as to be no authority or protection at all; but as to that I express no opinion. Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

TEMPLE, J., (*dissenting*.) I cannot agree with the conclusion of the majority in this case. It seems to be admitted that the contract was void, the law authorizing it unconstitutional; and, if this be so, the debt for the services is expressly denounced as unauthorized by the constitution. The language is: "The legislature shall have no power * * * to pay or to authorize the payment of any claim hereafter created against the state * * * under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void." Article 4, § 32.

So far as I am able to understand the logic of the leading opinion, it is this: The constitution only forbids the payment of claims arising upon contracts made without express authority of law. The word "law" is a very general term, and was not used in any technical sense. It includes all sorts of laws. A void law, or at least a void statute, is in the popular sense *some* sort of a law. This contract was authorized by a void law; therefore the legislature is not prohibited from paying; therefore the legislature has the power to pay.

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Now, in the first place, I deny that there is any common usage or popular sense in which a void statute is spoken of as a law which differs from the use of the words by lawyers or by the courts. We all speak of void laws, unconstitutional statutes, void contracts, void judgments, etc., meaning the things which in some respects appear to be the things named, but which really are not. So, if we desire to refer to one of these void instruments to identify it, we might say the contract A or the statute of April 1st, etc. If there be any common usage beyond this, and which is not common to lawyers, I challenge example and evidence of it.

But, admitting that even void laws or statutes are sometimes referred to as laws or statutes, that does not meet the necessities of the case. The phrase in the constitution is, "without express authority of law." Will any one assert that in any use whatever of language an act is ever said to be *authorized* by law, meaning that it is pursuant to law known to be void? How is it authorized if the law be void? The very words used imply a valid law. An act *authorized by law* must be a lawful act. Would it not have sounded strange if the convention had used the words "without authority of a *valid* law," or had added, "provided a void statute shall be deemed authority of law."

But waiving all this, and admitting that the contract we have just declared void because not authorized by law was authorized by law in the "popular sense," so that the legislature is not by this constitutional provision expressly prohibited from paying the claim, the difficulty is not ended. It is necessary to find in this negative language, not only no prohibition, but an affirmative grant of power to pay; for there still remains the implied prohibition that the legislature cannot authorize the payment of a debt created in violation of the constitution. There still remains the admission that the contract was void because not authorized by law.

If it requires authority to show that even without an express prohibition the legislature cannot authorize the payment of a claim created in violation of the constitution, we have it in *Nougues v. Douglass*, 7 Cal. 65. The legislature authorized a contract for a state capitol. Plaintiff took the contract, and performed labor upon it, for which he was entitled, by the terms of his contract, to receive an admitted sum of money. The act was within the general scope of legislative power, but the court held that the legislature could not pay the debt. It was said: "If, then, the legislature had no right to create a state debt beyond the limit fixed by the constitution, that body has no constitutional right to tax the people to pay a void debt. * * * The restriction upon the power of the legislature would be nugatory if the same end could be accomplished by other modes. The evil intended to be prevented would still exist, and the injury to the people would be the same. If the power to create the debt is denied, the power to levy taxes to pay it must be equally denied. The power to pay is a necessary incident to the power to tax, and they both must stand or fall together."

And, again, let it be admitted that there cannot be found in section 32 of article 4 of the constitution a limitation on the power of the legislature, either express or implied. Why is not this relief bill a gift within the meaning of section 31, article 4, of the constitution? "Nor shall it [the legislature] have power to make any gift, or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." It is admitted that the contract is utterly void; that it imposes no legal liability or obligation upon the part of the state. The state has received and will receive nothing from the parties to whom this money is to be given. True, if the contract had been valid, in legal contemplation the state would have received a consideration in the service performed by reason of the contract, although there was nothing of benefit in it. Now, a gift is something bestowed without return. If this be not something bestowed without return, what is the thing returned? Can there be any other reason

for holding this appropriation not a gift, except that it would be highly inequitable and unjust not to compensate the respondent for services rendered pursuant to an act of the legislature believed to be valid? In other words, the claim is founded upon a moral obligation which the state ought to recognize and satisfy.

This construction, I submit, virtually repeals sections 31 and 32 of article 4 of the constitution. What sense is there in prohibiting the contract, and declaring it void, if the legislature may nevertheless voluntarily perform the contract on the part of the state? What practical purpose is served by forbidding gifts of the people's money or property if the legislature can recognize and discharge a moral obligation? The legislature must be the judge of the moral obligation, and would rarely ever care to make a gift where it could not claim the existence of a moral obligation. My brothers deny, as I understand the decision, that they hold any such doctrine. I hope this will prevent the decision from being regarded as a precedent upon this question; but will it? I have shown that, disclaim it as they will, such is the real ground of the decision. Our successors will justly claim that it can be sustained on no other theory. This is the excuse for all relief bills. Can any one deny that the sole purpose of the provisions was to prevent this very legislation?

But I do not care to pursue the subject further. The constitution itself directs how laws shall be made, and of course the law meant must be a law passed as in the constitution provided. The whole claim seems to be baseless. A void contract based on a void law, ratified against the express prohibition of the constitution, constitutes no valid claim against the state. I do not think it necessary to pass upon the question whether there might not be an unconstitutional statute which would have some effect.

We are not now considering such a question as was before the court in *Sesums v. Botts*, 34 Tex. 335. It might be admitted that the convention adopted sections 31 and 32 of article 4 of the constitution in view of such a rule, and to prevent its application to the cases like that in hand. The rule was there adopted, however, to protect ministerial officers who had obeyed the law before it was held unconstitutional, and to prevent judgment creditors from losing their liens because the officers had obeyed such law. Here the question is simply as to the meaning of two sections of the constitution.

72 Cal. 308

In re AMBROSE. (No. 20,299.)

(Supreme Court of California. May 31, 1887.)

DIVORCE—INTERLOCUTORY AND FINAL ORDERS—HABEAS CORPUS.

In an action of divorce, brought by the wife, an order was made on the twenty-sixth of July, 1886, allowing the wife \$200 per month as alimony *pendente lite*. On the twenty-seventh of September all questions of property between the parties were referred to a referee. On the third of January, 1887, while the reference was still pending, judgment for divorce was entered, providing that "all questions as to property, and as to a suitable allowance to the wife, are hereby reserved." The husband refused to pay the alimony granted by the order of the twenty-sixth of July, claiming that that order was vacated by the judgment of the third of January, and was imprisoned for contempt. *Held*, on an application for a writ of *habeas corpus*, that the judgment of the third of January, as to questions of property, was interlocutory, and not final, and therefore did not vacate the order of the twenty-sixth of July.

In bank. On *habeas corpus*.

Stanly, Stoney & Hayes, for petitioner. McAllister & Bergin, for respondent.

MCKINSTRY, J. On the twenty-fourth of June, 1886, Mary C. Ambrose, wife of the petitioner, commenced an action for the dissolution of the bonds of matrimony. In her complaint, after alleging facts showing extreme cruelty, she alleged that the defendant in said action, the petitioner herein, was a man

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of large means, and the owner of tracts of land therein described of very great value,—of the value of between \$500,000 and \$600,000. The prayer is for a divorce, and an injunction restraining defendant from disposing of his property *pendente lite*; that such portion of the property of defendant as the court might, on the hearing, think should be distributed to her, be adjudged and decreed to her; that reasonable alimony be allowed her for her support during the pendency of the action; that costs and counsel fees for plaintiff be forthwith paid by defendant; that in the final judgment there be adjudged to the plaintiff such portion of the property of defendant as might be deemed just; and for other and further relief, etc.

The action was called for trial in the superior court, and testimony taken therein in the months of August and September, 1886, and on the twenty-seventh of said September the court filed findings of fact, and the conclusion of law that the plaintiff was entitled to a divorce, with the further order:

"All questions as to property are hereby reserved, and the cause is now referred to B. A. Reynolds, Esq., as referee herein, to take such testimony as the respective parties may offer upon the question of property, and to report to this court: *First*. What is the common property of plaintiff and defendant? *Second*. What is the separate property of plaintiff, and the present income of said separate property? *Third*. What the separate property of the defendant, and the present income of said separate property? And also to report to this court all testimony taken before him."

On the thirtieth of December, 1886, and while the reference was pending, the superior court filed additional findings of fact, and a conclusion of law as follows: "And as conclusion of law the court finds that the plaintiff is entitled to a judgment for divorce from defendant on the ground of extreme cruelty;" and ordered: "Let judgment be entered accordingly; all questions as to property being reserved." (Signed by the judge.) And on the third of January, 1887, a judgment in form was made and entered in the action in words and figures following:

"[Title of court and cause.] In accordance with the findings heretofore entered and filed in this action, it is hereby adjudged and decreed that the marriage heretofore and now existing between the plaintiff, Mary C. Ambrose, and the defendant, Thomas Ambrose, be dissolved, and the same is hereby dissolved, upon the ground of extreme cruelty inflicted by the said defendant on the plaintiff; and the said parties plaintiff and defendant are, and each of them is, freed from the obligations of said marriage. All questions as to property, and as to a suitable allowance to the wife for her support, are hereby reserved."

On the twenty-sixth of July, 1886, an order was made by the superior court, in said action, that the plaintiff be allowed the sum of \$200 per month as and for alimony "*pendente lite*," commencing with the date of the commencement of the action.

On the first of April, 1887, the plaintiff in the action aforesaid demanded of the defendant therein, the petitioner herein, the payment to her of \$200 by virtue of said order of July 26, 1886, which petitioner refused to pay.

April 14, 1887, on application, the judge of the superior court ordered the petitioner to show cause why he should not be adjudged guilty of contempt in disobeying the order of the twenty-sixth of July, 1886. The petitioner appeared by himself and counsel in response to such order to show cause, and such proceedings were had under such order that the same came on for hearing before the superior court on the eighteenth of April, 1887, when the petitioner appeared and claimed to show, for cause, that the order of July 26, 1886, was vacated by the entry of the judgment and decree of January 3, 1887. The superior court made and entered an order adjudging the petitioner, defendant in said action, guilty of contempt, and that he stand committed to the jail of the city and county of San Francisco, there to remain

until he pay said sum of \$200 to said Mary C. Ambrose, plaintiff in said action. A warrant of commitment was issued to the sheriff, who attached the person of the petitioner, and imprisoned him in the county jail, and continues to imprison him; the said \$200 not having been paid. The petitioner contends that the imprisonment is illegal, and the order directing it void, and asks to be discharged.

It is contended by counsel for the petitioner that the sole question to be determined in this proceeding is, was the decree entered, in the case of *Ambrose v. Ambrose*, on January 3, 1887, a final or interlocutory decree? We do not find it necessary to decide, however, that the decree was not a finality, so far as it adjudged a dissolution of the marriage. We have only to consider the effect of the clause, "All questions as to property * * * are hereby reserved." The language imports at least a reservation of the issues made by the pleadings as to property, common or separate, for further investigation in the action. If not a reservation for that purpose, it means nothing. It would be a forced construction to say the words employed are simply a declaration that the court refuses to try or pass on those questions. Moreover, the same rules of interpretation apply in ascertaining the meaning of a court order or judgment as in ascertaining the meaning of any other writing, and, if the language be in any degree uncertain, we may properly refer to the circumstances surrounding the making of the order or judgment,—to the condition of the cause in which it was entered. When the decree of January 3, 1887, was entered, the referee was proceeding under the order of July 26, 1886, which order remained in full force and effect. The decree may properly be read in connection with the order of reference, and the proceedings thereunder. All questions of property were "reserved," to be disposed of on the coming in of the referee's report.

It seems to us that, to justify an order discharging the petitioner, we would be compelled to treat the reservation clause in the decree as absolutely void, and that, on the entry of the decree for divorce, the superior court became *functus lite*, with no jurisdiction to proceed further in the cause, to entertain the report of the referee, to hear the parties upon any question of property, or to render judgment in the action with respect thereto. But this would be to disregard the clause of the order or decree which, as we construe it, reserves such questions, and, in view of the previous order, evidently contemplates further judicial action in the same cause; would leave untried important issues, and questions undetermined for the determination of which the suit was commenced and prosecuted. In construing its meaning, we are not required to decide whether it was an irregularity to enter the decree before all the issues were tried. If the court had no power to enter it, certainly the suit was not terminated by the decree. If the power existed, the meaning of the decree is that the questions as to property be reserved for further hearing and consideration in the same action.

Ordered that the petitioner be remanded to the custody of the sheriff.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; PATERSON, J.

72 Cal. 487

STUTTMEISTER v. SUPERIOR COURT. (No. 12,168.)

(Supreme Court of California. June 9, 1887.)

APPEAL—FROM PROBATE COURT—APPEALABLE ORDER—CONTEMPT.

The claim of an attorney for services rendered to the estate of a deceased person, when allowed and approved by the probate court, not as costs, but to be paid in due course of administration, becomes one of the "acknowledged debts of the estate, to be paid in due course of administration," (Code Civil Proc. Cal. § 1497;) and an order for its payment is appealable, under section 963, Code Civil Proc. Cal., which provides that an appeal lies to the supreme court from certain orders of

the superior court in probate proceedings, among which are orders for the payment of a debt, claim, legacy, etc.;¹ and after an appeal taken by an administrator from such an order of the superior court, and the filing of a *supersedeas* bond, the action of the superior court in fining the administrator for refusing to pay the claim of the attorney is in excess of its jurisdiction.

Department 2. Review to superior court, San Francisco, department 9.
Ben Morgan, for petitioner. *E. J. & J. H. Moore*, for respondent.

SEARLS, O. J. This case comes up on a writ of review issued to the superior court in and for the city and county of San Francisco, department 9. From the record presented it appears that, in 1884, John A. Collins presented a claim for services as attorney against the estate of F. W. R. Stuttmeister, deceased, to W. O. Stuttmeister, the administrator of such estate, and such proceedings were afterwards had therein that, on or about October 10, 1884, such claim was allowed and approved by the probate court for \$300, and ordered to be paid out of the estate in due course of administration. On the seventeenth day of May, 1887, the said superior court, in probate, made an order upon the administrator, requiring him to forthwith pay to said John A. Collins said sum of \$300, so allowed as aforesaid; that thereafter, and on the eighteenth day of May, 1887, W. O. Stuttmeister, administrator as aforesaid, took and perfected an appeal to this court from said order of May 17, 1887, requiring him, as such administrator, to pay said sum of \$300 as aforesaid. A *supersedeas* bond was filed, and the appeal is in all respects regular in form.

Subsequent thereto the court below proceeded to adjudge said administrator guilty of contempt for failing to pay over said sum of money, in accordance with such order of May 17, 1887, and adjudged him guilty of such contempt, and fined him in the sum of \$200, and, in default of payment thereof committed him to the custody of the sheriff, etc.; whereupon said administrator sues out this writ of review.

If the order for the payment of the \$300 was appealable, then the proceedings thereon, having been stayed by an appeal and *supersedeas* bond as provided by the Code of Civil Procedure, the superior court was divested of jurisdiction to act further in the matter pending such appeal.

By section 963, Code Civil Proc., an appeal to the supreme court is given from certain orders of the superior court in probate proceedings, among which are judgments or orders for "the payment of a debt, claim, legacy, or distributive share," etc. The contention of counsel for respondent is that the demand in question is for services rendered in the progress of administration, and is not a *debt* or *claim* within the purview of section 963, *supra*, and consequently that no appeal lies therefrom. We are inclined to agree with counsel for respondent that the term "claim," as used in the Code, in reference to estates of deceased persons, has reference to such demands or debts against the decedent as existed and (if due) might have been enforced against him in his life-time by proper action, (*Fallon v. Butler*, 21 Cal. 24; *Estate*

¹An order in probate proceedings directing the sale of real estate is appealable, *In re Stuttmeister*, (Cal.) 12 Pac. Rep. 270; but no appeal lies from an order dismissing a petition for the revocation of the probate of a will, or denying motions to set aside the orders and decrees made in the matter of the probate of a will, *Estate of Sbarboro*, (Cal.) 11 Pac. Rep. 563; nor from an order refusing to vacate an order of distribution and settlement of the final accounts of an executor, *In re Lutz*, (Cal.) 8 Pac. Rep. 39. As to appeals from other orders of probate courts, see *Gilbert v. Thayer*, (N. Y.) 10 N. E. Rep. 148; *Putney v. Fletcher*, (Mass.) 5 N. E. Rep. 640; *Pemberton v. Pemberton*, (N. J.) 7 Atl. Rep. 642; *In re Pemberton*, (N. J.) 4 Atl. Rep. 770; *Morey v. Sohler*, (N. H.) 3 Atl. Rep. 636; *Charles v. Charles*, (Minn.) 29 N. W. Rep. 170; *Hardy v. Minneapolis & St. L. Ry. Co.*, (Minn.) 28 N. W. Rep. 219; *Auerbach v. Gloyd*, (Minn.) 27 N. W. Rep. 193; *Daniells v. St. Clair Circuit Judge*, (Mich.) 27 N. W. Rep. 1; *Hart v. Circuit Judge*, (Mich.) 23 N. W. Rep. 326; *In re Brown*, (Minn.) 21 N. W. Rep. 474; *In re Huntsman*, (Minn.) Id. 555.

of *McCausland*, 52 Cal. 568;) and that liabilities of the administrator or executor, incurred in the management of the estate, or in administering the trust, stand upon a different footing. Conceding all this, however, and the case is not altered. In this instance, it is apparent the demand was presented, allowed, and ordered paid as a claim against the estate; to be paid, not as costs, but in due course of administration. When so allowed, it became one of the "acknowledged debts of the estate, to be paid in due course of administration." Code Civil Proc. § 1497. When thus treated, an order for its payment was appealable under section 963, *supra*.

Respondent cannot treat the claim against the estate as an *established debt*, for the purpose of enforcing its payment out of the estate, and at the same time impugn it, and the order founded thereon, as the basis of an appeal. It follows that the action of the court below, in adjudging the administrator guilty of contempt after the appeal was perfected, and a bond for the stay of proceedings filed, was in excess of jurisdiction, and such proceedings to adjudge the administrator guilty of contempt, and to punish him therefor, are quashed, and the court below ordered to stay further proceedings in such behalf until the hearing and determination of the appeal from the order aforesaid.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 379

FRESNO CANAL & IRRIGATION CO. v. WARNER. (No. 11,911.)

(*Supreme Court of California. May 28, 1887.*)

1. CORPORATIONS—EXISTENCE OF—ESTOPPEL.

When one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be heard to say that the corporation had no existence, and for that reason no contract was made.¹

2. SAME—EVIDENCE OF EXISTENCE—ARTICLES.

A copy of articles of incorporation filed in the office of the county clerk of the county in which the principal business of the company is conducted, as required by Civil Code Cal. § 296, when certified by the secretary of state, as provided by section 297, is admissible as *prima facie* evidence of the existence of the corporation.

3. SAME—OTHER EVIDENCE.

In an action in California by a corporation, a certified copy of the articles of incorporation were introduced in evidence, but they were not read to the jury, nor was their reading waived. The president of the company testified that he owned all of the stock except a few shares, and that he had been its general manager or president since its organization. The court refused to allow the jury to take the copy of the articles with them when they retired, but instructed them to find specially whether or not the plaintiff was a corporation, as alleged, and told them that they could not consider any documentary evidence that might have been offered, unless the document had been read to them, or its reading waived. The jury found that the plaintiff was a corporation. *Held*, that the court properly submitted the special issue to the jury after the argument and instructions, under Code Civil Proc. § 625, authorizing the submission of special issues to the jury, and that the verdict was not contrary to the law and the evidence.

Commissioners' decision. Department 2.

¹One dealing with a corporation is estopped by his contract from denying the validity of its organization, or its power to enter into the contract. *Slater Woolen Co. v. Lamb*, (Mass.) 9 N. E. Rep. 823; *Town of Searcy v. Yarnell*, (Ark.) 1 S. W. Rep. 319, and note; *Wentz v. Lowe*, (Pa.) 3 Atl. Rep. 879; *Broadwell v. Merritt*, (Mo.) 1 S. W. Rep. 855; *Broadwell v. Weller*, Id. 857; *Broadwell v. Jenkins*, Id. 857; *Broadwell v. Alexander*, Id. 858; *Broadwell v. Terry*, Id. 858; *Grangers' Business Ass'n v. Clark*, (Cal.) 8 Pac. Rep. 445; *Inter-Mountain Pub. Co. v. Jack*, (Mont.) 6 Pac. Rep. 20.

Appeal from superior court, Fresno county.

Wigginton, Creed & Hawes, for appellant. *Nourse & Church*, for respondent.

BELCHER, C. U. This is an action to recover the sum of \$500 alleged to be due the plaintiff for conducting water, sufficient for irrigation purposes, upon the lands of defendant, under a contract made between the parties. The complaint alleged that the plaintiff was a corporation, incorporated under the laws of this state, and engaged in the business of diverting water from Kings river, and supplying therewith, for irrigation and other useful purposes, the people of Fresno county. The answer denied that the plaintiff was a corporation, and also denied the making of the contract alleged, or any contract, for conducting water upon his land. The case was tried by a jury, and the verdict and judgment were in favor of plaintiff. The defendant moved for a new trial, and now appeals from the judgment and order denying his motion.

It appears from the record that, at the commencement of the trial, counsel for plaintiff offered in evidence a copy, certified by the secretary of state, of the plaintiff's articles of incorporation. Counsel for defendant objected to the offered evidence, upon the ground that it purported to be a copy of a copy, and was irrelevant, immaterial, and incompetent. The court overruled the objection, and thereupon the paper was handed to the clerk of the court, and by him marked "Plaintiff's Exhibit A." It was, however, never read to the jury, and the reading of it was neither waived nor admitted.

M. J. Church was then called as a witness, and testified that he was "the M. J. Church named in the articles of incorporation of plaintiff as one of the corporators of said plaintiff, and that he owned all but five shares of the capital stock of plaintiff, and that he had been its president ever since its organization, except about three years, and its superintendent ever since its organization." No other or further evidence as to whether plaintiff was a corporation or not was offered during the trial of the cause.

Upon the other questions involved, considerable evidence was introduced by both sides, and at its conclusion counsel argued the case to the jury. The court then gave its instructions, and counsel for plaintiff asked that the jury be permitted to take with them, upon retiring for deliberation, the certified copy of plaintiff's articles of incorporation. This was refused, and thereupon counsel asked that the jury be instructed, in addition to their general verdict, to answer the question: "Was and is the plaintiff a corporation, as alleged in the complaint?" This last request was granted, against the objection and exception of defendant. The jury then retired, and in due time returned with a general verdict in favor of plaintiff, and an answer to the question submitted, as follows: "We, the jury, find that it was and is so a corporation."

The first point made for the appellant is that the court erred in submitting to the jury the special issue as to whether the plaintiff was a corporation or not. A sufficient answer to this point is that the Code fully authorized the ruling. Section 625 of the Code of Civil Procedure provides that the court, "in all cases, may instruct them, [the jury,] if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon." That this was done after argument, and after the giving of the instructions to the jury, is not material.

It is next claimed that the court erred in admitting in evidence the certified copy, from the office of the secretary of state, of the plaintiff's articles of incorporation, as it was only a copy of a copy. Here, too, the Code furnishes full justification for the action of the court. Section 296 of the Civil Code provides that articles of incorporation must be filed in the office of the county clerk of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county clerk, with the secretary of state.

And section 297 then further provides: "A copy of any articles of incorporation filed in pursuance of this chapter, and certified by the secretary of state, must be received in all the courts and other places as *prima facie* evidence of the facts therein stated."

Lastly, it is insisted that the verdict was not justified by the evidence, and was against law. The court charged the jury that, under the laws of this state, they could not consider any documentary evidence that might have been offered, unless the document had been read to them, or its reading waived; and the position of appellant is that, as the plaintiff's articles of incorporation were not read to the jury, nor the reading waived, there was no evidence before them showing the plaintiff's corporate character; and hence the verdict, finding that the plaintiff was a corporation, was contrary to the evidence, and also contrary to the instructions of the court.

Leaving out the articles of incorporation, we think there was some evidence before the jury tending to show that the plaintiff was a corporation. The testimony of Church was admitted without objection, and in that he speaks of the plaintiff as a corporation, and of himself as one of the incorporators, and says he owned the larger part of its capital stock, and had been its president a part of the time, and its superintendent all the time, since its organization. How could this be true if the plaintiff never became a corporation, either *de jure* or *de facto*? But, however this may be, we think the verdict may be sustained upon another ground. It is not denied that there was ample evidence before the jury to show that the contract was made and executed by the plaintiff, as alleged in the complaint. This being so, the defendant, under the rule of law now generally accepted, cannot be heard to question the plaintiff's existence as a corporation.

In *Lehman v. Warner*, 61 Ala. 455, it is said, on page 466: "It is too well settled now to be controverted that a party who contracts with a corporation, whether it be by subscription for its stock, or by promissory note, bond, mortgage, or other form of contract, is estopped from denying the existence of the corporation;" citing authorities. It is then added: "It has often been said that, when a corporation sues, its corporate existence must be shown, if it is controverted. When the action is against one contracting with it in its corporate capacity, the contract furnishes the evidence."

In *Close v. Glenwood Cemetery*, 107 U. S. 477, 2 Sup. Ct. Rep. 267, it is said: "One who deals with a corporation as existing in fact is estopped to deny, as against the corporation, that it has been legally organized."

In *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co.*, 10 Sawy. 470, 23 Fed. Rep. 232, it is said: "The law is well settled that the person who contracts with an apparent corporation as such is estopped, when sued on such contract, to say that the plaintiff had no corporate existence, or power to make such contract. A corporation, like an individual, when sued on a contract, may set up as a defense its want of power or capacity to make such contract; but the party with whom it contracts cannot set up such a want of power or capacity as a defense to an action by the corporation for a breach thereof." The same doctrine is announced in Bigelow, Estop. (4th Ed.) 527, and many authorities are cited in support of it.

In support of their contention that the existence of the plaintiff as a corporation may be questioned in an action like this, counsel for appellant cite *Mokelumne H. C. & M. Co. v. Woodbury*, 14 Cal. 426; *Harris v. McGregor*, 29 Cal. 127; and *Oroville & V. R. Co. v. Plumas Co.*, 37 Cal. 360, 361. But these cases are not in point. In neither of them was the action based upon a contract alleged to have been made between the corporation and the adverse party. The distinction seems to be this: In actions not founded upon contract made between the parties, the existence of the alleged corporation, if put in issue, must be proved; but when one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be

heard to say that the corporation had no existence, and for that reason no contract was made.

In our opinion the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NICKELSON v. SMITH.

(Supreme Court of Oregon. May 24, 1887.)

TRIAL—VERDICT—JUSTICE OF PEACE.

Where a jury in justice's court presented a paper purporting to contain their verdict, but which failed to express their real meaning, and the justice continued the case till next day, and allowed the jury to separate, and next day received their verdict, *held*, that such verdict was irregular, and must be set aside, and a new trial granted.

Appeal from Wasco county.

Geo. Watkins, for appellant. *T. Dufur*, for respondent.

STRAHAN, J. The appellant here originally commenced an action against the respondent before W. E. MCARTHUR, Esq., justice of the peace for Dalles precinct, in Wasco county, Oregon, to recover a balance alleged to be due him of \$52.88. The defendant filed a counter-claim, amounting to \$76.09, and demanded a judgment for \$24.21. Issue having been duly taken by the reply on the new matter contained in the answer, the defendant in that proceeding demanded a jury. What occurred after the evidence was closed, and the cause was argued by counsel, is fully disclosed by the record:

"The case was then submitted to the jury, and they retired under a sworn bailiff. At about 7:30 o'clock P. M. the jury, having been out about one hour, returned into court,—Geo. Watkins, Esq., one of plaintiff's attorneys, being present,—and presented to the court what purported to be their verdict, a certain writing of which the following is a copy, to-wit:

"'JUSTICE'S COURT FOR: DALLES PRECINCT, COUNTY OF WASCO, STATE OF OREGON.

"' *Wilson B. Smith, Plff., v. J. C. Nickelson, Deft.*

"'We, the jury impaneled to try the above cause, find for the defendant, and assess his damages at \$18.99.

[Signed

" 'H. SOLOMON.

" 'C. W. JONES.

" 'G. F. SETTLE

" 'A. J. SIMMONS.

" 'G. W. WERLIN.'

—Which verdict was received and filed November 27, 1885. The jury then explained in open court that they intended to allow the defendant the sum of \$18.99 as a counter-claim to the plaintiff's cause of action, thereby reducing plaintiff's claim against the defendant, as set forth in his complaint, to the sum of \$33.89, which amount they found that the plaintiff was entitled to recover from the defendant in this action. The paper purporting to be the verdict of the jury not being actually the verdict found by the jury, and the court not being advised what course should be pursued in the matter, continued the case until to-morrow morning, at 10 o'clock A. M., for advisement. It was ordered that the jury be present at that time. In the meanwhile the jury were allowed to separate, but were not discharged.

"W. E. MCARTHUR, Justice of the Peace."

"NOVEMBER 28, 1885.

"The jury all being present, and the attorneys for the plaintiff and defendant also being present, the court submitted the case to the jury, against objections of defendant's counsel; and, after deliberation, they rendered their verdict in open court; all parties in interest being present, or represented by learned counsel. The following is a copy of the verdict, to-wit:

" 'IN JUSTICE'S COURT FOR DALLES PRECINCT, WASCO COUNTY, STATE OF OREGON.

" '*Wilson B. Smith, Plaintiff*, v. *J. V. Nickelson, Defendant*.

" 'We, the jury in the above-entitled action, find for the plaintiff, and assess his damages at \$33.89 cents.

H. SOLOMON, Foreman.

" 'G. W. WERLIN.

" 'C. W. JONES.

" 'A. J. SIMMONS.

" 'G. F. SETTLEMIRE.

—Which verdict was received and filed November 22, 1885. Thereupon the jury were discharged. Wm. E. MCARTHUR, Justice of the Peace."

From the record of the justice it further appears that the plaintiff moved for judgment on said last-named verdict in his favor for \$33.89; and the defendant at the same time moved for a judgment in his favor for \$18.99 on the alleged verdict of the preceding day; and the court, after hearing the argument of counsel in favor of and against said respective motions, still being in doubt what judgment ought to be given thereon, took both of said motions under advisement. Thereafter, on the twenty-second day of May, 1886, said justice overruled the defendant's motion, and granted the motion of the plaintiff.

The defendant, having demanded a jury, had no right of appeal. Gen. Laws, p. 478, § 120. The defendant accordingly sued out a writ of review, and removed the record of the justice into the circuit court. That court annulled the judgment of the justice, and remanded the cause for a new trial, from which last-named judgment this appeal is taken. Numerous errors are assigned in the notice of appeal. The only errors material to be considered are those relating to the action of the court in reversing the judgment of the justice, and in remanding the cause for a new trial.

The first question which naturally presents itself here for our consideration is, which of the two papers presented by the jury to the justice is their verdict?

Section 7, p. 463, Gen. Laws, provides, in substance, for the same course of procedure in a justice's court as prevails in a court of record, "except as in this act otherwise specially provided." Section 210 of the Civil Code, thus made applicable, provides: "When the verdict is given, and is such as the court may receive, *and if no juror disagree*, or the jury be not again sent out, the clerk shall file the verdict. The verdict is *then* complete, and the jury shall be discharged from the case. The verdict shall be in writing, and, under the direction of the court, shall be substantially entered in the journal as of the day's proceedings in which it is given."

Now, it is too plain for argument that the first paper signed by the jury and delivered to the justice, though in form a verdict, did not contain or embody the result of their deliberations. As a verdict every juror did object to it at the time, or, in the language of the section quoted, "disagreed." It then becomes the duty of the justice to send them out again, to enable them to put the verdict in such form as would give legal effect to the result of the trial. In *Warner v. New York Cent. R. Co.*, 52 N. Y. 437, it was held that the announcement of a verdict, or the bringing in of a sealed verdict by a jury, and the entry thereof by the clerk in his book of minutes, is not such a recording

as makes the verdict fixed and unalterable; but, until the jury are dismissed, their power over the verdict, and their right to alter it so as to make it conform to their real and unanimous intention and purpose continues. And to the same effect is *Dalrymple v. Williams*, 63 N. Y. 361.

This view of the subject disposes of the defendant's claim that the paper purporting to be a finding in his favor was to be treated as the verdict, and it results as a necessary consequence that the court had the power to allow the jury to put their finding in such form as would be according to their real and unanimous intention and purpose. But when should this power have been exercised? Must it be done at the time the disagreement was made known to the court, and before the jury were allowed to separate, or might it be done at some indefinite time in the future, when it would be convenient for the court to call the jury together for that purpose? Or, in other words, could the court, without the consent of the parties, allow the jury to separate after the cause had been submitted to them, and then bring them together again, against the protest or objection of either party, and receive their verdict? Such a practice does not appear to be in accordance with the plain requirements of the statute of this state. The Civil Code, § 200, provides: "After hearing the charge, the jury may decide in the jury-box, or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury thus together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon a verdict. * * *

We think it was an erroneous exercise of the judicial functions of the justice to allow the jury to separate without the consent of the parties, and to permit them, on the next or some subsequent day, to return and complete their verdict against the objections of either party. Such a practice, if permitted, is liable to great abuse, and we think we ought to give full effect to the requirements of the section above quoted. The justice had ample power to permit the jury to put their verdict in proper form at the time of the disagreement. He could have sent them out for further deliberation, or they could have then decided in the jury-box; but the practice of allowing a jury to separate after a cause has been submitted, and without the consent of the parties, would be clearly in contravention of our statute. The verdict of the jury was therefore irregular,—not void,—and must be set aside, and a new trial directed before the justice. The conclusions of the circuit court seem to be in harmony with these views, and its judgment must therefore be affirmed.

UNITED STATES *v.* ELDRIDGE and another.

(*Supreme Court of Utah*. June 9, 1887.)

1. BAIL—UNDERTAKING OF—DEFENSE—UNLAWFUL COHABITATION.

Where two prosecutions for unlawful cohabitation were instituted against a defendant upon the same day, and the accused failed to appear at the trial of either, *held*, that it was no defense to an action on the undertaking of bail, given upon the prosecution last begun, that, on account of the doctrine of continuous offense, the accused could not have been convicted in both prosecutions, as the mere pendency of one prosecution would not be a bar to the other.

2. UNLAWFUL COHABITATION—SUCCESSIVE INDICTMENTS.

Although unlawful cohabitation is a continuous offense, and separate indictments will not lie for successive periods of time covered by such cohabitation, prior to the finding of the indictments, yet if, after one indictment, the cohabitation is continued, another indictment will lie for such subsequent cohabitation.

3. SAME.

Follows *U. S. v. Eldredge*, 13 Pac. Rep. 673, upon the points decided therein.

Appeal from district court.

Action on an undertaking of bail given in a prosecution for unlawful cohabitation. Further facts are given in the opinion and in former case of *U. S. v. Eldredge*, 13 Pac. Rep. 673. Plaintiff had judgment below.

Dickson & Varian, for the United States. *Le Grande Young*, for appellants.

BOREMAN, J. The principal facts of the case are the same as in case No. 6599, heretofore decided at the last January term, except as to the time of the alleged unlawful cohabitation, and except that in this case two prosecutions, instead of one, are pleaded. The two prosecutions thus pleaded in defense of this action are the indictment of the twenty-fourth of March, 1885, and the prosecution in which the undertaking sued on in case No. 6599 was given. Both of those cases, as well as the present one, were for unlawful cohabitation. It is contended that unlawful cohabitation is one continuous offense, and that it cannot be divided into two or more offenses, and that the present prosecution is not the one on which the accused could have been held. It will be proper for us, therefore, first to examine whether the prosecution in which the undertaking herein sued on was given, could or could not have been the proper one.

The supreme court of the United States has lately decided, in the case of *Ex parte Snow*, 7 Sup. Ct. Rep. 556, (not yet officially reported,) that unlawful cohabitation is a continuous offense, yet that an indictment for that crime would not preclude another prosecution for the same offense committed at a time subsequent to the finding of such indictment. The cohabitation in the present case is alleged to have been committed at a time subsequent to the indictment of the twenty-fourth of March, 1885, and, as a consequence, that indictment would be no bar to the prosecution in which the undertaking herein sued on was given, and cannot be pleaded as a defense in this action.

With the indictment of the twenty-fourth of March, 1885, eliminated from the case before us, there remains for our consideration the question whether the other prosecution, the one on which the undertaking sued on in case No. 6599 was given, is a bar to the present action. The complaint for the arrest of the accused in that case, and the complaint in the present one, were filed before the commissioner on the same day; but the one represented by case No. 6599 was prior in time. The warrants were issued on the same day; the accused was brought before the commissioner on the same day on both warrants; and the undertakings in both cases were on the same day.

The appellants, the sureties on the undertaking herein sued on, claim that if they had surrendered the accused, or if he had appeared at the time appointed, he would have been entitled to his immediate discharge from custody; that since the institution of this action, the supreme court of the United States having decided that there could be but one prosecution for this offense, therefore the holding of the accused on the charge in this case was unlawful and void, and hence that the holding of the sureties on the undertaking is unlawful and void. The supreme court of the United States did not decide that there could be but one prosecution instituted, nor could that idea have been intended to be conveyed. It would have been contrary to the settled doctrine. It is not infrequent that a second or even a third indictment is found for the same offense; but on one alone is the party tried, and the others are dismissed. In all such cases there can be but one judgment, of either conviction or acquittal; and any such judgment can be pleaded in bar of any other prosecution for the same offense. But here the accused had not been convicted or acquitted on the charge pleaded at bar, nor on any other charge, for the offense of unlawful cohabitation. The defense set up by the sureties is one that the accused himself could not have availed himself of in his defense on the charge upon which this case is based; much less, then, it would seem, could his sureties do so.

The doctrine of the supreme court of the United States as set forth in the case of *Ex parte Snow*, above referred to, when applied to this case, is that for the time between the finding of the indictment of the twenty-fourth of March, 1885, and the date of complaint before the commissioner, to-wit, the sixteenth day of February, 1886, there could be but one conviction; and not that the pendency of one indictment or prosecution was a defense to a trial or conviction upon another for the same offense. It is a well-settled rule of law that the pendency of one indictment is no bar to the trial or conviction on a second or subsequent indictment for the same offense. Chitty, Crim. Law, 447; *Com. v. Murphy*, 11 Cush. 472; Whart. Crim. Pl. 472; *U. S. v. Herbert*, 5 Cranch, C. C. 87; *Kalloch v. Superior Court*, 56 Cal. 236; 1 Archb. Crim. Pl. 110, 111.

The pendency of the former prosecution, that presented by case No. 6599, would not preclude the prosecution in this case. Had the former prosecution been carried forward to trial and judgment, it could have been pleaded in bar of the action in which the undertaking herein sued on was given, and also of this action. But as the accused did not appear, and was not surrendered, there could be no trial or judgment. One prosecution for the time subsequent to the indictment of March 24, 1885, as we have seen, was proper and legal. The prosecution in which the undertaking sued on was given, was subsequent to that indictment. Its being subsequent would not, therefore, it seems, render it invalid or illegal. It might be legal. The pendency of the former prosecution being no defense to this action, we are not in a position to say that the present action is illegal or unauthorized. If the accused could have been prosecuted to judgment, the bond to require him to appear was not invalid. Had the accused appeared at the time appointed for the trial, he could not have interposed any legal objection to proceeding to trial in the case in which the undertaking herein sued on was given; nor could his sureties have made any such objection. Besides, had he appeared then, a new indictment might have been presented against him, covering the whole time subsequent to the indictment of the twenty-fourth of March, 1885, and by the undertaking herein sued on he was bound to answer to it. He would not have been entitled, at least, to be discharged *ex debito justitiæ* at that time. The accused should have appeared at the time, and his sureties should have seen that he thus complied with the requirements of the undertaking. They were, to some extent, his jailors, and could have arrested and restrained him to the extent necessary to produce him at the appointed time. They failed to do their duty in not having him there, and he failed to appear of his own will, and the undertaking was duly forfeited. They did not deny then that he was liable to arrest, nor did he deny it. It would seem that they are now estopped from denying that he was liable to arrest upon the charge, to answer which the undertaking herein sued on was given. *Henriques v. Dutch West India Co.*, 2 Id. Raym. 1535; *Welland Canal Co. v. Hathaway*, 8 Wend. 481.

It was not for the accused, nor for his sureties, to judge of the propriety or necessity of his attendance at the time, when it was the obvious policy of the law to refer that question to the court whether he was required to repair. "If," to use the language of the supreme court of New Jersey, "he had appeared, * * * and there had been nothing against him, * * * it might have been sufficient cause for the court to have discharged his recognizance, and given him leave to depart; but it was not in itself such leave or discharge. A recognizance, in general, binds to three particulars: *First*, to appear to answer either to a specified charge, or to such matters as may be objected; *second*, to stand to and abide the judgment of the court; and *third*, not to depart without the leave of the court,—and each of these particulars is distinct and independent. The party is not to depart until discharged, although no indictment should be found against him by the grand jury or although he be tried and a verdict of acquittal rendered." *State v. Stout*, 11 N. J. Law, 124.

The same doctrine is laid down by the supreme court of Maine, which says that "the right to enforce a recognizance in no way depends upon the question of the guilt or innocence of the accused, and that question can only be determined by trial upon the complaint;" that "the defendant was bound to appear." etc.; and "he cannot set up the repeal of the statute." *State v. Boies*, 41 Me. 344.

In Pennsylvania it is held that in an action on a recognizance, which originated before a justice of the peace, the validity of it cannot be questioned, either by proof that it was illegally taken, or that it was fraudulently taken. *Clark v. McComman*, 7 Watts & S. 469; *Pierson v. Com.*, 3 Grant, Cas. 314.

In New York it is held that sureties on an undertaking of bail, in an action against them after breach, cannot question the liability of the principal to arrest or imprisonment; that they cannot defend upon the ground of the illegality of the arrest. They should have moved for exoneration at the proper time. *Gregory v. Levy*, 12 Barb. 610; *Levy v. Nicholas*, 19 Abb. Pr. 282. Various other states hold the same doctrine.

The supreme court of the United States has held in the case of *Beers v. Haughton*, 9 Pet. 329, that where the accused would have been entitled to his immediate discharge if he had been surrendered at the appointed time, the sureties could plead that fact in bar, and thereon be discharged from their recognizance.

Since that decision of the supreme court of the United States, the circuit court of the United States, (Ninth circuit,) Judge FIELD presiding, held that, while the accused was testing the validity of the indictment on the ground that it stated no offense, he might be admitted to bail, and, if he were, the recognizance which he should give would be valid and binding, although the indictment itself should subsequently be adjudged to be void, as charging no offense. *U. S. v. Reese*, 4 Sawy. 635. The circuit court in the case last named said that "the authority of the court to pass upon the validity of the action of the grand jury, and over the defendant while this validity is under consideration, is not an usurped authority, but is an authority essential to the exercise of the general jurisdiction with which the court is clothed over all offenses cognizable under the laws of the United States."

If the doctrine contended for by the appellants is correct, then, to use the language of Judge FIELD again, in the last-named case, "if the court should refuse to look into the indictment, and to pass upon its validity, the judges would be justly censurable for neglect of duty; but, if the court detained the defendant in custody while considering its validity, the judges would be liable to an action for false imprisonment, if their ultimate decision be that the indictment was void."

At the time that the accused in the case before us was required to appear, the question was under consideration in the courts, although not in this case, whether unlawful cohabitation was a continuous offense, or whether it could be segregated into two or more offenses, and it had not then been held that it was one offense only. In this case, the point had not even been raised, nor was it ever raised by the accused at any time, nor by the sureties themselves, until this action on the undertaking was instituted. The principal might have raised the objection at the time of giving the bail, but he made no such objection then, nor did he make any such objection upon the trial. Not having appeared for trial, a denial of his liability to arrest was a privilege which belonged to him, to be made at the proper time; and it did not belong to his sureties after the time had expired for an application for exoneration for the sureties, and after the bail had become fixed. *Stever v. Somberger*, 19 Wend. 121, 24 Wend. 275; *Lyon v. Auchincloss*, 12 Pet. 234.

In the case of *Beers v. Haughton*, above referred to, there was no question pending as to the validity of the charge or of the arrest; there was no question of doubt to be settled, but the accused's right to a discharge from cus-

ty was absolute, clear, and unqualified. Had there been any such unsettled question as in the present case, it is manifest that the court would have held that the accused was not entitled to his immediate discharge had he been surrendered, or had he appeared at the proper time. The doctrine of *Beers v. Houghton* is grounded upon the idea that the surrender of the accused would have been an idle ceremony, because he would have been immediately released from custody, and the bail could have pleaded that as much as they could have pleaded the death of the accused. *Duncan v. Darst*, 1 How. 308. But the death of the principal could not have been pleaded after the bail was fixed. *Davidson v. Taylor*, 12 Wheat. 604; *Olcott v. Lilly*, 4 Johns. 407.

So we do not see that the doctrine of *Beers v. Houghton* is at all applicable to the case at bar; for nothing whatever appears in this case to show that the accused would have been entitled to his immediate discharge if he had appeared or been surrendered. On the contrary, he could have been held and tried upon the charge, to answer which the undertaking herein sued on was given. There can be no doubt of this fact. The only ground that could have been urged against his being so held and tried, would have been that he had already been tried, and convicted or acquitted, upon another charge for the same offense, if such had been the fact; but such does not appear to have been the fact, and of course it could not have been pleaded or urged. There is, therefore, no ground nor reason for saying that the undertaking herein sued on is a nullity.

The charge being valid, the undertaking to answer thereto is valid. The action upon the other undertaking, the one sued on in case No. 6599, above referred to, has gone to judgment, but such judgment was not paid nor otherwise discharged, nor pleaded in defense to this action, but that case is still contested and pending on appeal to the supreme court of the United States from the judgment therein.

With the present case in judgment, then, two judgments will exist against the bail of the accused, on two separate charges for the same offense. It is an anomalous situation, but one of the accused's and his sureties' own making; for this double responsibility could have been avoided by the accused having been produced in court at the appointed time. Trial and judgment upon one of the charges or indictments would thus have been reached. The accused then could not have been called to trial upon the other, and the undertaking on the charge not tried would never have been forfeited, and the sureties thereon could never have been held liable. It is not the province of the accused, nor of his sureties, to decide upon which charge he should have been prosecuted, or held to answer; that was a matter for the government to decide. As a consequence, neither the accused nor his sureties can question the validity of either undertaking for his appearance at the appointed time. If the sureties could plead exoneration from one undertaking by reason of the existence of the other, it is possible that it might have been done in case No. 6599, where it might have been said, if said at all, that the second arrest for the same offense should release the sureties on the first undertaking. *Medlin v. Com.*, 11 Bush, 605. But of this we express no opinion. The question was not raised on the former case. It certainly cannot be raised on the present one.

The other questions arising in this case arose in a case between the same parties decided at the last January term of this court, and for our views thereon we refer to the opinion filed in that case. We see no reason for holding the undertaking herein sued on to be invalid; nor do we see any error of law in the case. The judgment of the district court is therefore affirmed.

ZANE, C. J., and HENDERSON, J., concur.

10 Colo. 14

BOARD OF COUNTY COM'RS OF SUMMIT CO. v. PEOPLE *ex rel.* HURLBUT.

(*Supreme Court of Colorado.* April 30, 1887.)

COUNTIES—FISCAL OPERATIONS—WARRANTS AND BONDS.

A county, under a statute authorizing the funding of its floating indebtedness, by an election conducted in substantial conformity to the statute, voted to issue bonds as a means of funding such indebtedness. *Held*, that the plaintiff, a holder of county warrants constituting a part of such floating debt, was entitled, upon tendering his warrants, and refusal on the part of the county commissioners to issue to him bonds to the amount of such warrants, to a *mandamus* to compel them to do so.

Appeal from an order of the judge of the district court of the Fifth judicial district, awarding a peremptory writ of *mandamus*.

J. H. Richards, for appellant. *H. M. Orahod*, for appellee.

BECK, C. J. The application for the peremptory writ of *mandamus* was submitted to the judge of the court below upon the petition of Hiram E. Hurlbut, the party in interest, and upon an agreed statement of facts signed by the counsel representing the respective parties to the controversy. The petition alleges that said Hurlbut was, at the time of presenting his said petition, and had been for two years immediately preceding, the legal owner and holder of more than \$5,000 of the floating indebtedness of said Summit county, which was evidenced by the orders or warrants of said county duly issued and duly registered as by law required; that said warrants had been presented for payment, and payment refused for want of funds; that he has also offered to surrender said warrants to the board of county commissioners of said county, and demanded of said board and of its chairman the bonds of said county in exchange therefor, but that said board of county commissioners, and the chairman thereof, have refused to issue to him bonds in lieu of said county warrants. Other allegations of fact necessary to confer jurisdiction are contained in the agreed statement of facts, which by reference is made part of the petition. Said agreed statement likewise recognizes, as part and parcel of the case presented for the judgment of the court, the facts alleged in the petition proper.

It is thus alleged that, for many years prior to the presentation of the petition for the peremptory writ of *mandamus*, the floating debt of said county has exceeded the sum of \$10,000, and that this floating debt is "evidenced by county orders or warrants regularly and duly issued and presented for payment to the treasurer of said county, and not paid for want of funds, and were duly registered as by law required;" that proceedings for the funding of said floating indebtedness, under the provisions of the statute authorizing the funding thereof, and the issue of county bonds to the holders of such outstanding county warrants, were regularly and legally instituted prior to the last general election held in said county. All the various steps necessary to the submission of the question of funding said county indebtedness to the legal voters of said county qualified by law to vote thereon are set out in detail, and show a substantial compliance with all the provisions of the statute. It further appears that said question was duly submitted to such qualified electors at the general election held in said county November 2, 1886, and that a majority of the votes cast thereon was in favor of the funding of said indebtedness. It is stipulated and agreed by the respective parties that the law relating to the funding of said county indebtedness was fully complied with in everything pertaining thereto, except it may have been an irregularity mentioned which occurred in two precincts, which precincts together cast not to exceed 16 votes on this question, and, which votes in no manner affected the result of said election.

We are of opinion that the facts thus presented show a substantial compliance with all the requirements of the statute in the holding and conducting of

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said election upon this question, and in the submission of said question to the electors qualified to vote thereon. The result of said election being in favor of funding the county indebtedness by the issuing of county bonds in exchange for the outstanding warrants of said county in manner specified in the statute, we are also of opinion that the county commissioners are authorized, and that it is their duty, to proceed and carry out the provisions of the statute. If, then, the relator is the owner and holder of valid county warrants covered by and included within the funding proceedings, he is clearly entitled to the relief sought. Upon this point we must assume, from the conceded facts appearing in the record before us, that the orders or warrants of said county held by the relator, and which he has offered to surrender in exchange for county bonds in accordance with the provisions of the statute, are valid warrants, and in all respects come within the class covered by the funding proceedings. Upon this proof of their validity, and other prerequisites, we base our judgment that the relator is entitled by law, on presenting said warrants to the county commissioners of said Summit county, to have county bonds issued to him therefor as prayed for in his said petition.

The action of the district judge, therefore, in ordering a peremptory writ of *mandamus* to issue to said county commissioners, is affirmed.

10 Colo. 105

TOWN OF IDAHO SPRINGS v. FILTEAU.

(*Supreme Court of Colorado. May 18, 1887.*)

MUNICIPAL CORPORATIONS—LIABILITY—FLUME IN STREETS.

A town which, exceeding its corporate powers, grants permission to a mining company to build a flume in its streets, does not thereby become liable for damage done to adjoining premises by the water leaking from the flume onto such premises.

Appeal from county court, Clear Creek county.

This was an action brought before a justice of the peace in Clear Creek county by Kate Filteau against the town of Idaho Springs, for damages to her real estate occasioned by the water leaking from the flume of the Sunshine Mining Company, built in the street of the town of Idaho Springs by said company, by leave of the town expressed by ordinance. Kate Filteau, the plaintiff, recovered judgment for \$130. From this judgment the town appealed to the county court of Clear Creek county. Trial there by a jury. Verdict for plaintiff for \$225. Motion for a new trial by defendant, denied by the court, and judgment rendered on verdict. Exceptions duly reserved, and appeal to this court by defendant.

One of the errors assigned presents the question, is the town liable on such demand? At the time of the trial of this case in the county court, the decision in the case of *City of Denver v. Bayer* had not been made. That decision, being made soon afterwards, seemed to settle the law against the right of the plaintiff to recover against the town on such demand; whereupon the counsel for the plaintiff, Kate Filteau, made the following statement in this court: "This case, in our opinion, turns upon the question of the liability of the municipal corporation to a private individual, where the act complained of is not within the power or authority of the corporation as conferred in its charter or by statutes." "The case at bar was tried in the lower court in May, 1883. The attorney who tried the case followed, in his conduct of the trial and preparation of the case, the decisions of the supreme court of Illinois, where a municipal corporation was held liable for acts similar to the one complained of in this case. Since the trial of this cause in the lower court, this court, in the case of *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6, has held the contrary to be the law. We fear there is no substantial distinction between this case and the one at bar, but, as the case is here, we will submit it."

J. N. Smith and T. J. Cantlon, for appellant. T. B. Bryan, for appellee.

STALLCUP, C. The case is submitted upon the question, is the town liable for that it had granted leave to the Sunshine Mining Company to build a flume in the street? The decision in the case of *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6, is decisive that the town is not liable.

The judgment should be reversed, the case remanded, with directions to the county court to dismiss the action.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to dismiss the action.

10 Colo. 104

TOWN OF IDAHO SPRINGS v. WOODWARD.

(*Supreme Court of Colorado. May 18, 1887.*)

Appeal from county court, Clear Creek county.

This was a case brought before a justice of the peace of Clear Creek county by Woodward, appellee, against the town of Idaho Springs, for damages to his real estate occasioned by water leaking from the flume of the Sunshine Mining Company, built by it in the street of the town by leave of the town by ordinance. Judgment by the justice against the town, from which the town appealed to the county court, and judgment there against the town, from which the town appealed to this court.

J. N. Smith, T. J. Cantlon, and J. E. Rockwell, for appellant. T. B. Bryan, for appellee.

STALLCUP, C. The case is submitted upon the question, is the town liable for that it had granted leave to the Sunshine Mining Company to build a flume in the street? The decision in the case of *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. Rep. 6, is decisive that the town is not liable.

Judgment should be reversed, and the case remanded, with directions to the county court to dismiss the action.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the cause is reversed and remanded, with directions to the court below to dismiss the action.

10 Colo. 84

DUNNING v. THOMAS.

(*Supreme Court of Colorado. May 18, 1887.*)

CONTRACT—PRIVITY—EVIDENCE.

In an action against the owner of a house by a mechanic who did some of the work in the building of it, it appeared that the contract for the building was made with other parties; that, some changes becoming necessary, plaintiff was consulted as to what he would charge for them, and an agreement for making them at such prices was indorsed on the original contract, and signed by the original contractors, defendant saying to plaintiff that he would put it into the contract. Defendant also testified that he told plaintiff explicitly that he would not contract with him, but only with the original contractors. *Held*, that there was no contract between plaintiff and defendant, and the action could not be maintained.

Appeal from county court, Larimer county.

Haynes, Dunning & Annis, for appellant. F. A. Ballard, for appellee.

MACON, C. This suit was originally instituted before a justice of the peace of Larimer county, by appellee, Thomas, against appellant, Dunning, to recover the sum of a hundred dollars for work alleged to have been done for Dunning on a certain brick house, in the town of Fort Collins, in the summer and fall of 1882, on two special contracts made between the parties,—the one

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on the eighteenth of July, and the other on August 2, 1882, by the first of which Dunning was to pay Thomas \$235, and by the second \$75, for certain brick work to be done upon Dunning's house. There were no written pleadings in the case, but Dunning denied at the trial that he had ever made any contract with Thomas to do any work, or that he had ever agreed to pay him for anything he might do on said house. The evidence is clear and uncontradicted that on the thirteenth of July, 1882, Dunning made a written agreement with Schooley and Shortridge for the rebuilding of the same house on which Thomas worked, and for which he now claims a right of action against Dunning. By that written agreement the price for the work of rebuilding was fixed at \$1,025. This article of agreement was signed by Schooley and Shortridge on the one part, and Dunning on the other. On the eighteenth of July a change was made in the house, as it was to be rebuilt under the original contract of July 13th, which increased the expense \$304.25. This agreement as to the alteration was indorsed on the original contract, and signed by Schooley and Shortridge. Again, on August 2d a further change was made in the building. It involved a further cost of \$75, which was also indorsed on the original, and signed by Schooley and Shortridge. The building was then completed, and during the progress of the work payments were made from time to time by Dunning to Schooley and Shortridge, until, early in September, 1882, Dunning paid Schooley and Shortridge the whole of what was due them under these several contracts, above stated, except \$150 retained to meet a lien filed by Smith and Soult. The whole amount paid by Dunning to Schooley and Shortridge and Smith and Soult, under these agreements, was \$1,404.25. After the payment to Schooley and Shortridge of this amount, Thomas called on Schooley and Shortridge for payment of what he claimed to be due him for his work upon said building; and, a disagreement arising between him and them as to the amount due him, he called on Dunning to inquire what he (Dunning) understood were the prices to be paid for the work specified in the two contracts of July 13th and August 2d, and whether satisfied or dissatisfied with Dunning's answer we know not; but a few days thereafter he sued Dunning for a hundred dollars, the same sum which was in controversy between him and Schooley and Shortridge. In the trial in the county court, Thomas proceeded upon the sole ground that he had contracted for the work he did on Dunning's house with Dunning alone, and not with Schooley and Shortridge, and, failing to get his pay from them, he fell back upon Dunning as his primary pay-master, and looked to him for payment, though he would have been content had Schooley and Shortridge paid him.

The only point in the case, as we view it, is, did Dunning contract directly with Thomas for the work which the latter performed on Dunning's house, or was the contract made by Dunning with Schooley and Shortridge, and did Thomas work under them, as an employe or subcontractor for them? If Dunning did hire Thomas to do the work, then he must pay him; but if he contracted with Schooley and Shortridge only, and Thomas did his work for Schooley and Shortridge, then there was no privity between Dunning and Thomas, and the latter must look to Schooley and Shortridge for his wages, and not to Dunning. Whether such contract was made between Dunning and Thomas must depend upon the evidence in the case, and in discussing this question we shall rely entirely upon the testimony of Thomas, and the uncontradicted testimony of Dunning and Schooley. In his testimony, Thomas says "that he went to see Dunning on July 13th, and agreed with him as to the cost of the change in the original plan of the house to be rebuilt; that he supposed Dunning was going to put it in writing; that Dunning said: 'I will put this in the contract.' He had some other items, among others something for glass, and he said he would put it all into the contract. I said: 'I do not know why this should go into the contract. I have nothing to do with that; but I do not care so long as I get my pay.' He went to writing, and I went off."

It is not denied that Thomas knew that the contract Dunning alluded to was that of July 13th. Thomas knew this fact, and hence the remark: "I do not know why this should go into the contract. I have nothing to do with that; but I do not care so long as I get my pay." Dunning did not ask Thomas to sign this additional agreement, but required Schooley and Shortridge to do so, and they complied. The same may be said of the second alteration of August 2d.

Leaving out of sight the positive declaration of Dunning that he would not contract for this work with any one except Schooley and Shortridge, and looking at the case upon the statements of Thomas alone, it is unquestionable that Dunning did not intend to enter into any engagement with Thomas, and that the latter so understood, or should have done so. An agreement is a meeting or accord of two or more minds as to a particular thing; and, if one sought to be held as agreeing dissents in the ordinary language of business intercourse, it is an absurdity to say he did agree merely because the other party insists he did not understand the language. It seems impossible to doubt that Thomas understood perfectly that Dunning did not intend to contract with him, from the conversation between them detailed by Thomas, and we cannot comprehend how one can compel another to enter into contractual relations with him when that other refuses so to do.

If now we look to the testimony of Dunning and Schooley, which is uncontradicted, we find a stronger confirmation of the views above expressed. Dunning says he told Thomas plainly and unequivocally on the eighteenth of July, when the first change in the original contract was suggested and made, that he would not contract with any other persons than Schooley and Shortridge; and this was said in answer to Thomas' declaration that he did not see what he had to do with the contract between Dunning and Schooley and Shortridge of the thirteenth of July. Dunning's exact language is this: "Thomas' bill was one hundred and twenty-five dollars too much, I thought. He figured finally to do the work that much less. The glazier's bill had been obtained. After Thomas agreed to do the work at price named, I added the three bills, viz., the carpenter's, mason's, and glazier's, together. They came to \$304.25. I started to put it into the contract with Schooley and Shortridge. Thomas demurred, saying he did not see what he had to do with that. I said I would only have my contract with one party; have it in writing, and then try and live up to it; that I did not propose to have contracts with several. Thomas said: 'Well, as long as I get my pay, I don't care.' I then reduced the understanding to writing which is on back of contract under date of July 18th. Then read it over in presence of Schooley and Thomas. It being satisfactory, I signed and Schooley signed. Then Thomas and Schooley left the office." As to the second alteration, Dunning says: "Second change was entirely in brick. Schooley and Shortridge were to have Thomas' figure, and tell how much. He came to me saying they so instructed him, and it came to \$197. I refused to pay such price. Change had to be made. Tried to get figures of others. In a week, Markham said he would do it for \$65, but was busy. I told Schooley I would pay \$75 to have the work proceed. Thomas came to my office; said Schooley had thus informed him, and he would go ahead. Schooley came to my office that day. I reduced this second change to writing, and he signed it with his name and Shortridge's." Schooley's testimony is to the same effect as to Dunning's refusal to contract with Thomas, and as to the contracts for the alterations being made between Dunning and himself and Shortridge.

Upon this state of facts it is obvious that no contractual relations existed between Dunning and Thomas, and that the county court misconceived the law arising out of the transactions detailed, in holding that Dunning was liable to Thomas by virtue of a contract between them. In this view of the law, it is unnecessary to discuss the weight of the conflicting evidence so strongly insisted upon by counsel for appellant.

We think the county court erred, that the error was material, and that the judgment should be reversed.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed and the cause remanded.

10 Colo. 53

PEOPLE *ex rel.* DOWNER v. ANNIS.

(*Supreme Court of Colorado.* May 18, 1887.)

DISTRICT AND PROSECUTING ATTORNEYS—CHANGE OF DISTRICTS.

Under the constitution of Colorado, the district attorney must be a resident of the district in which he is elected; but when the legislature, acting under authority expressly conferred by the constitution, transfers the county of his residence to another district, he does not thereby become the prosecuting officer of the latter district.

Original case in the nature of *quo warranto*.

Downer was elected district attorney of the First judicial district. At the time of his election his residence was, and ever since has been, in Boulder county, which then constituted a part of said district. Thereafter the legislature created the Eighth judicial district by taking Boulder county from the First, and uniting it with certain other counties from the Second, and certain new counties created at the same session of the legislature. The governor appointed a district judge for the Eighth district, who in turn appointed and commissioned respondent, Annis, to act as district attorney of said Eighth district until the first succeeding general election. Annis thereupon filed his bond, took the oath of office, and entered upon the discharge of his duties. These matters are brought before the supreme court upon an agreed statement of facts, for the purpose of having that tribunal determine which of the parties named is entitled to hold the office in controversy.

Alvin Marsh, Atty. Gen., for relator. *Frank J. Annis*, respondent, *pro se*.

HELM, J. Relator's argument in support of his right to the office in dispute rests upon two premises: *First*, that, by the act of 1887, the seven judicial districts theretofore existing were obliterated,—the entire state became a body of territory wholly without judicial district organization, and was then carved up into nine *new* districts; and, *second*, that the legislature was powerless to deprive him of his office. Both of these premises are open to serious question; but, if (for the purposes of this case only) we accept them as correct, relator's conclusion that he became district attorney of the Eighth district does not follow.

At the time of his election to the office of district attorney there was no Eighth judicial district in the state. The voters of the First district, which included Boulder county, where he resided, made him the prosecuting officer of that district. Under the act of 1887, the identity of the First district remains unchanged. It retains its original number, and three of the most important of its original counties. In our judgment, the detaching of Boulder, Grand, and Routt, and placing them in other districts, did not destroy this identity. But, were we to concede that it did, relator's claim would not be strengthened; for he could not (nor does he) contend that the *Eighth* district, consisting of Boulder and four other counties which were not previously included in the First, is in any sense, or for any purpose, to be regarded as the old First district.

There are but two constitutional ways of filling the office of district attorney, viz., by election and appointment. Relator has never been either elected or appointed to this office in the Eighth district. If, under the constitution

and statute, he remains in office at all, it must be as attorney for the First district. As shown, the old First and the new Eighth districts cannot be considered identical; and, while we do not say that relator was legislated out of the office to which he was constitutionally elected, we certainly cannot hold that he was legislated into a new and different office. True, the district attorney must, by virtue of a constitutional mandate, be a resident of the district in which he is elected or appointed; but where the legislature, acting under authority expressly conferred by the constitution, transfers the county of his residence to another district, it does not follow that he thereby becomes the prosecuting officer of the latter district.

Relator's contention, if allowed, might lead to serious and perplexing embarrassment. Supposing the county of his residence had been, by the act of 1887, transferred to an existing district that already had its prosecuting attorney; or supposing a new district had been created by uniting two counties from different districts in which the respective district attorneys resided,—under relator's view, by what rule or principle could the courts be guided in adjudicating between the two contestants for the office in controversy? Relator cannot successfully dispute the title of respondent, who was appointed district attorney of the Eighth district by the judge of that district, and who, having duly qualified, is discharging the duties of the position.

The interrogatory propounded in the agreed statement must be answered in favor of respondent. Judgment that he is entitled to hold the office in question will be accordingly entered.

10 Colo. 63

YENTZER v. THAYER and another.

(*Supreme Court of Colorado.* May 18, 1887.)

1. ABATEMENT—FORMER SUIT PENDING—VOID JUDGMENT—JUSTICE OF THE PEACE.

A judgment by default in justice's court, rendered, in the absence of defendant or his counsel, prior to the hour set out in the citation, is a void judgment, and is not sufficient to support a plea in abatement on the ground of a former suit pending, filed in a second suit on the same cause of action.

2. SAME—APPEAL.

The fact that in an action before a justice the plaintiff, who failed to appear at the appointed hour, took an appeal, does not operate to keep the suit alive so as to support a plea in abatement on the ground of another suit pending in a second suit upon the same cause of action, under Gen. St. Colo. 1883, § 1941. Upon such failure, the suit should have been dismissed.

Appeal from county court, Summit county.

Suit was begun before a justice of the peace by plaintiffs upon the account in controversy. Summons issued and was duly served. Prior to the hour named in the summons for her appearance, default and judgment were entered against defendant. On the succeeding day, plaintiff caused a new summons to be issued by the same justice, and defendant was a second time sued, and duly served with process for the same asserted debt. On the return-day of the second summons, defendant appeared, a trial of the cause was had upon the merits, and judgment again rendered against her. She then appealed from the latter judgment to the county court, where plaintiffs obtained the judgment from which the present appeal is taken. After the trial of the second cause before the justice, plaintiffs themselves attempted to take an appeal from the former judgment of the justice to the county court. There, at the first opportunity, they caused an order to be entered dismissing the first suit without prejudice. At the time this order was entered, the second suit was also pending in the county court upon defendant's appeal. The opinion sufficiently states all other essential facts.

A. D. Bullis, for appellant. J. M. Breeze, L. L. Breeze, and T. C. Earley, for appellees.

HELM, J. The evidence before us fully warranted the finding and judgment of the court below. The remaining objection here urged by counsel rests upon the refusal of the county court to abate the action on the ground of a former suit pending. Defendant was entitled to be heard at the time specified in the first summons issued, and entering default and judgment against her before that time, in the absence of herself and counsel, was a proceeding as completely beyond the jurisdiction of the justice as though the process had never been served. The denial to her, in this way, of her right to appear, was, "in legal effect, the recall of the citation" served upon her. The acts mentioned were wholly without warrant or authority; and the judgment of the justice, thus rendered, was void. "A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh*, 93 U. S. 274; *Howard v. Clark*, 43 Mo. 344. This legal proposition was practically recognized by the justice himself when he made the following docket entry on the subject: "This judgment was rendered by mistake, and without legal notice, and hence is dismissed and set aside." The cause remained for trial as though there had been no pretended default or trial or judgment. But as to what was done when 3 o'clock P. M., the hour named in the summons, arrived, we are not informed. The justice's transcript in evidence is silent on the subject. It shows no appearance by either plaintiff or defendant, or any reason for their absence, neither does it indicate that the cause was continued. We must therefore assume that the parties did not appear, and that nothing was done. The correctness of this assumption is demonstrated by subsequent proceedings. But when plaintiffs failed to appear at the time fixed in the summons, or to give sufficient reason for their non-appearance, it was the duty of the justice to dismiss the cause. Section 1941, Gen. St. And under the circumstances above narrated, although the justice failed to obey this statute, a total discontinuance of the cause took place. Moore, Justice, §§ 492, 493, and cases cited. Therefore, when plaintiffs, on the succeeding day, brought the present action upon the same account, the first suit was not pending. There was no ground for plea in abatement, and had one been properly presented it must have been overruled.

The subsequent attempted appeal by plaintiffs themselves from a judgment that was void, and in a cause that was out of court, amounted to nothing. It could in no way affect the foregoing conclusion.

The judgment of the county court is affirmed.

10 Colo. 24

UNION IRON-WORKS v. BASSICK MIN. Co. and others.

(Supreme Court of Colorado. May 18, 1887.)

INJUNCTION—EXECUTION SALE—ERRONEOUS AND VOID PROCEEDINGS.

Upon a bill to foreclose certain liens an order of sale was erroneously made, directing generally a sale of all the property to satisfy all the liens, although the lien of one of the parties was, by the pleadings and by the decree, limited to a certain part of the property, and after a sale thereunder a judgment creditor redeemed the property, and sold it again upon his execution to satisfy his claim. Thereafter another judgment creditor redeemed the property in turn, and being about to sell it under his execution, still another judgment creditor, pending an appeal from the original order of sale, sought to enjoin him, claiming that the original order of sale, and the sale under it, and consequently the proceedings taken and threatened by the other creditors, were not only erroneous, but void. Held that, as that question was in dispute, the parties would be left to settle it at law, and an injunction would not be granted.

Appeal from district court, Custer county.
Complaint filed June 9, 1886, as follows:

"The plaintiff, complaining of the defendants, alleges:

"(1) That it is a body corporate organized and doing business under and by virtue of the laws of the state of California, and was such corporation at and during all of the times hereinafter mentioned.

"(2) That the defendant, the Bassick Mining Company, is a corporation organized under the laws of the state of New York, and authorized, by a compliance with the terms and conditions of the laws of the state of Colorado, to do business in said last-mentioned state.

"(3) That, at and before the times hereinafter mentioned, the said defendant company was indebted to the plaintiff in a large sum of money, to-wit, the sum of sixteen thousand three hundred and eighty-five dollars, (\$16,385,) with interest upon the same according to the terms of such indebtedness then existing, and, being so indebted, the plaintiff on, to-wit, the sixteenth day of June, 1885, began its action in the district court of the Second judicial district of the state of Colorado, in and for the county of Arapahoe, in attachment against the said defendant, the Bassick Mining Company, and upon the filing of its bond, as required by the statute in such case made and provided, a writ of attachment issued against the said defendant company out of and under the seal of said court.

"(4) That on, to-wit, the seventeenth day of June, 1885, the summons in said cause was duly served upon said defendant company, by delivering a true copy thereof to its agent for that purpose appointed; and on, to-wit, the eighteenth day of June, 1885, the said writ of attachment was served by levying upon the following described property, to-wit, [description of property.]

"(5) That afterwards and on, to-wit, the fifteenth day of August, 1885, the said defendant company having wholly failed to answer, and having permitted the said cause to go by default, judgment was duly entered against it in favor of this plaintiff for the sum of sixteen thousand seven hundred and ninety-five dollars and fifty-eight cents (16,795.58) together with the costs of said case, amounting to twenty-seven dollars and forty-five cents, (27.45,) and execution, both general and special, ordered against said defendant company and against the property attached.

"(6) That, before the rendition of said judgment, divers other attachments had been, at the instance of divers other creditors, sued out and levied upon the identical property so aforesaid attached by this plaintiff, a large number of which attachments were prior in date to the said attachment of this plaintiff, and some of which, having been brought in other courts and in vacation, were prior in time and senior to the attachment of said plaintiff; the first of said writs of attachment having been issued in behalf of the Hendrie & Bolthoff Manufacturing Company out of and under the seal of the said court, and levied upon the said identical property on, to-wit, the twenty-eighth day of May, 1885, and in which said cause a judgment was entered against the said defendant company for the sum of seven thousand forty-two dollars and seventy-nine cents, (\$7,042.79.) said judgment having been rendered on the twenty-ninth day of July, 1885; and divers other judgments against the said defendant company were entered at the suit of divers other creditors, both in said court and in the district court in and for the said county of Custer.

"(7) That execution having been issued in said cause of the said Hendrie & Bolthoff Manufacturing Company upon the personal property attached and levied upon by this plaintiff, as well as by the said company, the same was sold under said execution as of a prior lien, and the proceeds thereof devoted to the payment *pro tanto* of said judgment, and in consequence thereof no execution has been or could be levied upon said property in this cause; leaving the real estate hereinbefore described alone to satisfy the judgment of this plaintiff, and such other judgments and claims and levies as have been obtained and acquired against the said premises.

"(8) That afterwards, and on the twelfth day of January, 1886, an execu-

tion in said cause was issued to the sheriff of the said county of Custer for service, and returned as against the said property of the said defendant company, which had, as will hereafter more fully appear, been sold under certain other executions issued in certain other cases upon judgments therein obtained, by means whereof this plaintiff has failed to realize any part or portion whatsoever of the amount of its said judgment against the said defendant, the Bassick Mining Company, up to and including the day hereof.

"(9) The plaintiff further alleges that on or about the first day of June, 1885, one William D. Schoolfield, who is made a party defendant to this suit, commenced a certain action in the district court in and for the county of Custer aforesaid, against the said defendant, the Bassick Mining Company, Fred McKeon, M. D. Swisher, M. M. St. Clair, Julia E. Hamlin, the Lafin & Rand Powder Company, Frazer & Chalmers, and the Hendrie & Bolthoff Manufacturing Company, to enforce a lien upon and against the property hereinbefore mentioned as having been attached at the instance of this plaintiff, together with all and singular the improvements thereon; that afterwards, and about the nineteenth day of June, 1885, the said action was dismissed as to the said Hendrie & Bolthoff Manufacturing Company, Fred McKeon, M. D. Swisher, William Houze, M. M. St. Clair, Julia E. Hamlin, the Lafin & Rand Powder Company, and Frazer & Chalmers.

"(10) That in said action, brought by the said Schoolfield, H. T. Holthoff, John H. Templeman, and John Jordi intervened as lien claimants against the said defendant, the Bassick Mining Company, and against the said property hereinabove described.

"(11) That on or about the eleventh day of June, 1885, one Thomas Armstrong was, by order of said court duly made, allowed to intervene in said action, and did so intervene, and filed his petition, claiming a miner's lien upon the said Maine lode only, and upon such buildings and permanent improvements and appurtenances as belonged thereto for and on account of work done and performed in and about said Maine lode within the months of March, April, May, and June of said years, by himself and certain persons who had assigned their respective claims and liens therefor to him for purposes of enforcement, amounting to the sum of twenty-one thousand eight hundred and forty-seven dollars and eighty-five cents, (\$21,847.85.)

"(12) That said petition of said Armstrong, among other things, set forth and alleged that the above said work and labor was done and performed by said persons in the working and development of said Maine lode, and the said Armstrong in no wise or manner whatsoever claimed, or attempted to claim or demand, a lien on any of the other of the said premises of the said defendant company.

"(13) And afterwards, and on the nineteenth day of June, 1885, in said action so brought by the said Schoolfield, the said court entered its decree, which said decree, after reciting that the cause coming on to be heard upon the complaint, the answer and the cross-bill of the defendant B. C. Adams, the intervening petition of H. C. Holthoff, John H. Templeman, Thomas Armstrong, and John Jordi, and the default of the Bassick Mining Company to answer, and the report of the referees theretofore appointed, orders that said plaintiff, Schoolfield, have a lien and judgment upon the property of the said company, described in his complaint, for six thousand ninety-three dollars and nine cents, (\$6,093.09,) and costs; that said defendant, B. C. Adams, have a lien and judgment upon the property of the said defendant, Bassick Mining Company, as asked for in his said complaint, for two thousand three hundred and twenty-one dollars and fifty cents, (\$2,321.50,) and costs; that the intervening petitioner John Jordi have a lien and judgment upon the property of said company, as asked for in his said petition, for two hundred and sixty-two dollars and fifty cents, (\$262.50,) and costs; that the intervening petitioner Thomas Armstrong have and recover of and from the said defend-

ant company the sum of twenty-one thousand two hundred and twenty-five dollars and ninety cents, (\$21,225.90,) and that he have a lien upon the property of the said defendant, the Bassick Mining Company, therefor, as asked for in his said intervening petition, and his costs to be taxed; that the intervening petitioner Templeman have a lien and judgment upon the property of the said mining company, as asked for in his petition, for seven hundred and ninety-seven dollars and fifty cents, (\$797.50;) that the intervening petitioner Holthoff have a lien and judgment upon the property of the said defendant company, as asked for in his said intervening petition, for four thousand two hundred and twenty-one dollars and twenty-six cents, (\$4,221.26,) as asked for in his said petition. The said decree further orders that all property mentioned or described in the petition of said Schoolfield, being the said property so as aforesaid attached by this plaintiff, be sold by the sheriff of the said Custer county, on the terms and conditions as a sheriff is directed by the law to sell real estate on execution; and after having given notice as required by law for the sale of real estate on execution for cash in hand to the highest and best bidder, selling said property in separate parcels or altogether, as would bring the most money; that the said sheriff was thereupon then ordered to appropriate the proceeds of said sale—*First*, to the payment of the costs of said suit, and of the receiver who had been appointed thereunder; *second*, to the payment *pro rata* of all and singular the several liens and judgments therein decreed, and, in case the said judgments should not be satisfied in full, then that all parties, claimants thereunder, should have execution for the balance remaining unpaid.

“(14) That the said defendant company in said decree was not given any time whatsoever for the payment of the said decree, or any part thereof, prior to the issuance of execution thereunder, and that it was provided that such executions should issue at once and without delay.

“(15) Plaintiff further alleges, upon information and belief, and so charges the fact to be, that the said property of the said defendant company, mentioned in said decree, was and is of great value, to-wit, of the value of not less than one hundred and fifty thousand dollars (\$150,000,) and that the said Maine lode is the main or principal lode of the said defendant company,—the other lodes, however, being also of great value; that the mill of the said defendant company, which plaintiff is informed and believes is of a value of not less than twenty-five thousand dollars, (\$25,000,) is not upon said Maine lode at all, but upon one of the other properties mentioned in said decree.

“(16) Plaintiff further alleges, upon information and belief, that the said parties to the said action at the time the said action was brought by the said Schoolfield, and in whose favor the several liens were allowed, were in collusion with each other, and caused the published notice of the sale under said decree to be commenced on the eighteenth day of June, 1885, one day before the said decree was signed by the said court; that said notice was given in the Rosita Index, a paper published in Rosita, in said Custer county, which said paper is a weekly paper, and the issue thereof for said week in which said notice first appeared was published on Thursday, the eighteenth day of June, 1885; that said paper is published and issued on Thursday of each week; that the first issue thereof made after the signing of said decree was made on Thursday, the twenty-fifth day of June, 1885; that the sale of the property under said decree of said court was made by the sheriff of said county on the eleventh day of July, 1885, sixteen days after the said twenty-fifth day of June, 1885, which said June 25th was the first possible date that public notice thereof, under said decree, could have been given through said paper, and that no other notice of sale than the said notice in said paper, commenced on June 18, 1885, was given of said sale of said premises under said decree.

“(17) That afterwards, and on the eleventh day of July, 1885, pursuant to the said notice so as aforesaid given, the said sheriff sold said premises de-

scribed in said decree, being the identical property hereinbefore described, to satisfy said liens and judgments in said decree mentioned; that said property was not sold separately, but, on the contrary, all of said property was sold *en masse*, and the same realized at the said sale, above expenses, the sum of thirty-eight thousand dollars, (\$38,000,) or thereabouts.

"(18) That the said premises were sold as aforesaid, as well upon the decree in behalf of said Armstrong as upon the decree in behalf of the other lien claimants, and all of said property was sold as much under the said decree of the said Armstrong as of the other said lien claimants, notwithstanding that the said Armstrong claimed no lien whatsoever upon any of said premises save and excepting the said Maine lode mining claim. And the plaintiff avers that by reason of the said advertisement and manner of said sale, and by reason of the making of the decree as aforesaid, the plaintiff has been advised that the said sale is probably null, and, if so, that no rights can be required by redemption creditors thereunder.

"(19) Plaintiff further alleges that the sale has at no time been affirmed by the said court, or the judge thereof, and that on or about the eleventh day of January, 1886, the time for the redemption of said premises from said sale by the said defendant company expired and ceased by limitation.

"(20) That on or about the twelfth day of January, 1886, the said Hendrie & Bolthoff Manufacturing Company caused to be issued out of the said district court of Arapahoe county an execution in due form, directed to the sheriff of Custer county, for service and return, and accompanied the same with funds to redeem the said premises under the said sale made in virtue of said decree; but having been advised that by reason of the said irregularity of said decree, and the sale thereunder, the same was not by the said Hendrie & Bolthoff Manufacturing Company redeemed.

"(21) The plaintiff, further complaining, alleges that the said defendant Bassick is one of the directors of the said defendant company, and that he, together with the defendants White, Staples, and others, as plaintiff is informed and believes, has entered into a combination and conspiracy with themselves to have the property in said decree mentioned realize as small a sum as possible, that they might buy in the same for their own use and benefit, and thereby deprive, defeat, cheat, swindle, and defraud the creditors of said defendant company out of their just debts and demands; that said White, as the assignee of a judgment of one A. Vorreiter against the said Bassick Mining Company in the district court in and for said Custer county, for the sum of three thousand one hundred and fifty-two dollars and fifty-seven cents (\$3,152.57) debt, and the further sum of twenty-two dollars and sixty cents costs, with interest thereon from the date of the said judgment, on which said judgment is a credit of three hundred and sixty-one dollars and eighty-three cents, (\$361.83,) subsequent to the expiration of six months' time of redemption given said company from said sale, and during the month of January, 1886, sued out an execution on said judgment last aforesaid, and placed the same in the hands of the sheriff of said Custer county to execute; that said sheriff, the defendant Hunter, did indorse on the back of the said execution, issued on said judgment of said Vorreiter, a levy upon said property in said decree described; whereupon the said White paid the said sheriff the sum of \$39,523.15, being the amount of money and costs as realized on said sale of July 11, 1885, with accrued interest, to redeem the same, in said decree mentioned in said action brought by said Schoolfield, W. Armstrong, and others as intervenors.

"(22) That said defendant Hunter, sheriff of said county, under and by virtue of said redemption of said White, did advertise the said property in said decree mentioned for sale to the highest and best bidder for cash for the tenth day of March, 1886; whereupon the said Hendrie & Bolthoff Manufacturing Company did file its certain complaint in said cause, upon which a writ of injunction issued, commanding the said defendant wholly to

desist and refrain from making sale thereunder until the further order of the court in the premises; whereupon the said Hunter did, instead of returning the execution in his hands as by law he was required to do, with the causes of his failure to sell indorsed thereon, advertised that he would adjourn said sale to the twenty-fourth day of March, 1886, between the hours of 10 o'clock A. M. and the setting of the sun on that day. That on said day, the said injunction being still depending undetermined, the said Hunter did further postpone said sale by advertisement until the fourteenth day of April, 1886, and afterwards, and on the fourteenth day of April, 1886, the said injunction being still against the said sale, postponed the said sale until the sixth day of May, 1886, at the hour and place specified; and afterwards, and on to-wit, the sixth day of May, 1886, advertised that he would postpone the said sale until the thirteenth day of May, 1886, when the same would take place at the hour and place therein specified; the last said postponement having been advertised but for the period of seven (7) days in the said Rosita Index, (being but one issue of the said paper,) and said advertisement having appeared only on the day of said sale, as plaintiff is informed and verily believes, which, as aforesaid, is a paper published weekly in said county and state, and a copy of which said advertisement is in words and figures following: [Here follows advertisement of sale and postponements.]

"(23) Plaintiff further alleges that the said writ of injunction having been dissolved by order of the judge of said court on, to-wit, the tenth day of May, 1886, prior to the said sale, the said defendant Hunter did proceed to make sale under and by virtue of the said advertisement and judgment and executions aforesaid, and that other creditors did then and there offer and bid the sum of \$50,000 upon and for said premises, whereupon the defendant Staples, in pursuance of the said conspiracy, collusion, and intention to cheat and defraud, as hereinbefore stated, did bid the sum of \$60,016.67 upon said premises; he, the said Staples, claiming by virtue of said bid to be the assignee of a judgment of Radcliff Brothers against said Bassick Mining Company upon a judgment obtained by them against the said company for the sum of \$678.70, said judgment having been obtained in the district court in and for the said county of Custer.

"(24) That, immediately after the said sum of money was by the said Staples so as aforesaid bid at said sale, the said defendant sheriff, by virtue of an execution issued out of the district court of the Third judicial district within and for said county in favor of said defendant Staples, as assignee of the said Radcliff Brothers, plaintiff, against the said Bassick Company, wherein and whereby he was commanded to make the said sum of \$678.70, did advertise in the said Rosita Index that he would offer and expose for sale on the tenth day of June, 1876, the said premises hereinabove described, for the purposes of making the said sum of \$678.70, and the further sum of \$60,016.70, being the said sum paid by the said Staples as aforesaid, together with interest on said sums as provided by law, said sale to take place at the front door of the court-house in said town of Rosita between the hours of 10 o'clock A. M. and the setting of the sun on the same day, and which said publication is in words and figures, as follows, [notice of sale.]

"(25) The plaintiff further alleges that after the said sale of the eleventh day of July, 1885, and after the said sale of the thirteenth day of May, 1886, as it is informed and believes, the said defendant the Bassick Mining Company sued out its certain writ of error from the supreme court in and for the said state, directed to the said district court of Custer county in the said cause, entitled '*W. D. Schoolfield, et al., with the said Armstrong as Intervenor, against The Said Bassick Mining Company.*' and did cause a transcript of the said record to be lodged in the clerk's office of the said supreme court; and that afterwards, and to-wit, on the seventeenth day of May, 1886, the said supreme court, having fully examined the record and assignment of errors

therein, did grant a *supersedeas* as to the decree and judgment rendered in said cause upon the filing of a bond in the sum of seventy thousand dollars, which said bond has been duly signed, executed, approved, and filed, and the said *supersedeas* granted.

"(26) That in and by the said writ of *supersedeas* all proceedings under the said judgment obtained in the said case of Schoolfield have been suspended by reason of the said action of the said supreme court, and the said cause is now pending in the said court on said writ of error, subject to the review of said tribunal.

"(27) The plaintiff, further complaining, alleges that it is a non-resident corporation, and that the various matters and things hereinabove set forth have only come to its knowledge within, to-wit, the last twenty days, and that the facts connected with the said sale, the granting of the *supersedeas*, and the character of the said decree, and the sale thereunder in the said cause of Schoolfield, were not brought to its attention and knowledge until within, to-wit, the last two or three days.

"(28) This plaintiff, further complaining, alleges that it stands ready and willing and is anxious to purchase said property at the said sale, to take place on, to-wit, the tenth day of June, 1886, and that the said sum of sixty-two thousand dollars, or thereabouts, it has raised and collected for the purpose of making redemption therefrom, in order that it may realize the amount of its said judgment against the said defendant company, and that the said judgment cannot be realized by it against the said defendant company save by and through its purchase of the said property under the statutes of the state of Colorado as a judgment creditor; that it has no desire to obtain the said property for its own use or purposes, and that the same, according to its best knowledge, information, and belief, is amply sufficient to pay all the judgments and claims of creditors against it, provided the same can be applied to that purpose.

"(29) The plaintiff, further complaining, alleges that it is advised that, inasmuch as the said supreme court has granted a *supersedeas* upon said judgment and decree in the said Schoolfield case, and inasmuch as the said judgment may be wholly reversed and declared void, for naught held, and inasmuch as the said property was originally sold pursuant to said insufficient advertisement, and *en masse* instead of separately, and inasmuch as said sale was not confirmed, and inasmuch as the said sale made on the thirteenth day of May, 1886, on said Vorreiter judgment, was made as aforesaid upon an advertisement and notice of seven days only, it cannot pay the said sum of more than sixty thousand dollars with complete safety to itself; but that should the said judgment be set aside, or should said Schoolfield sale be held to be irregular and of no effect, the said sum of \$60,000 so as aforesaid required to be paid, might be forever lost to this plaintiff, to its great, irreparable, and utter damage and ruin; and that, on the other hand, should the said sale be ratified and confirmed, and the said judgment under which the same was made be held to be valid, then in the event this plaintiff fails to pay the said sum of money, and cause said property to be then sold upon its own execution, it will forever lose its said judgment of sixteen thousand seven hundred and odd dollars, with interest thereon, to its great damage.

"(30) The plaintiff, further complaining, alleges that inasmuch as the said sale so as aforesaid advertised and published for the tenth day of June, 1886, is a sale to be made under the said execution issued on the said judgment of Radcliff Brothers, the said defendant Hunter declines to pay any attention to the *supersedeas* issued in the said Schoolfield case by the said supreme court, but has notified the plaintiff that he is advised that it is his duty, and that in consequence he will proceed, to make said sale under said execution of Radcliff Brothers in behalf of said Staples at the time and place therein mentioned, and that, in the event the said sale does not realize from outside bid-

ders any amount greater than the said sum for which it is to be held, he will make a deed of conveyance to the said Staples for said premises.

"(31) That if the said property is not redeemed, and the said deed is made, it is the object and intention of the said Staples, White, Bassick, and other co-conspirators to secure to themselves the said property, and to work and develop the same for their own private ends, so that all other creditors of the said defendant company, including this plaintiff, will be deprived forever thereafter of any lien against the same, or of the possibility of recovering any part or portion of their said judgment.

"(32) The plaintiff further alleges that its lien of attachment did take effect upon said premises by virtue of the levy hereinabove mentioned, and that its execution has issued within the time required by law, and that the same is ready to be delivered into the hands of the sheriff for the purpose of purchasing said premises and readvertising the same, but that the plaintiff cannot pay the said amount of money in view of all the facts and circumstances hereinabove narrated without grave risk of incurring the entire loss thereof; but that, if the said premises could be again offered for sale, it would enable other creditors to come in subsequently so soon as they could be assured of the validity of the said Schoolfield decree and sale thereunder, as redemption creditors, or to make original sale of said property if the invalidity of said sale and decree should be established, by means whereof all and singular the debts of the said defendant company owing to them could be realized out of said property; and that, until the question of the validity or invalidity of said decree and sale thereunder is properly established, neither of the said defendants should be permitted to make sale of said premises, either under the executions now in the hands of the sheriff, or any executions whatsoever.

"(33) Plaintiff further alleges that besides its own claim there are judgment liens upon said premises, as it is informed and believes, amounting, to-wit, to the sum of about seventy-five thousand dollars, which said sums have been wholly unsatisfied and will remain wholly unsatisfied provided the said sale should take place on the tenth day of June aforesaid, and a deed should be made therefor, and the said Schoolfield decree should be affirmed.

"(34) Plaintiff further alleges that the said defendant the Bassick Mining Company is wholly and absolutely insolvent; and, beyond the said property and premises hereinabove mentioned as about to be sold, it has no available means or assets out of or by means of which the plaintiff's said claim can be realized.

"(35) That this plaintiff is wholly without remedy save in a court of equity; and, inasmuch as it stands ready and willing to pay off all of the said sum of money mentioned in the said advertisement of sale, so soon as it can do so with safety, in order that it may realize the amount of its own legitimate claim, it respectfully prays this court that a writ of injunction issue out of and under the seal thereof, directed to the coroner of said county for service and return, and commanding the defendants, and each and all of them, wholly to desist and refrain from advertising or making sale of said premises hereinabove described, or any part or portion thereof, under the said execution issued on the said judgment of Radcliff Brothers against the said Bassick Mining Company, or under any other execution whatsoever, until the further order of this court; and that until the said decree in the said case of Schoolfield against the Bassick Mining Company be either affirmed or reversed the said injunction order remain in full force and effect; and that, in the event the same should be reversed, the said decree of injunction be made perpetual, and that this plaintiff have such other and further relief as to equity and good conscience shall seem meet."

On this bill of complaint a temporary injunction was issued in the court below. Subsequently this injunction was dissolved, and a decree entered dismissing the bill. From this decree the complainant appealed to the supreme

court, and upon his application a temporary restraining order was issued. Further facts in the case sufficiently appear in the opinion.

L. S. Dixon and R. D. Thompson, for appellant. *Hugh Butler and T. D. W. Yonley*, for appellees.

ELBERT, J. The case of *Schoolfield et al.* against the Bassick Mining Company, now pending on error in this court, was a proceeding under the mechanic's lien law, to enforce sundry liens against the property of the defendant therein. The decree was rendered in that case by the court below in favor of the several lien claimants, and a sale of the defendant company's mining property, consisting of seven or more lodes, with improvements thereon, was had under the decree. It is claimed that this decree and sale are void for reasons which will be hereafter stated. The contention here is between judgment creditors of the Bassick Mining Company, to-wit, White, Staples, and the Union Iron-Works, the complainant herein. Each of these judgment creditors had a right, under the statute, to redeem the property sold under the decree in the *Schoolfield* case. White redeemed and sold the property under an execution issued on his judgment. Staples, in turn, redeemed the property, and advertised it for sale under the execution issued on his judgment. The Union Iron-Works, the complainant, instead of redeeming, filed its bill in the district court of Custer county, asking that the defendant Staples be enjoined from selling the property under his execution. On this bill a temporary injunction was issued by the court below. Subsequently this injunction was dissolved, and a decree entered dismissing the bill. This is the case before us on appeal.

The leading facts as disclosed by the bill, and those upon which the equities of the complaint chiefly rest, are as follows: One Armstrong was one of several lien claimants in the *Schoolfield* case, and claimed and was decreed a lien on the Maine lode belonging to the defendant the Bassick Mining Company. The other claimants in that suit claimed and were decreed liens, not only on the Maine lode, but on several other lodes, property likewise belonging to the defendant the Bassick Mining Company. The court, notwithstanding the fact that the Armstrong lien was decreed on the Maine lode alone, ordered and directed generally a sale of all the property to satisfy all the liens. All of the property affected by the different liens was subsequently sold under this decree *en masse*.

It is contended by counsel for complainant that this order of sale was void, and that the sale thereunder to satisfy the liens was also void. The sale was made July 11, 1885, but the complaint does not disclose who was the purchaser. This, however, is unimportant. If the sale was void, as claimed, he took no title to the property sold; that is to say, notwithstanding the sale, the title of the property remained in the judgment debtor the Bassick Mining Company.

In January, 1886, the defendant White, as a judgment creditor of the Bassick Mining Company, caused an execution to be levied on the property in controversy, and paid the sheriff the sum of about \$39,000, that sum being the amount necessary to redeem from the sale under the *Schoolfield* decree. The sheriff then proceeded and advertised the sale of the property under the White execution. This sale was made May 13, 1886. Upon the proposition that the order of sale in, and the sale itself under, the *Schoolfield* decree was void, it is claimed that this redemption and sale by White are also void. *Freem. Ex'ns*, § 321; *Mulvey v. Carpenter*, 78 Ill. 580; *Johnson v. Baker*, 38 Ill. 98; *Keeling v. Heard*, 3 Head, 592.

The sale under the White execution was on the thirteenth of May, 1886. At this sale the defendant White was the highest bidder and purchaser. The allegation in the complaint that Staples was the purchaser at this sale is admittedly a mistake. Thereafter, as the owner of a judgment against the Bassick Mining Company, the defendant Staples caused an execution to be levied on the prop-

erty, paid to the sheriff the sum of \$60,016 redemption money, and advertised the property for sale on the tenth day of June, 1886. It is this sale that the court below was asked to enjoin. It is claimed, for the reasons given, that the redemption by the defendant Staples was void, and that the sale under his execution, if allowed to proceed, will likewise be void. Other questions are made respecting the regularity of the proceedings under both the White and the Staples execution, but we do not deem it necessary to notice them. Under the allegations of the bill the case of the defendants stands thus: The decree in the Schoolfield case, and the sale thereunder, the redemption by White, and the sale under his execution, were all void. The redemption by the defendant Staples was also void, and his sale, if allowed to proceed, will be of like character. The *status* of the complainant is this: On the eighteenth day of June, 1885, it levied its writ of attachment on the property in controversy. On the fifteenth day of August, 1885, it obtained judgment against the Bassick Mining Company for the sum of \$16,795.58. On the twelfth day of January, 1886, it caused an execution to be issued, and afterwards, on the ninth day of June, 1886, it filed the bill we are considering.

The only question presented is, did the court below err in dissolving the injunction and dismissing the bill?

The power of courts of equity to restrain proceedings at law is well established. The jealousy, however, with which the jurisdiction has always been regarded, has restricted it to somewhat narrow limits. Fraud, mistake, and surprise in obtaining judgments are the most common grounds on which the jurisdiction is invoked. In this case it is to be observed the grounds of complaint do not arise out of the judgment sought to be restrained, but out of matter extrinsic the judgment. The judgment of the defendant Staples is unassailed. We are asked by the complainant to enjoin the sale under it until the Schoolfield case shall be decided by the appellate court. Two principal grounds are assigned:

1. That the complainant cannot redeem on its judgment under the statute, except at the peril of losing the redemption money paid should the decree in the Schoolfield case be hereafter declared void by the appellate court. This is an embarrassment which arises out of the alleged void or voidable character of the Schoolfield decree, and is in nowise chargeable to the defendant Staples or his judgment. As a judgment creditor, the same risk confronted him, and he chose to take it. The complainant asks that he may be restrained until it, the complainant, may be advised by the decision of the appellate court whether or not it may safely proceed to exercise its statutory right of redemption. Whatever hardship may exist, is the result of a rule of law, namely, that a purchaser at a sheriff's sale, as well as a party redeeming, is bound at his peril to inquire whether it sufficiently appears on the face of the record that the court had jurisdiction. Freem. Judgm. § 509. We do not understand that the hardship this rule of law is liable to entail is a ground for equitable relief, nor are we cited to any authority that so holds.

It is claimed, however, by the complainant—

2. That the sale under the Staples execution, if allowed to proceed, will be void, and will cast a cloud upon the title of the property to which the complainant is looking to satisfy its judgment. It is true, courts of equity interfere, not only to remove, but to prevent a cloud upon a title. High, Inj. § 147. The cases, however, illustrative of the jurisdiction, proceed upon much clearer rights and equities than any presented by the bill under consideration. A number of recognized rules interpose between the complainant and the relief it asks. "It is a general rule that the enforcement of a legal right will not be enjoined in equity except upon a clear showing of a right superior to that which it is sought to enjoin." High, Inj. § 152. The complainant and the defendant are both judgment creditors, and stand *in pari statu*. There is no superior right upon the part of the complainant. Each is at liberty, un-

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der the statute, for the purpose of satisfying his judgment, to issue an execution and levy it upon any property or upon any interest, either legal or equitable, in any property belonging to the judgment debtor. The defendant Staples, in his levy and sale, is proceeding under the statute, not in any wanton or inequitable disregard of the rights of the complainant, but in the method prescribed by the statute, seeking satisfaction of his judgment. In this connection it is to be remembered equity will not interpose and enjoin an execution creditor, where by so doing it will destroy or imperil his rights, and prevent him from obtaining that satisfaction of his judgment to which he is both legally and equitably entitled. *Freem. Ex'ns*, § 440. It is true that questions may arise as to the regularity of proceedings under the execution, and the soundness of the defendant's title, should the proposed sale proceed; but this is matter of dispute.

It is contended upon the part of counsel for defendants that the Schoolfield decree, and the proceedings thereunder, as well as the proceedings under the White and Staples execution, are not void; that, if irregular, they are voidable only. The different legal results, as respects the rights of purchasers and judgment creditors redeeming, flowing from these two different positions of the contending parties, are well understood and need not be stated. *Freem. Ex'ns*, § 339-345. If the position of defendant's counsel be correct, then, instead of clouding the title, the sale of the defendant Staples will pass the title.

The question is presented, should the court below have gone into the questions raised touching the void or voidable character of the Schoolfield decree, and of the proceedings thereunder, especially while it was pending on error in the appellate court, and likewise into the questions raised touching the void or voidable character of the proceedings under the White and Staples executions? We are not prepared to admit, nor do we know of any authority for the broad proposition, "that the complainant has a right in equity to have the regularity of former sales determined in advance of its redemption." In such matters it is for judgment creditors to proceed as they shall be advised. We do not understand it to be the practice of courts of equity, upon a bill of this nature, to pass upon a question of title in advance of its acquisition by either the defendant or complainant. The rule is that, "in general, questions of title being properly triable at law, equity will not interfere to restrain a sale of real estate under execution, the title to which is in dispute; but will leave the parties to pursue their remedy in a legal form." *High, Inj.* § 152. So, too, it is to be observed that had the court gone into the questions raised, and held the several sales void, an injunction would not have issued as of course. The rule is that a sale of real estate under legal process will not be enjoined because of irregularities in the proceedings, or because the judgment on which process issued was "void, where no serious injury or embarrassment to title is shown as likely to result from allowing the sale to proceed." *High, Inj.* § 248. It may well be doubted whether the injury suggested by the complainant in this case, viz., "the depreciation of the value of the property by reason of the cloud cast by a void sale," is not too remote and speculative to justify the restraint of the defendant in the exercise of his statutory rights, even if the other objections which we have given to the exercise of equity jurisdiction did not obtain.

For the foregoing reasons, we are of the opinion that the complainant does not show any such equity as entitles him to the relief prayed, and that the court below did not err in refusing to entertain the bill. The temporary restraining order heretofore issued must be dissolved, and the judgment of the court below affirmed.

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BASSICK MIN. CO. v. SCHOOLFIELD and others.

(*Supreme Court of Colorado. May 18, 1887.*)

MECHANIC'S LIEN—DECREE—ORDER OF SALE—JURISDICTION.

In an action to enforce a mechanic's lien on defendant's entire property, in which several intervenors also claimed liens upon the entire property, and one upon a portion only of the property, a decree was made establishing liens in favor of the different parties in accordance with their respective claims. *Held*, that an order of sale of the entire property, directing *pro rata* distribution of the proceeds among all said lienholders, was unauthorized and void.

Error to district court, Custer county.

This action was brought by Schoolfield to enforce a mechanic's lien against the Bassick Mining Company, Adams, and others. Adams filed an answer and cross-complaint in the suit, claiming a lien upon all the premises in the plaintiff's complaint. Templeman, Holthoff, Jordi, and Armstrong were intervening petitioners. The several cases were tried and determined as one suit, under the statute. The court entered the following decree:

"Now, this cause coming on to be heard on the complaint, the answer, and cross-bill of the defendant B. C. Adams, the intervening petitions of H. C. Holthoff, John H. Templeman, Thomas Armstrong, and John Jordi, and the default of the defendant the Bassick Mining Company to answer, and the report of the referees heretofore appointed herein, and all matters and things having been heard and fully considered by the court, and the court being fully advised in the premises, it is ordered, adjudged, and decreed that the said plaintiff have and recover of and from the said defendant the Bassick Mining Company the sum of six thousand and ninety-three dollars and nine cents, and that he have a lien on the said property of the said Bassick Mining Company, as prayed for in his said complaint, and his costs to be taxed; that the said defendant the said B. C. Adams have and recover of and from the said defendant the Bassick Mining Company the sum of two thousand three hundred and twenty-one dollars and fifty-two cents, and that he have a lien therefor on the property of said Bassick Mining Company, as asked for in his said cross-complaint, and his costs to be taxed; that the intervening petitioner John Jordi have and recover of and from the defendant the Bassick Mining Company the sum of two hundred and sixty-two dollars and fifty cents, and that he have a lien on the property of said mining company, as asked for in his said petition, and his costs to be taxed; that the intervening petitioner Thomas Armstrong have and recover of and from the defendant the Bassick Mining Company the sum of twenty-one thousand two hundred and twenty-five dollars (\$21,225) and ninety-three cents, and that he have a lien on the property of the said the Bassick Mining Company therefor, as asked for in his said intervening petition, and his costs to be taxed; that the intervening petitioner John H. Templeman have and recover of and from the defendant the Bassick Mining Company the sum of seven hundred and ninety-seven (797) dollars and fifty cents, and that he have a lien on the property of the said the Bassick Mining Company therefor, as asked for in his said intervening petition, and his costs to be taxed; that the intervening petitioner H. C. Holthoff have and recover of and from the defendant the Bassick Mining Company the sum of four thousand and two hundred and twenty-one (4,221) dollars and twenty-six cents, and that he have a lien upon the property of the said the Bassick Mining Company as asked in his said intervening petition, and his costs to be taxed.

"It is further ordered, adjudged, and decreed that the said property of the said defendant the Bassick Mining Company, to-wit: The Maine lode and mill-site, being mineral certificate number twenty-nine, (29,) designated by the surveyor general as lots Nos. 59 A and 59 B, recorded in Book 27, pages 112, 113, 114, 115, and 116, of the Custer county, state of Colorado, records;

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also the Triangle lode, being mineral certificate No. 92, designated by the surveyor general as No. 181, recorded in Book 41, at pages 1, 2, 3, and 4, of the said Custer county records; also the Spring lode, being mineral entry No. 94, designated by the surveyor general as lot No. 182, recorded in Book 41, at pages 5, 6, 7, and 8, of the said Custer county records; also the Frank lode, being mineral certificate No. 93, designated by the surveyor general as lot No. 192, recorded in book 41, at pages 9, 10, 11, and 12, of the records of said Custer county; also the Georgie lode and Lookout mill-site, being mineral entry No. 95, and designated by the surveyor general as lots Nos. 193 A and 193 B, recorded in Book 41, at pages 13, 14, 15, and 16, of the records of said Custer county; also a three-quarters interest in the Nemaha lode, being mineral certificate No. 84, designated as lot 64, recorded in Book 21, pages 464, 465, and 466, of the records of said Custer county; also the Lookout lode, being mineral certificate No. 28, designated as lot 58, recorded in Book 21, at pages 565, 566, 567, and 568, of the records of said Custer county,—together with all the buildings, machinery, and improvements thereon situate, and the privileges and appurtenances thereunto belonging, all in Hardscrabble mining district, in the said county of Custer and state of Colorado, be sold by the sheriff of said Custer county on the same terms and conditions as the sheriff is directed by the law to sell real estate on execution; and, after having given notice as required by law for the sale of real estate on execution, for cash in hand, to the highest and best bidder, selling said property in separate parcels, or all together, as will bring the most money.

"It is further ordered that the said sheriff shall appropriate the proceeds of said sale as follows: (1) To the payment of all the costs of this proceeding, including whatever balance may be due the receiver, James W. Kurtz, for the care and preservation of the said property up to and including the day of sale; (2) to the payment of the several liens herein declared, and the judgments herein decreed, in full, if there shall be a sufficiency to pay the same; but if there shall not be a sufficiency to pay the same, then payment on said judgments to be made *pro rata*. And in case said judgments shall not be paid in full, each and all the parties, claimants therein, shall have execution for the balance remaining unpaid."

The defendant the Bassick Mining Company brings the cause to the supreme court by writ of error. The further facts in the case sufficiently appear in the opinion of the court.

Patterson & Thomas, for plaintiff in error. No appearance for defendants in error.

ELBERT, J. The petition of Schoolfield claimed a lien upon all the property of the defendant the Bassick Mining Company. The defendant Adams filed his answer and cross-bill, claiming a lien upon all the property. Templeman, Holthoff, and Jordi successively filed their respective petitions as intervenors, also claiming on all the property. Subsequently Armstrong filed his petition as an intervenor, claiming a lien upon a *part* of the property only, viz., the Maine lode. The liens decreed the several lien claimants, with the exception of Armstrong, were upon all the property of the defendant, consisting of seven or more lodes, and the improvements thereon, including the Maine lode. The lien decreed the complainant Armstrong was upon the Maine lode *only*.

The leading error assigned, and the only one argued by counsel for plaintiff in error, goes, not to the decree proper, establishing and decreeing the liens of the several parties to the proceeding, but to the order of sale embodied in the decree, and made a part of it. It will be seen, upon examination, that the order of sale is general; that is to say, to sell all the property to satisfy all the lien claimants, without reference to the fact that the lien claimed by and decreed to Armstrong was on the *Maine lode only*. The office of an order

of sale is to enforce and make productive the decree. It is based upon the decree, and should be warranted by it. Had Armstrong been the only lien claimant, and his petition the only petition before the court for consideration, it is entirely plain that, while the court had jurisdiction of the subject-matter of the petition, it had no power or authority to order a sale of property other than that mentioned in the petition, and upon which a lien had been decreed. Its jurisdiction was not invoked with respect to a claim of lien upon any other property, nor could it attach to any other property than that mentioned in the petition. "Jurisdiction in the court is power to hear and determine the particular case involved. If this power to hear and determine the particular case does not exist in the court in point of law, then there can be no jurisdiction in the case. If it does exist, then to confer actual jurisdiction of the particular case, or subject-matter thereof, the jurisdictional power of the court must be invoked or brought into action by such measures and in such manner as is required by the local law of the tribunal. When this is done, it is then *coram judice*. If this be not done, there is at least error, if not want of validity, in the proceedings. * * * The power of the court, as we have seen, over the property or subject-matter referred to in the proceedings, must be invoked over the particular case by a petition good upon demurrer; and so it must by personal notice or service, where, by statute, the latter is essential to confer jurisdiction. * * * The action of the court and notice of sale, as also the sale itself, must be of and concerning the same subject-matter described in the petition. If the want of such conformity appears,—as if the petition be in reference to one tract of land, and the decree, sale, or notice of sale be of another and different one,—then no title will pass by the sale. The proceedings, so far as the sale is concerned, will be a nullity. In *Frazier v. Steenrod*, [7 Iowa, 338,] the order of sale and the notice of sale were for entirely different tracts of land, and the court held the sale void, although the sale was of the tract described in the order, and the sale and deed had been approved by the probate court." Ror. Jud. Sales, §§ 70, 73, 74, cases cited; Freem. Judgm. § 116 *et seq.*, 143; *Rhode Island v. Massachusetts*, 12 Pet. 718; *U. S. v. Arredondo*, 6 Pet. 710; *Frazier v. Steenrod*, 7 Iowa, 340; *Fithian v. Monks*, 43 Mo. 502; *Wood v. Stanbery*, 21 Ohio St. 142.

We think it equally plain that the defect of jurisdiction which we have pointed out was not cured by the fact that the jurisdiction of the court had attached to all the property under and by virtue of the petitions of the other lien claimants. Their petitions did not invoke the jurisdiction of the court in respect to the Armstrong claim. We do not see that the court had any greater or different jurisdiction than if the subject-matter of each petition had been tried and adjudicated separately. The same fundamental principles fix the limits of the power and authority of the court in the one case as in the other. *Curtis v. Leavitt*, 15 N. Y. 116.

Counsel contend that, considered as one suit, there was jurisdiction of the subject-matter, and that the order of sale is therefore not void, though irregular. Subject-matter is that which is offered for judicial decision. The subject-matter of the Armstrong petition was not the Maine lode, but his claim of lien upon the Maine lode. The subject-matter of the petitions of the other lien claimants was not the property mentioned in their petitions, but their claims of lien upon the property mentioned. Counsel, therefore, assume that which is contested when they say the court had jurisdiction of the subject-matter. The question is whether, *on the case before the court*, the action of the court was judicial or extrajudicial,—with or without authority of law. Cases cited *supra*. A claim of lien by Armstrong upon all the property of the defendant company was not a matter presented by any petition before the court. It was not, therefore, and could not be, the subject of order or decree. Had such a lien been decreed, it would have been void. *A fortiori* the order of sale is void.

Section 2155 of the General Statutes is as follows: "The court may proceed to hear and determine said liens and claims, or may refer the same to a referee to ascertain and report upon said liens and claims, and the amount justly due thereon. Judgment shall be rendered according to the rights of the parties. The various rights of all the lien claimants, and other parties in any such action, shall be determined and incorporated in one judgment or decree. Each party who shall establish his claim under this act shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien shall have attached, to the extent hereinbefore stated." By this section "judgment is to be rendered *according to the rights of the parties*," and each party is to have a lien established and determined in said decree "*upon the property to which his lien shall have attached*." The succeeding section provides that the court shall cause *said property* to be sold in satisfaction of said lien and costs of suit, as in case of foreclosure of mortgages.

For the reasons given we think the order of sale was not only irregular, but beyond the power and authority of the court, and void. To this extent the decree of the court below is reversed, and the cause remanded. As we are advised that there has been a sale under the decree, we are in doubt as to the present *status* of the case in the court below.

If the liens have been satisfied, the purchaser at the sale, or those redeeming from him, may wish to be heard touching the right to be subrogated to the rights of the lien claimants whose claims they have paid. *Freem. Ex'ns*, § 352; *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, 77 Amer. Dec. 557.

We therefore remand the case without direction, with a view of allowing all parties interested an opportunity to be heard.

ANDREWS v. ANDREWS and another.

(*Supreme Court of Washington Territory. January 27, 1887.*)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—JUDGMENT AGAINST HUSBAND.

In a suit by a wife to vacate a judgment against her husband, and a sheriff's sale of community real estate thereunder, *held*, that while, under section 2410, Code Wash. T., she was entitled to an action to resist or vacate such sale, yet the burden was on her to prove that the judgment was not rendered on a community debt, and was not, therefore, a lien on the community real estate.

2. SAME—PLEADING—AMENDMENT.

In such a case, leave to file a supplemental complaint of the wife, alleging proceedings for divorce and a decree of divorce between herself and husband, during the pendency of the suit, and her purchase at a sheriff's sale thereunder of her husband's interest in the community real estate, was properly refused, as amounting to the substitution of a different cause of action.

Suit by appellant, Ada C. Andrews, against her husband, Julius Andrews, and his half-sister, Jane L. Jaqua, commenced April 8, 1884, before the district court, Second judicial district, holding terms at Olympia, to vacate a judgment by confession against said Julius Andrews, in favor of said Jane L. Jaqua, for \$2,892.68 and costs, and to set aside a sale of real estate by the sheriff of Chehalis county upon execution issued on said judgment. After a stay of proceedings, plaintiff, by leave of court, filed a supplemental petition, alleging her divorce from the defendant Julius Andrews, to which a demurrer was sustained. A reference was made, and the award was excepted to by both parties. Plaintiff then moved for leave to file a supplemental complaint, showing her divorce from and judgment against her husband, and her purchase of her husband's interest in the community real estate at execution sale thereunder, which was refused, and judgment ordered for defendants. Plaintiff appeals.

C. W. Hartman, for appellant. *Joseph W. Robinson and Porter & Robinson*, for appellees.

GREENE, C. J. The judgment sought to be vacated by the suit from which this appeal arises was in form a personal judgment against the appellee Mr. Andrews. It was, under our statutes, valid and enforceable, and capable of being made a lien as against his individual property. It was also valid and enforceable, and a lien under it was capable of assertion, as against community personal property of Mr. Andrews and his wife. Code, § 2409. If the judgment was one recovered for a community debt, the lien of it would extend to and cover community real estate likewise. Code, § 2410. But as to whether the lien of it touched community real property, the wife, having never had opportunity to be heard in the original action, had a right to be heard in some suitable form of action or proceeding as soon as there was an attempt to subject community real estate to the satisfaction of it.

Appellee's position that the judgment should be considered as *prima facie* for a community debt we regard as correct; but when he goes on to contend that, inasmuch as it was *prima facie* such, it was irregular and voidable, because affecting the community real estate, and liable to be vacated in equity at the suit of the wife, we cannot follow him. He seems to call upon us to hold that no husband who with his wife possesses community real estate can be subjected, against the objection of his wife or without her consent, to a personal judgment even for his personal debt. But undoubtedly the law is that a husband's creditor can, regardless of the wife, pursue him to judgment, and take his property in execution, not excepting even the community personal property; and the law is clear, also, that the same judgment security for his debt, which the creditor has a right to compel, can, by confession of judgment, be voluntarily conceded. So long as there is only a judgment, or a judgment lien, confessed or suffered by the husband alone, the community interest in real estate is not affected, unless in fact the debt upon which the judgment was given was a community debt. The force and qualification of the lien of a judgment to which the husband only is a party, as affecting community real estate, is given in section 2410 of the Code, by way of proviso to the restriction on the power of the husband to alienate or encumber such property. In the statute itself, the wife and all the world have notice of the limitation of such a lien as regards such property. Indeed, the judgment not being determinative of any issue as to the character of the property which is to be included in its lien, the husband himself would be at liberty to contest the extension of the lien over community real estate. We see no way for a creditor to get a judgment lien conclusively operative upon such real estate, except as the result of an action or proceeding to which both husband and wife were parties, and in which the community character of the debt is admitted or in issue. It may be that he could come into court in the first instance alleging the community character of the debt, and obtain a judgment as for a community debt.

There is nothing in the decision of *Holyoke v. Jackson*, 3 Pac. Rep. 841, that militates against these views. In that case, it was held that, under a statute like ours, a husband's agreement to sell community real estate was void. This was held as a logical deduction from the restriction on the husband's powers contained in section 2410. We approve and affirm that decision. But it determined nothing as to the power of the husband to bind the community real estate by a judgment recovered against himself for a community debt.

We are of opinion that Mrs. Andrews was entitled to her day in court, not to attack the judgment confessed by her husband, but to resist or vacate the sale of community real estate under execution issued thereupon. But, when she came into court for such a purpose, the burden was upon her to show

that the character of the judgment debt was such as would not warrant the sale. In this respect her complaint is defective, and the evidence appearing in the transcript is not such as to aid its infirmity. We think the district judge was right in refusing to allow the proposed supplemental complaint to be filed. That complaint, if introduced, would have effected a revolution in the issues to be determined, and would have amounted to a substitution of a new cause of action.

The judgment of the district court must be affirmed, with costs.

TURNER and LANGFORD, JJ., concur.

HARBERGER v. HARBERGER.

(Supreme Court of Oregon. May 24, 1887.)

DIVORCE—ACCUSATION OF ADULTERY—EVIDENCE.

In a suit for divorce brought by the wife against the husband, on the ground, among other things, of charges of adultery made by the husband against the wife, *hcd*, that mere circumstantial evidence of opportunity is not sufficient to overcome the presumption of innocence in regard to a married woman's intercourse with her uncle, and that such evidence would not justify an accusation of adultery.

Appeal from Grant county.

Ramsey & Bingham, for appellant. R. Williams, for respondent.

STRAHAN, J. This is a suit for a divorce, and for such further relief as may be incident thereto. The main causes relied upon by the plaintiff are cruelty and personal indignities rendering her life burdensome. I think it sufficiently appears from the evidence that on one occasion the defendant used force in ejecting the plaintiff from his bed; that he followed her out, and used some violence upon her person afterwards; and that he was very angry at the time. It also appears that on one or two other occasions the defendant used violence towards the plaintiff. The accusations of adultery seem to be very fully established. In fact it is admitted by the answer that the defendant accused the plaintiff of the crime of adultery; but it is added, in mitigation, that he did so by way of remonstrance. But, aside from the admission contained in the answer, the defendant undertook to prove upon the trial that the plaintiff had been guilty of adultery with her uncle, one B. C. Trowbridge. To this one point the greater portion of the defendant's evidence was directed. A somewhat careful review of all of the evidence does not lead to this conclusion; but, on the contrary, it only tends to prove and establish that these parties kept up and maintained the usual and common amenities of social life between like relations in their condition and situation. Because they were sociable, the court will not presume evil; and because they had the opportunity and might have committed adultery there is no presumption that they did. The presumptions are the other way. The law will not presume that these parties violated the criminal statutes of the state, and transcended their social duties, or were guilty of any wrong. He who alleges it must prove it; opportunity alone will not suffice. *Pollock v. Pollock*, 71 N. Y. 137. Of course, direct proof is rarely attainable, and is not necessary; but, where circumstances are relied upon, they ought to be such as to lead to the conclusions of the adulterous intercourse, not only by fair inference, but as a necessary conclusion. Appearances equally capable of two interpretations, one an innocent one, will not justify the presumption of guilt. *Pollock v. Pollock*, *supra*. But in this case there is not enough to require the rule to be invoked. There is nothing but the vaguest, and so far as appears the most unreasonable and groundless, suspicion. This case clearly falls within *Smith v. Smith*, 8 Or. 100, and *McMahan v. McMahan*, 9 Or. 525.

The decree of the court below must therefore be affirmed.

LENT and others v. TILSON and others. (No. 8,540.)*(Supreme Court of California. May 31, 1887.)***1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—SUPERVISORS.**

The act of California of March 23, 1876, providing for the widening of Dupont street in the city of San Francisco, defining the district benefited thereby, and appointing a board of commissioners to carry out the work, and assess the cost thereof on the property benefited, did not deprive the supervisors of the discretion with respect to local improvements secured to them by the city charter, because by its terms it was not to go into operation until the board of supervisors should declare, in such form as they should deem advisable, that it was expedient to widen the street in the manner proposed.

2. SAME—DUE PROCESS OF LAW—NOTICE.

Said act does not conflict with the provision of the constitution that no person shall be deprived of his property without due process of law, because, *first*, such process is provided by the notices, (that the board of commissioners is organized, and that its report, giving full information of every determination of the board which can affect the interest of any person, is open for inspection and objection,) which are required by the act to be published in the newspapers, and which are sufficient when construed together with the act; for the sufficiency of such notices is to be determined from the particular circumstances of the case in hand, and in this case the owners of property assessed knew that the act was passed, knew what notices were provided for, and knew that the entire cost would be a lien on their property; hence they ought to have been diligent to see that the board performed its duties properly. The district to be assessed was defined in the statute, and publication during 20 days that the report of the board was open for inspection for 30 days was reasonably sufficient, when helped out by the statute.

3. SAME—APPEAL TO COURT.

And, *second*, as the power to determine the expediency of a public improvement rests with the legislature, and is not judicial in its nature, the rights of persons whose property is taken are fully secured if they have a right to be heard as to the amount of compensation awarded, and as to the assessment levied, before the lien becomes final upon their property. Such right is protected by the provision that any objection to the action of the board, as shown in the report, may be heard and decided by the county court; and the notice to be given was sufficient to bring into court all parties interested, not as if the proceedings were judicial, but such as the case admits.

4. SAME—INJUNCTION—ESTOPPEL.

Owners of property assessed under said act of March 23, 1876, cannot bring suit, on account of the misconduct of the board of commissioners, to enjoin collection of taxes for the payment of bonds issued to pay for the improvement, when ample provision is made for the correction of such irregularities at the hearing before the county court, and the act itself provides that completion of the work "shall be deemed an absolute acceptance by the owners of all lands affected by this act of the lien created by this act upon the several lots so affected."

5. SAME—ASSESSMENTS—DISTRICT BENEFITED.

The legislature has authority to declare what district is benefited by a local improvement, and to levy on such district an assessment therefor, and the courts will interfere to set aside such assessment only where there has been a manifest abuse of discretion.

6. PUBLICATION—NOTICE—SUPPLEMENT.

Publication of a notice on the third sheet, called the "supplement," and containing matter for which there was no room in the two sheets on which the paper was usually printed, is sufficient when it appears that the so-called "supplement" is circulated co-extensively with the rest of the paper.

PATERSON, J., dissenting.

In bank. Appeal from superior court, San Francisco.

McAllester & Bergin and *D. M. Delmas*, for appellants. *Garber, Thornton & Bishop*, for respondents.

TEMPLE, J. This suit was brought to enjoin the tax collector of the city and county of San Francisco from selling certain real estate, for the collection of the tax imposed for the payment of the Dupont-street bonds, issued under the act of the legislature approved March 23, 1876, (St. 1875-

76, p. 433.) That act provided for the widening of Dupont street, but was not to go into operation until the board of supervisors should declare by resolution or order that in their judgment it was expedient to widen the street in accordance with and in the mode prescribed by the act. The act specially defined the district benefited by the proposed improvement which should bear the burden of making it, to be assessed to the owners of land in proportion to the benefit received. The district was described as two separate parcels of land, being two strips,—one on either side of the street,—extending from Bush street to Market; the strip on the east side in width extending half-way to Kearny, and that on the west half-way to Stockton,—such streets being the parallel streets nearest to Dupont on the east and west. In case the board of supervisors expressed their judgment in favor of the improvement, the Dupont-street commissioners named in the act, to-wit, the mayor, the auditor, and county surveyor, were to publish a notice in two of the daily papers printed in the city of San Francisco, informing property owners along the line of said street of the organization of the board, “and inviting all persons interested in property sought to be taken or which would be injured by said widening, to present to the board maps and plans of their respective lots, and a written statement of the nature of their claim or interest in such lots.” The board was required to have an office in the city, and was furnished with a secretary, and allowed to employ clerks, attorneys, surveyors, draughtsmen, searchers of records, etc., and section 7 of the act defines with considerable particularity the duties of the commissioners, and the mode of performing them. It is provided, however, that within 30 days after the publication of the notice of the organization of the board the owners of a majority in value of the property fronting on the street may interpose their veto to the further prosecution of the work, which veto shall be final. If the proceeding was not thus arrested, the board was to proceed, and, having completed the work of estimating damages and benefits, was to embody the result in a report, the precise nature of which is minutely defined in the act, and which apparently, when so made, would give full and particular information of every determination of the board which could affect the interest of any person. This report, when thus completed, was to be left “at the office of the board daily during ordinary business hours, for 30 days, for the free inspection of all parties interested, and notice that the same is open for such time and such place,” to be published by the board daily, for 20 days, in two daily newspapers printed and published in the city. At any time within this 30 days any person interested, who felt aggrieved by the action of the board, could file in the county court his petition setting forth his grievance, and the court was empowered to approve the report, or to cause the same to be altered or modified, and finally to approve as modified. When the report was finally approved, the board was to issue bonds of the city and county in a sum sufficient to pay the damages awarded, and all costs, the bonds to be paid by a tax on the district benefited. When the damages were all paid by the proceeds of the bonds, and the persons receiving the payments had conveyed to the city and county the lands taken, the board was to remove the buildings and widen the street; and it was provided that the completion of the work “shall be deemed an absolute acceptance by the owners of all lands affected by this act, and by their successors in interest of the lien created by this act upon the several lots so affected. * * *

The complaint avers that the work was actually performed, that is, that during the first seven months of the year 1877 the street was actually widened from 44 feet to 74 feet, by the removal of the buildings, and the turning of the same into roadway and sidewalk; that the bonds were sold, and the money thus obtained was used for the payment of the damages and costs; but it is claimed that money was expended improperly, and a large sum retained without just authority, for costs to accrue.

The objections to the proceedings are numerous, but may be included under the following: (1) The act is unconstitutional; (2) the board of commissioners had no power or jurisdiction to act because the board of supervisors did not properly express their judgment that it was expedient to widen Dupont street; (3) the notices required to be given to parties affected were never, in fact, given as required; (4) the board was guilty of fraud and misconduct; and (5) the report, as confirmed, shows that the damages exceed the benefits.

1. It is claimed that the act is unconstitutional on many grounds.

First. Because it is an attempt by the state to exercise the power of assessment for local improvements within the limits of a municipality. *People v. Lynch*, 51 Cal. 34. In that case it was said of the statute there under consideration: "Such law is unconstitutional, because it is mandatory in its nature, and deprives the board of trustees * * * of all choice or discretion in reference to improvements." The act in question does not do that. It leaves the matter entirely to the local legislature to say whether the work shall be done or not. True, if the board of supervisors concludes to order the work to be done, the act designates the city officers who shall act as commissioners. This power to act as a board is given to such officers, and their successors in office. The mode of procedure is also prescribed. There is nothing unusual in this. Nor does it matter that the mode differed from that laid down in the consolidation act for inaugurating other improvements. But this question is not an open one. *People v. Bartlett*, 67 Cal. 156, 7 Pac. Rep. 417; *Pacific Bridge Co. v. Kirkham*, 64 Cal. 519, 2 Pac. Rep. 409.

Second. It is claimed that the act is unconstitutional because it does not provide for due process of law.

1. It is claimed that the parties to be affected had a right to be heard upon the question whether the street should be widened or not, that the proceeding is judicial in its character,—is, in fact, a part of the proceeding to take private property for public use, to which the persons whose property is affected must be parties. There was no provision for such hearing. But it is plain that it is not a judicial act in that sense. It may be said to be judicial in the sense that it is not ministerial. It is an act which rests in the sound discretion of the authority. It may act or not, or may act in such mode as it may deem best, within legal limits, but it is not a determination by a judicial tribunal of the rights of parties before it. It is a legislative act, and the power to determine the expediency of a public improvement rests with the legislature, or such local authorities as have been charged with the duty of determining the policy of the government in such matters. Some authorities from New Jersey are cited to the contrary, but the overwhelming current of decision is in accord with this view. Where compensation is provided for property taken, and persons interested are awarded an opportunity to be heard as to the amount, the constitutional requirement is satisfied. So, too, where a district is charged with an assessment for a local improvement, it is enough if the parties to bear the burden have a right to be heard as to the assessment before the lien becomes final upon their property. *Reclamation Dist. v. Evans*, 61 Cal. 104; *In re Zborowski*, 68 N. Y. 88; *Holt v. City*, 127 Mass. 408; *Pearson v. Zable*, 78 Ky. 170; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Smith*, 21 N. Y. 595.

2. It is claimed that the act does not provide for due process of law, because the notices prescribed are insufficient. The notices provided for in the act which are criticised under this head are the notice of the organization of the board; and the notice that the report of the board is open for inspection.

The sufficiency of the notice will depend, to a very considerable extent, on the nature of the proceeding, and the statute on which it is based. The statute is always presumed to be known, and whether the notice really affords the necessary information, and gives the party whose interests are affected

an opportunity to be heard, must depend largely upon those provisions. It has been repeatedly held that proceedings for the levy and collection of taxes are not necessarily judicial, and that due process of law, as applied to such matters, does not require such notice as is considered essential to the validity of a judgment. In *Kentucky R. R. Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57, it is said: "Notice by statute is generally the only notice given, and that has been held sufficient. 'In judging what is *due process of law*,' said Justice BRADLEY in *Davidson v. New Orleans*, 96 U. S. 97, 'respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust it may be declared to be not *due process of law*.'" In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And further, in matters of assessment and taxation, the same character of notice is not required as in ordinary actions in a court of justice; for the reason, I presume, that in such summary proceedings it is not practicable or usual.

Now, then, what are the circumstances of this case which have a bearing upon this question? Dupont street is one of the oldest streets in the city of San Francisco. That portion affected by this proceeding was in the heart of the city, and had long been a finished street, the lots along it on both sides built upon and occupied. The district which it was alleged would be benefited was specifically defined in the act. Kearny street had shortly before been widened by a proceeding somewhat similar, and the result had been to make the street more attractive. The tendency of business was westward, and Dupont street was the next parallel street. It was 44 feet wide. It was not to any considerable extent a thoroughfare, except for local purposes. There was not much reason for widening the street which could interest the general public, but the case comes as near as can be imagined to being one in which it was a certain proposition that the proposed improvement would be greatly to the advantage of the individual property owners. The municipality and the general public, however, were obviously so little interested in the matter that it would hardly be putting the matter too strongly to say that there was no decent pretext for the improvement except upon the hypothesis that the local property holders desired it, and would be advantaged by it. It is inconceivable that the matter should be passed through the legislature without being a frequent subject of discussion among the lot-owners, even if it were not done at their instance. They had notice, not only as a rule of law which charges every one with knowledge of the statute, but must have had such information as a fact; and also that in making the improvement the officials were acting, in a certain qualified sense, as their agents, for their individual advantage, rather than for the public. After the supervisors had resolved that it was expedient that the street should be widened, and the board of commissioners was organized, the whole proceeding could even then be stopped by a majority in value of frontage on the street. And when the work should all be completed, the act provides, as already recited, that the completion shall be deemed an acceptance by the lot-owners of the lien of the debt, as an absolute waiver of all claim upon the city for any part of the debt, and as a contract between such owners and the holders of the bonds issued under authority of the act.

Under such circumstances, it seems to me the notices required are greatly helped out by the act itself. The owners are in a certain sense parties to a proceeding, and are informed beforehand of the notices which will or may be given and of the purpose of them. They are informed minutely of the course of procedure, and the duty, in my opinion, is cast upon them of exercising a

certain degree of diligence in regard to them. Having notice that the municipality would assume no part of the burden, and that when completed the entire cost would become a lien upon their property, and the bonds be considered as their individual contracts, they were put to their diligence to see that the board faithfully performed its duties, at least to the extent that they could not afterwards complain of mere irregularities, or of any misconduct on the part of the commissioners which they could have had reviewed and corrected in the proceeding itself, *dum fieri*. This, of course, if correct, does not obviate the necessity of notice, but I think it has an important bearing upon the issue as to the sufficiency of the notices provided; and, if I am right, it is unnecessary to mention particularly some objections to the statutory provision which I may venture to say, in such a view, seems almost trivial. Some of them, however, cannot justly be so characterized. Among these are the objections that the notice is not required to be addressed to any one; that, at the best, it is only for those owning property fronting on Dupont street.

As already indicated, the notice must be read in the light of all the provisions of the act. In *Boorman v. Santa Barbara*, 65 Cal. 313, 4 Pac. Rep. 31, which is much relied upon by the respondents, the act authorized the mayor and common council, upon petition, to lay out, widen, etc., *any* street in the city, and directed them to give notice by publication in a newspaper of the time and place where they would proceed to examine the property to be affected. St. 1877-78, p. 777. This court held the act unconstitutional, because it did not sufficiently provide for notice. As it "provides for no notice at all addressed to any particular person or class of persons, or which would inform any particular person that on failure of appearance any burden would be imposed upon him or his property," the court said: "It will be observed the act neither fixes the boundaries of an assessment district nor authorizes the common council to fix them. * * * It is possible, if the commissioners were authorized to fix the limits of the assessment district, finally or conditionally, in the first instance, and then to give notice—even by publication—to the owners of property within the district, the notice would be sufficient. But the act provides only for notice, at most, to all property owners in Santa Barbara. Who can know that his property may by the commissioners be deemed to be benefited?"

Plainly, that is not an authority against the sufficiency of the notice here. The authorities seem to be all, or nearly all, in favor of the proposition that when the limits of the assessment district are defined in the statute the notice need not be addressed to the persons whose property is affected by name; and certainly, in this particular case, we see no good reason for such a requirement. *In re Mayor*, 99 N. Y. 580; *City of Ottawa v. Macy*, 20 Ill. 413. Nor was it necessary that the property sought to be taken or affected should be specifically described in the notice. As a whole, the property is so described in the statute.

The first notice prescribed in section 6 was, in part, to inform property owners along the line of the street that the board was then organized. The words, "property owners along the line of said street," as there used, are not the equivalent of the words, "owners of property fronting on said street." For the meaning of the language we must again refer to the statute. There we find the lands to be assessed for benefits described as two narrow strips on either side of the street, each fronting on and along the line of the street. For one purpose, no doubt, the notice was effective only as to owners of frontage; that is, to set the time running in which the owners of frontage might have stopped the proceedings; for it seems that only such persons could act in the matter. But it was also a notice to all persons interested that the proceedings were then pending, and that the board, unless proceedings were arrested by the veto of the owners of frontage, would proceed with their labors.

3. Various objections are made to the notice prescribed in section 7 of the act. That provision is: "Such report, as soon as the same is completed, shall be left at the office of the board daily, during ordinary business hours, for thirty days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by said board daily, for twenty days, in two daily newspapers printed and published in said city and county." This must be construed to require the notice to be published as early as the first day of the 30 days during which the report was to remain for free inspection. Otherwise the notice could not truthfully state: "The report *is* open for inspection" for such time. It is said this is insufficient, because the 20-days publication of notice must come out of the 30 days, which would leave only 10 days for the parties to object; which would be an unreasonable period in which to require parties affected to make their objections. The idea that the notice only allows 10 days after notice seems to be derived from the practice concerning the service of summons. There the summons, when not personally served, may, under proper conditions, be sometimes served by publication for the two months, or such period as the judge may direct. The law provides that the service shall be complete when the term of publication has expired, and the person served may have a certain number of days after service within which to appear and answer. But evidently that is a mere statutory arrangement, and the service would be just as effectual if the time for answering was made to expire with the publication; provided a reasonable opportunity to be heard was afforded by the notice given. So here it would not matter if the publication were required to continue for the entire period of 30 days. It would be curious if the court should hold that the notice would have been good if it had been published only 5 days of the 30, as was very nearly the case in *San Francisco v. Certain Real Estate*, 42 Cal. 513, and bad because it was required to be continued for 20 days. On such principles there would have been no notice, though it were published for a twelvemonth, during all of which the report was open for inspection and objection.

Of course, unless the notice required can be helped out by reference to the statute, it would amount to nothing. It is true it is not required to be addressed to any one specially. It informs no one what property is to be affected. It indicates no steps to be taken by the person aggrieved to obtain redress, and mentions no tribunal before which, or any time or place at which, his grievance, if he have any, can be heard. But all this is provided for in the statute. He has been already informed that this very notice will be so published, and of all the steps he will be required to take to protect himself. The privilege afforded by the statute to apply to the court to fix a time for his grievance to be heard is as beneficial to him as though such time and place had been fixed by the notice. The authorities upon all these questions of notice are exceedingly numerous, and apparently, in some respects conflicting. Much of this apparent conflict disappears, however, when we remember that each case must be judged by its own circumstances, and under the rule I have cited from *Kentucky R. R. Tax Cases*, 115 U. S. 331, 6 Sup. Ct. Rep. 57. All the cases on the subject seem to be referred to by counsel, but I do not deem it important to cite or discuss them in this opinion. I call attention, however, to the numerous statutes of this and other states quoted by counsel for appellants, which show that the mode here adopted is not strange or novel to judicial proceedings. It seems to me quite clear that there is no objection to the act under consideration on the ground that it fails to provide for due process, so far as the matter of notice is concerned.

But it is contended, admitting that the notices were sufficient, no adequate hearing was awarded to the parties whose rights were affected. So far as the claim that there ought to have been a hearing by the commissioners before the assessment was made is concerned, the point has been settled in

this court by the case of *Reclamation Dist. v. Evans*, 61 Cal. 104, and by the *Kentucky R. R. Tax Cases*, *supra*, and, in fact, by all the cases upon the subject.

Section 8 of the act provides for a hearing before the county court. Any person interested, feeling himself aggrieved by the action or determination of the board, as shown in the report, might, at any time during the 30 days that the report was to be kept for inspection, "apply by petition to the county court, * * * setting forth his interest in the proceedings had before the board, and his objections thereto, for an order on said board requiring it to file with said court the report of said board, with such other documents or data as may be pertinent thereto, in the custody of said board and used by it in preparing said report. Said court is hereby authorized and empowered to hear said petition, and shall set the same down for a hearing within 10 days from the date of the filing thereof." It then provides for service upon the members of the commission, that they may answer the petition and appear by counsel in response thereto. "Testimony may be taken by said court upon said hearing, and the process of the court may be used to compel the attendance of witnesses, and the production of books or papers or maps in the custody of the board or otherwise. It shall be in the discretion of said court, after hearing and considering said application, to allow said order or deny the same; and, if granted, a copy thereof shall be served on said board, and it shall proceed to obey the same according to the terms of the order to be prescribed by the court. * * * The court shall have power to approve and confirm said report, or refer the same back to said board, with directions to alter or modify the same in particulars specified by the court in the order referring the same back."

Now, it is argued that after the person aggrieved has filed his petition, and a day has been fixed for the hearing, and the hearing had, witnesses summoned, books, papers, and maps produced under the process of the court, and counsel heard, and the court is fully advised as to the grievances, all the court can do in the matter is to order the report to be filed; and even this, although affording no relief, is in the discretion of the court. It is a proposition so often asserted by courts that perhaps now the question should be considered as closed, that the constitution is to be read in connection with laws of this character; and, if no hearing is expressly provided by the statute, still, if the constitution guaranties it, the statute is to be properly construed so as to allow it if possible, and not to deny it. The constitution and the statute will be construed together as one law. This rule was carried so far in *Neal v. Delaware*, 108 U. S. 370, that words denying the right were regarded as stricken out of the state constitution and statutes by the controlling language of the constitution of the United States. *Kentucky R. R. Tax Cases*, 115 U. S. 334, 6 Sup. Ct. Rep. 57.

We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard without which the law would be void. To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And I must confess it seems to me it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section, but it would not have provided so elaborately for a thorough investigation of grievances if it was not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify. And it seems that such action is to be based upon the hearing provided for. The word "discretion" is used in various meanings, but here evidently it was intended to sub-

mit the whole matter to the sound judgment of the court, to be exercised according to the rules of law.

The statute does not expressly authorize the court to pass upon the validity of the act, or whether the board of supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard. If to be heard upon such questions was a constitutional right, and the constitution is to be read as a part of the law governing this procedure, as the authorities plainly hold, then the law must clearly be held to give the parties that right. In my opinion, however, the right is not doubtful under the statute itself, independent of this proposition. The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections. The determination, for instance, might have been objected to because, the act being invalid or the notices not having been given, the board had no right to proceed to act at all. If this contention were sustained, the result would have been that the court would not have confirmed the report, and the proceedings would have ended without fixing a charge upon the property of plaintiffs. They could have complained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much; or for any misconduct of the commissioners which could affect them; or that the cost exceeded the estimated benefits; and it does not seem to me that the court would have found any difficulty in granting relief.

I do not regard the fact that the commissioners were allowed to answer the petition of the aggrieved party as of any consequence. There was no occasion to require an answer at all. The provision was intended to prevent the matter from going by default, and to enable the commissioners to aid the court by such information as was in their power. This aid did not prevent any person interested from being heard, and, if the commissioners betrayed their trust in this matter, that of itself would have constituted a proper subject of complaint which any one might have presented to the court. The idea evidently was that there might be many complaints made by persons feeling themselves aggrieved. The court was bound to hear all and consider all competent and pertinent testimony offered. If any of the alleged grievances were found to be well founded, the report was to be ordered into court. After all complaints had been duly heard, and the court duly advised, the final order was to be made declaring what alterations and modifications were necessary. In this order the court was authorized, not only to grant the specific relief asked for by the petitioners, but also to so modify the report in other respects, so as to adjust the final determinations in regard to the assessment to the report as altered at the prayer of the petitioners.

I concede at once the proposition that, to maintain this final order, it is necessary to hold that all persons whose rights were affected by the proceeding were before the court; that the notice given under section 7 of the act was a process by which they were brought into court, and from that time on they were charged with notice of everything done, and of any step taken in the county court. I think this is perhaps the most debatable point in the case, but the difficulty arises to great extent from a disposition to compare the opportunity here afforded with that deemed essential in ordinary judicial proceedings. Measured by that standard, it would unquestionably be deemed insufficient. But that cannot be accepted as furnishing the rule. "Due process

of law," says Judge Cooley, (Const. Lim. 356,) "in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Under a statute which authorized the commissioner of immigration to prevent paupers, criminals, lewd women, and certain others to land, certain women were detained, and on application to this court on a writ of *habeas corpus*, it was adjudged that the act did not violate the requirement of due process. Here there was no hearing provided by the act at all. Any woman, if found on a vessel from a foreign port, was *liable* to be deprived of her liberty under circumstances most humiliating and degrading. This court, speaking through Justice McKINSTRY, said: "The peculiar necessities which call for the action of the officer, and whether a power was exercised in the same manner prior to the adoption of the constitution without being regarded a violation of the principles of *magna charta*, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person who is subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit,—the case being one in which the end sought to be attained is lawful,—a statute cannot be said to deprive a party of the benefits of due process of law." *Ex parte Ah Fook*, 49 Cal. 406.

This conclusion was based partly upon the fact that the object of the law could not be attained unless the action under it was prompt and summary, precluding the possibility of according a hearing at an appointed time and place, and, although it is not so stated in the opinion, perhaps to some extent because the imprisonment, if it can be said that there was any, was so only in a qualified sense. They were only prevented from entering this state, but were not prevented from going anywhere else. This is an extreme case, no doubt, but it well illustrates, as all quarantine laws do, the proposition that the constitutional provision will not be given such effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society, and that, when usage and necessity both sanction it, the opportunity may be so limited as not to render the law inoperative.

The sufficiency of the opportunity to be heard, accorded, must be ascertained in each case, not only by considering the adequacy of the opportunity to be heard, but the practicability of a more perfect and satisfactory hearing in the particular case; and if that which is provided is such as the settled maxims of the law permit and sanction in such cases, and is reasonable in view of the necessities of the case, it is enough. The practice upon this subject, so far as this particular question is concerned, seems to have been uniform. It has never been held, so far as I can find, by any case really in point, that a new notice is necessary, or that parties whose individual assessments have not been altered must be brought in and given a right to be heard as to other changes, no matter how much their individual burdens may be increased by such changes.

The precise question here raised has been often discussed. *Patterson v. New York*, 1 Paige, Ch. 114, is directly in point. The court said: "The notice to propose objections to the report is a sufficient notice to those who are satisfied with the original report to appear before the commissioners, and oppose any alterations which may be proposed by the persons objecting." To the same effect is *In re William St.*, 19 Wend. 680.

In *Gilbert v. City of New Haven*, 39 Conn. 472, it is said: "It is further objected that the defendant had no notice of the recommittal, and of the subsequent proceedings. We are satisfied none was required. The whole matter, from the time of its first reference to the board of compensation to the

time the report was finally adopted by the court of common council, is one proceeding. The appellant was notified in the first instance, and appeared. If he neglected to attend the subsequent stages of the proceeding, it affords no ground of complaint now."

Chamberlain v. Cleveland, 34 Ohio St. 569, was a case very similar to this in the respect under consideration. It was held that, after the notice, "all persons interested are bound to take notice of what is done up to the time the equalized assessment is confirmed." See, also, *Astor v. Mayor*, 62 N. Y. 588; *Murray v. Graham*, 6 Paige, 625; *Gates v. Brooks*, 59 Iowa, 510, 6 N. W. Rep. 595, and 13 N. W. Rep. 640; *Avery v. East Saginaw*, 44 Mich. 589, 7 N. W. Rep. 177.

That is all I deem it necessary to say upon the subject of due process of law.

It is charged, also, that the act is unconstitutional, because it was not competent for the legislature to determine that the improvement would benefit the property owners, or would benefit them to the extent of the costs and damages. While I understand that this point is made by the learned and able counsel for respondents, it is fair to say that they have not much insisted upon the proposition in this form. They really claim that the act directs the commissioners to ascertain the benefits; that they did ascertain them, and determined that the benefits would be less than the estimated cost of the improvement. In this, however, it is clear the counsel are in error. The act only requires the commissioners to estimate the benefit which will accrue to each lot relatively to the benefits to accrue to other lots. The act certainly was not constructed upon the idea that the proceedings could be arrested by any possible finding in regard to benefits. Unless its final operation was made to depend upon such a finding, it is difficult to see why there should be one. Nor, in my judgment, did the commissioners pretend to ascertain the amount of such benefits. The report as first filed showed benefits and costs exactly equal, being each estimated at \$898,105. It would have been marvelous if, upon a real estimate of the amounts, they should have come out exactly equal, considering the great number of properties. If, however, they had first ascertained the amount of the costs of the improvement, it would then have been easy to have distributed them proportionately upon the properties benefited. And this is evidently exactly what they did do.

If I rightly apprehend the position of counsel, they seem to think the validity of the law in the first instance, and the jurisdiction of the court or commission which is to conduct the proceeding afterwards, will depend upon the fact as to whether the property is benefited, and this fact must appear affirmatively in order to give validity to the proceeding. But the power to assess for local benefits is not based upon the fact of local benefit in any other sense than all taxes are based upon supposed benefit to the tax-payer. The power of taxation is said by Chief Justice MARSHALL to be vested in the government by all for the benefit of all. "The state taxes are based upon the theory that all are benefited by the government which they are designed to support. And so of county and municipal taxation. And the legislature may also organize smaller or different districts than these usual political subdivisions, and place upon such districts the burden of taxation for purposes in which the inhabitants have a special interest, or which will specially benefit the property within the district."

Now, in regard to general taxation, if a case were presented in which we could plainly see that the tax was not for the benefit of the government, but was wholly for the private advantage of an individual, we should not hesitate to declare that it was not an exercise of legislative power, and the levy would be held void. The same rule, and no other, applies to assessments for local improvements. The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult, and generally impossible, for the court to say that the purpose of the

tax is not a public purpose, or that no benefit will result to the tax-payers, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the constitution, or by its own nature and purposes. Within these limits the legislature is the sole judge of when and to what extent the power shall be used.

It may be said that all the cases on this subject are exceptional, and many of them are cases of great hardship and clear extortion, in which the local benefit claimed is only a pretense to cover the unjust exaction, and the courts have often attempted to find some limitation, in the nature of the power, which would enable them to prevent the injustice. Thus it has sometimes been said that, the power being based upon the supposed benefit, the burden cannot go beyond the actual benefit, which may be inquired into whenever the attempt is made to enforce the tax; but this, obviously, cannot be so. The legislature must act, after all, in providing for the public good, upon the judgment of its members as to what is expedient or will prove beneficial. The most wisely planned projects often fail to realize the good expected. And then the benefits need not be immediate. I see no just limitation in this respect, except that the tax will not be upheld when the courts *can* plainly see that the legislature has not really exercised this judgment at all, or that manifestly and certainly no such benefit can or could reasonably have been expected to result. The judge should not place his mere opinion against that of the legislature. So, too, it has been said, that as the tax is in this instance imposed by a power *ab extra*, it is taxation without representation. I find no such limitation upon the power in the constitution, though if there were it might be questionable whether in this case there has been a violation of it. These, and some other limitations which courts have attempted to find in the nature of the taxing power, seem to me to be plain attempts to import into the constitution restrictions which cannot be found there by any just reasoning.

Judge Cooley, in his work on Taxation, 622, says: "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. We dismiss this topic, therefore, with the simple remark that with the wisdom or unwisdom of special assessments, when ordered in special cases in which they are admissible at all, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

The power being in the legislature, the limitations upon it must be found in the constitution, either in express provisions or by implication; and there exists, which must be recognized by the courts, the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so. Therefore it is presumed that the power of assessment existed, and the contrary must be very clearly made to appear before the court could declare the law invalid. It does not so appear in this case.

But it is contended, admitting that the law is valid, the board of supervisors did not authorize the work to be done by expressing their judgment that such improvement would be expedient. March 27, 1876, the board passed a resolution which fully satisfies the act. The proceeding was not conducted under the consolidation act. The statute is complete in itself, and it prescribes no preliminary notice. It furthermore expressly authorizes the board to express such judgment in such form as they might deem advisable. Counsel say this has reference only to the language in which the judgment should be expressed. Since the board could not express its judgment at all without choosing the language, that construction is not tenable.

It is objected that the notices were not duly published because sometimes printed in the supplements. The supplements, however, in this particular instance, were part and parcel of the newspaper itself. They constituted only a third sheet when there was too much matter for the usual two-sheet issue. Why they were designated as "supplements" I do not know, nor does it matter. The mere fact that the word "supplement" was printed at the head could not change their character. I have looked in vain for any evidence to sustain the finding that the so-called supplement was not circulated co-extensively with the balance of the paper. All the evidence upon the subject is the other way.

If I am correct in my conclusions as to this point, the remaining objections do not require much consideration.

That the benefits, as shown in the report, are less than the cost of the improvement, has been already sufficiently noticed. If the intervenors in their cross-complaint have improvidently admitted the construction of the act contended for, it will not help the plaintiffs. It cannot change the meaning of the law, or the legal effect of the finding. If there was a valid law authorizing the improvement, and the board was authorized to act and the county court obtained jurisdiction, the plaintiffs cannot complain here of mere irregularities or bad conduct on the part of the commissioners for which that court could have afforded relief. The alleged frauds were all such as by the exercise of a proper diligence ought to have been known by the interested parties in time to present to the county court. This action is by the property owners on the east side of the street; the property taken was immediately opposite. It is averred that the commissioners, willfully and intentionally, determined the value of lots taken to be more than three times as much as they in fact were, and omitted from their estimate of benefits to the same lots about two-thirds of the actual benefit. This overestimate of damages and underestimate of benefits, so far as I can judge from the statement of the case in the record, seems to be fully sustained. But the report showed fully what the estimates were, and the injustice was so obvious that a mere inspection by those familiar with the property, as the plaintiffs were, could not fail to disclose the fact. As to the interest of Bryant, one of the commissioners, I find no evidence of it except the admission in the cross-complaint that he had for seven or eight years owned the undivided half of a certain lot on the northeast corner of Dupont and Morton streets, which fact appeared upon the maps and reports made by the commissioners.

But admitting the validity of the statute, and that the preliminary steps were taken which authorized the work to be done, the plaintiffs cannot now maintain this action. The statute, as I have already stated, manifested very plainly that the improvement was to be made for their special benefit, and that they were to bear the entire cost. They were afforded an opportunity, even after the board was organized, to arrest proceedings, if a majority in value of frontage should be of opinion that it would not be to their advantage; and were distinctly notified that if they permitted it to be completed their acquiescence would be deemed an absolute acceptance by them of the lien created by the act. Under such circumstances, they could not remain silent, and permit the money obtained of the bondholders to be expended in the improvement of their property, and then escape liability on the plea that the officers charged with the work, who were in a sense their agents, were guilty of misconduct and fraud, which they by proper diligence could have prevented.

The pleadings and the briefs are full of the most positive charges of fraud and corruption against the commissioners, and, although apparently hurled at the board, they are constantly put forward as though the bondholders were in some way responsible for them. They represent themselves as victims who should be relieved at the expense of those who were induced by their former silence to loan the money to improve their property. There was fault and

culpability over and above that of the board which is charged with the perpetration of the frauds. The culpability is on the part of the lot-owners who remained silent while the bondholders were advancing the money to their agents and it was being expended by them for their benefit. I see no reason why the legislature might not declare, by a law before the fact, that such remissness shall constitute an estoppel. Certainly, under such circumstances, a court of equity would not lend its aid to the plaintiffs. Authorities are not wanting on this point, many of them going much further than this court is prepared to go. They fully sustain the proposition, however, that it is competent for the legislature to declare that the tacit acquiescence of parties interested, and their failure to challenge proceedings while in progress, will estop them from questioning them after they are completed; that they cannot accept the benefits and avoid the burdens.

In *Palmer v. Stumph*, 29 Ind. 329, an assessment was laid for the improvement of a street, under a statute which provided for an appeal, but declared that no question or act shall be tried which may arise prior to the making of the contract. The court held that the plain intent was that the owner should not remain silent until he had secured the full benefit of the work, and then avoid payment. It is said: "If he denies the power of the council to order the improvement, he must test the question by injunction before the work is done. Acquiescence in the action of the council is by law made to estop him from going behind the making of the contract."

The same statute was under consideration, and the same ruling made, in *Commissioners Allen Co. v. Silvers*, 22 Ind. 491. See, also, *Quinlan v. Myers*, 29 Ohio St. 500; *State v. Wertzel*, 62 Wis. 184, 22 N. W. Rep. 150; *People v. Common Council*, 65 Barb. 9; *State v. Mayor*, 40 N. J. Law, 244; *Kellogg v. Ely*, 15 Ohio St. 64; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Patterson v. Baumer*, 43 Iowa, 477; *Weber v. City of San Francisco*, 1 Cal. 455.

I think the cause should be remanded, with directions to dissolve the injunction and dismiss the complaint. So ordered.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND,

MCKINSTRY, J., (*concurring*.) I concur in the order of judgment directing the court below to dismiss the complaint.

1. If there were irregularities in the proceedings to widen Dupont street, which did not deprive the plaintiffs of opportunities to contest them, they should have been objected to in the course of the proceedings. If the statute is a valid statute, but it appears from the record that there were omissions, defects, or departures from the procedure prescribed by the statute, which render the assessment of the commissioners, or judgment of the county court invalid, for want of jurisdiction of the persons or property of the plaintiffs, each of the plaintiffs had a plain, speedy, and adequate remedy at law, by means of the writ of *certiorari*. *Ewing v. City of St. Louis*, 5 Wall. 413; *Spring V. W. Co. v. Bryant*, 52 Cal. 132; *People v. El Dorado*, 8 Cal. 61; *People v. Board of Delegates*, 14 Cal. 479.

2. And so, if the assessment or judgment is void because of the invalidity of the statute, each of the plaintiffs could have resorted to *certiorari*. Moreover, if the act of March 18, 1876, is unconstitutional and void, as contended by counsel for respondents, a sale of the lands assessed, and the tax collector's deeds thereof, would constitute no cloud on the title of the plaintiffs. An injunction will not be issued to restrain the collection of a tax or assessment by the sale of real property, unless it appears that the plaintiff would suffer irreparable injury, or an injunction is necessary to prevent a multiplicity of suits, or the sale would cast a cloud on his title. *Dean v. Davis*, 51 Cal. 407; *Houghton v. Austin*, 47 Cal. 647; *Savings & Loan Soc. v. Austin*, 46 Cal. 448; *Wiggin v. Mayor*, 9 Paige, 23; *Dows v. City of Chicago*, 11 Wall. 108;

Central P. R. Co. v. Corcoran, 48 Cal. 65. When a statute gives to a tax deed, the tax being levied by a valid law, effect as evidence *prima facie* of the regularity of the assessment, and of all proceedings under it, the deed may create a cloud. *Palmer v. Boling*, 8 Cal. 384; *Bucknall v. Story*, 36 Cal. 73; *Patten v. Greene*, 13 Cal. 328; *High v. Shoemaker*, 22 Cal. 372; *People v. Crockett*, 33 Cal. 157. But whatever effect the legislature may attempt to give to a tax or assessment deed as evidence, every such deed must be read with the statute under which it purports to have been issued, and, if the statute is void, the deed issued under it can cast no cloud on the true title.

3. At a very early day in the judicial history of this state it was held where an assessment was laid for improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons, and the improvement was completed without the plaintiff's interposing to prevent it, an injunction to prevent the sale for the assessment was properly denied on the ground that he who seeks equity must do equity; and that the city should be permitted to proceed and sell the plaintiff's land, leaving him after the sale to the technical rights which he set up in his bill. *Weber v. City of San Francisco*, 1 Cal. 455. I know of no case in which the doctrine of that case has been expressly overruled, or overruled by necessary implication. And while there is some conflict in the decisions of the courts of the several states with reference to the conditions under which equity will interpose to enjoin the sale of lands for assessments, there is ample authority to uphold the view taken by the supreme court of this state in *Weber v. San Francisco*. "One of the first of these [equitable principles] is that parties coming into equity must do equity. * * * If parties cannot come into equity without submitting to do equity, *a fortiori* they cannot come for the summary interference of the court when their conduct before coming has been such as to prevent equity from being done." Per TURNER, L. J., *Great Western Ry. v. Oxford, etc., Ry. Co.*, 3 De Gex, M. & G. 359. Here the plaintiffs with full knowledge of what was done by the officers and others under color of the statute,—for the contrary is not alleged, found, or proved,—with full knowledge of all the acts of which they now complain as wrongful and unlawful, remained quiescent until they had received the benefits of the work. The legislature had declared that their lands would be benefited, and there is nothing in the record to indicate that their lands were not, in fact, benefited to the full amount for which they have been or will be assessed. When the complaint was filed, valuable buildings belonging to many different persons may have been removed or destroyed, and the work of widening the street had been completed at very great expense. So far as appears, while great loss and injury to others would be the consequence of an injunction herein, the plaintiffs will suffer no real injury by a denial of an injunction. Under these circumstances, I think it clear that the plaintiffs so far acquiesced in the work of widening the street and the issue of the bonds as that they should have been denied an injunction decree. *Lux v. Haggin*, 10 Pac. Rep. 694, and cases there cited.

Where the county commissioners contracted for the building of a bridge without legal authority, and the bridge was completed, it was adjudged that payment for it could not be enjoined at the suit of a tax-payer. *Clark v. Dayton*, 6 Neb. 193. When an improvement had been made along a public street, to which the owner of property abutting thereon had made no objection until after its completion, upon a bill being filed by him to enjoin the assessment for want of notice, it was held he must do equity by paying the amount which his property was benefited. *Barker v. Omaha*, 16 Neb. 269, 20 N. W. Rep. 382. In Indiana the doctrine has been carried further, and it is settled that a property owner cannot quietly permit money to be expended in a work which benefits his land under a contract with a city, and then deny the power of the city to make the contract. *Palmer v. Stumph*, 29 Ind. 329;

Hellenkamp v. Lafayette, 30 Ind. 194; *City of Lafayette v. Fowler*, 34 Ind. 146.

4. It may be urged, however, that equity should entertain jurisdiction of a suit like the present "to prevent multiplicity of actions." The multiplicity of actions which it may be said (although in the absence of averment) the complainants here seek to avoid would not injuriously affect any one of them. *Cooley, Tax'n*, (2d Ed.) 771; *Dodd v. Hartford*, 25 Conn. 232. But, if that be not the true rule, and a bill may be filed by many persons to enjoin sales of the separate property of each for the same assessment; if the only necessary community of interest among the plaintiffs is in the questions at issue to be decided by the court,—“in the mere external fact that all their remedial rights arose at the same time, are of the same kind, involve similar questions of fact, and depend upon the same questions of law,” (1 Pom. Eq. § 260.)—the question still remains: Will a suit be entertained to prevent multiplicity, when it appears that no one of the plaintiffs could separately demand equitable relief? The cases sometimes supposed to do so do not, when examined, answer the foregoing question in the affirmative.

Kennedy v. City of Troy, 14 Hun, 308, and *Clark v. Village of Dunkirk*, 12 Hun, 181, were cases in which it was held that, when an assessment is invalid, but such invalidity is shown only by matters *dehors* the record, which in itself is in all respects regular, and within the power and jurisdiction of the authority laying the same, an action in equity may be maintained by any one upon whose real estate an apparent lien has been created by the assessment on behalf of himself and others in like situation; but to justify such an action it must be alleged in the complaint that the assessment is regular upon its face, and apparently in accordance with the provisions of the law authorizing it.

In *Ireland v. City of Rochester*, 51 Barb. 435, the supreme court said: “The assessment being void as to the plaintiffs, their right to maintain this action is clear, not only to avoid a multiplicity of suits, but to remove a cloud from their respective titles;” citing 14 N. Y. 534. The case referred to is *Heywood v. City of Buffalo*, 14 N. Y. 535. That was a suit by a single plaintiff, and the decision was: When an action was brought to restrain the collection of and annul an alleged illegal assessment, which, if legal, was a lien on the plaintiff's real estate, but the complaint did not show but that its invalidity appeared on the [face of the] proceedings imposing it, on demurrer to the complaint, held the action could not be maintained. And in *Scofield v. Lansing*, 17 Mich. 437, the supreme court of Michigan held that, when by the provisions of a city charter a tax was declared to be a lien on premises, it constituted a cloud on the title. In these cases each of the plaintiffs could have claimed separately (as was held by the courts of New York and Michigan) the aid of equity to remove a cloud from his title, as well as have maintained his action or defense at law. In some of them the plaintiffs were permitted to join as plaintiffs in an equitable suit, because the title to their respective tracts of land was affected by the same cloud, created by the same proceedings.

Even if there are cases in which each of the several plaintiffs would not be allowed to maintain a separate suit in equity, but yet all would be entitled to unite in one suit for the determination of questions which might arise in separate actions at law, the result herein must be the same. The plaintiffs, by their acquiescence and consent, having lost their right to ask the aid of equity by injunction, the court ought not to have granted to all that which it should refuse to each. To grant the injunction to all because each may be subjected to a separate action at law is to reward the laches and neglect which has deprived each of his right to seek the equitable relief. The acquiescence which estops the plaintiff from obtaining an injunction is in the nature of a defense in equity, and, by holding all estopped by such acquiescence, it is

not necessarily held that the plaintiffs were improperly united as plaintiffs, whether they were united to prevent multiplicity of actions or for any other reason. It is simply to say that none of the plaintiffs are entitled to the preventive decree.

PATERSON, J., (*dissenting.*) I think the judgment should be affirmed. I assent to some of the propositions advanced in the leading opinion, but the statute and proceedings in controversy are in many respects, it seems to me, plainly violative of that clause in the constitutional declaration of rights, which says: "No person shall be deprived of * * * property without due process of law."

1. That the act itself should provide for "due notice" to the property owner, and afford him an opportunity to be heard, is settled beyond all controversy; and, whatever may be the conflict of opinion upon the question of what is "due notice," there can be no question that it should be notice of a full hearing as to time, place, and liability. Section 7 is the only provision which assumes to satisfy this requisite, but it provides no notice at all. It affords no notice of a hearing, and none was given. It provides for a notice, after assessment is complete, that the report "is open for inspection." It is true section 8 attempts to give any person dissatisfied with the report a hearing upon petition before the county court, which court could not, under sections 6 and 8, art. 6, of the old constitution, be clothed with jurisdiction of any case involving the title or possession of real property; but it is only by implication, if at all, that the court could aid him, the language of the statute being: "It shall be in the discretion of the court, after hearing and considering said application, to *allow* or *deny* the same." As to those, however, who were satisfied with the report, which had been left "open for inspection," there is no hearing provided, although the court is given in such cases absolute power to fix values and assess damages of its own motion, and according to its own rules and estimates, notwithstanding the report of the commissioners, with which the owner may be content.

The following is the concluding portion of section 8: "But, in case no such petition shall be filed with said county court within the time above limited for the filing thereof, the said report shall be presented by the said board to the said county court, with a petition to the court that the same be approved and confirmed by the court. The court shall have power to approve and confirm said report, or refer the same back to said board, with directions to alter or modify the same in the particulars specified by the court in the order referring the same back; and thereupon the said board shall proceed to make the alterations and modifications specified in the order of said court. The alterations and modifications aforesaid being made, the report shall be again submitted to the said court; and if the court, upon examination, shall find that the alterations and modifications have been made according to the directions contained in said order, the said court shall approve and confirm the same by an order to be entered on its minutes; but, if the said board shall have neglected or failed to make the alterations and modifications set forth in the order of reference, the court may again refer the report back to said board, and so on until its original order of alteration and modification shall have been complied with by said board, and the said court shall then approve and confirm said report." St. 1875-76, p. 436, § 8.

Of course, if we can say that the citizens of the state are charged with notice of all the acts of the legislature affecting their private interests, and must be on the alert to prevent fraud in the carrying out of the work provided for, the objection just considered is not well taken; but that would be equivalent to saying that "notice" and "opportunity to be heard," are not essential elements of "due process of law."

2. We might be able to overlook the defects referred to if it were clear that

the parties whose property was affected had, as matter of fact, due notice and substantial hearing; but, as I read the record, such is not the case here. Many of the orders seem to have been made *nunc pro tunc* in regard to the time for hearing. Several of the petitions were set for hearing on December 8th. On that day no orders were made; nothing was done until December 15th, when they were continued to December 18th. On December 19th the whole matter was continued to and set for hearing December 22d. Thereafter, and without further notice or opportunity to appear, the court, on an *ex parte* motion, took up the case and finally disposed of the matters before it, two days before the day set for regular hearing. These interesting, if not suspicious, facts appear on the face of the court's records, and in ordinary cases would not support a judgment. *Tompkins v. Clackamas*, 4 Pac. Rep. 1210.

3. The report and judgment show that the assessment was for about \$100,000 in excess of the benefits. If I understand the authorities on this proposition, a statute which imposes an assessment in excess of special benefits is unconstitutional. *Davidson v. New Orleans*, 34 La. Ann. 170; *Taylor v. Palmer*, 31 Cal. 254; *Creighton v. Mason*, 27 Cal. 624; *In re Market St.*, 49 Cal. 549; *Chicago v. Larned*, 34 Ill. 203.

It may be admitted that the legislature had the power to declare the benefit, but I fail to find any declaration of that kind in the act referred to. It is true the act speaks of "the district hereinafter described as benefited by said widening," but there is no direct finding of the fact of benefit therein by the legislature. On the contrary, the board of commissioners are therein directed to ascertain and fix the extent of damages and benefits "according to the judgment of the board." Section 7.

4. The bondholders stand in no better position than the municipal authorities. The bonds are not general or ordinary municipal bonds, issued for the benefit of the general fund. They are payable out of a special fund, raised by special tax, on a small district. They do not show on their face that the act has been complied with,—which is essential even if the act referred to be valid,—and consequently they are not negotiable so as to cut off the defenses claimed. *Carroll Co. v. Smith*, 18 Reporter, 33; *Williams v. Roberts*, 88 Ill. 11; *Cagwin v. Hancock*, 84 N. Y. 532; *Craig v. Andes*, 93 N. Y. 405; *Lyons v. Chamberlain*, 89 N. Y. 585.

72 Cal. 475

WHITE v. SUPERIOR COURT, etc. (No. 11,614.)

(Supreme Court of California. June 7, 1887.)

NEW TRIAL—PRACTICE—PROHIBITION.

Under the California practice, where the notice of the intention to move for a new trial, as served upon the opposite party, specifies that the motion will be heard upon a statement of the case, and the notice is not filed, and no draught-statement of the case for new trial has been served or filed, the trial court has no power to consider the motion; and if it persists in doing so the supreme court will issue a writ of prohibition to prevent it.

In bank. Petition for writ of prohibition.

The petition prayed that a writ of prohibition issue directing that the superior court, and judge thereof, be absolutely restrained from any further proceedings in the hearing of motion for new trial in the case of *White v. Gutenberg*, which was an action brought originally in a justice's court to recover a debt of \$100.

Wilbur F. George, for petitioner. Grove L. Johnson, for respondent.

BY THE COURT. On appeal from the justice's court upon questions both of law and fact, the action (*White v. Gutenberg*) was retried in the superior court, and a judgment therein rendered in favor of the plaintiff, the pe-

itioner for prohibition. The defendant Gutenberg served a notice of intention to move for a new trial, specifying that said motion would be heard upon a statement of the case, but such notice was never filed. No draught-statement of the case for new trial was ever served or filed by the defendant in said action. Neither the plaintiff, White, nor his counsel, ever stipulated that the statement of facts on which the cause was tried, should be adopted as the statement on motion for new trial, nor was it ever agreed between White and Gutenberg, or their respective counsel, that the motion should be heard, although the notice of intention was not filed. The notice of intention to move for new trial was served July 10, 1882. The present proceeding was commenced May 5, 1886. December 15, 1885, plaintiff, White, moved to dismiss the motion for new trial on the grounds (1) no notice of intention, etc., had been filed; (2) no statement had been served or filed, or any affidavits, etc.

The superior court has no jurisdiction to hear and determine the motion. Ordered and adjudged that the writ issue prohibiting said superior court, and the judge thereof, as prayed for in the petition herein.

72 Cal. 363

HECHT v. SLANEY and others. (No. 11,908.)

(*Supreme Court of California. May 23, 1887.*)

1. LIMITATION OF ACTIONS—RUNNING OF STATUTE—IMPLIED TRUST.

Upon a suit to subject to the satisfaction of a judgment property of an insolvent debtor, upon which he has filed a declaration of homestead, and which he has procured to be set apart to him as exempt in insolvency proceedings, upon the ground that the property was not subject to be selected as a homestead, and that the order in the insolvency proceedings was obtained by fraud, and without notice to the parties interested, and that, therefore, the debtor holds the property as trustee for his creditors, the statute of limitations will begin to run at least from the time when the stay effected by the insolvency proceedings ceased to operate.

2. SAME—NOTICE.

A party is presumed to know whatever he might with reasonable diligence have discovered; and when the fundamental facts upon which an alleged fraud rests are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches, nor stay the running of the statute of limitations.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

Graves & O'Melveny and *Chapman & Hendrick*, for appellants. *H. M. Smith* and *W. H. Clark*, for respondents.

BELCHER, C. C. This is an appeal by the plaintiff from a judgment entered against him, after demurrer sustained to his complaint. The facts set forth in the complaint may be briefly stated as follows: On the seventeenth day of May, 1879, S. W. Levy recovered a judgment in the district court of the Twenty-third judicial district of this state against the defendant William Slaney for the sum of \$2,296.17, and \$32.20 costs. On the tenth of May, 1884, Levy assigned the judgment to the plaintiff, and no part of it has ever been paid. On the twenty-fourth of July, 1879, Slaney filed a petition in insolvency in the county court of Los Angeles county, and on the same day an order was made staying all proceedings against him; which order remained in full force till the twenty-eighth of February, 1882. On the thirtieth of August, 1879, H. M. Mitchell, sheriff of Los Angeles county, was appointed assignee of the estate of Slaney, and received the usual assignment; and he continued to act as such assignee until he was discharged, on the twenty-eighth of February, 1882. On the twenty-fifth of February, 1879, Slaney was the owner of certain real property in the city of Los Angeles, and filed a declaration of homestead thereon. On the seventeenth of September, 1879, he filed a petition in the county court, where his insolvency proceedings were pending, asking that the property on which he had filed his declaration of

homestead be exempted and set apart to him. The petition represented that the property had been duly selected as a homestead, and was exempt from execution; and without any notice of the filing of the petition, or of the time set for the hearing thereof, the property was, by an order of court made on the twenty-fourth of January, 1880, set aside to him as a homestead.

It is then alleged that the representations in the petition were false; that the property was then worth at least \$10,000, and was not subject to be claimed as a homestead, because at the time of its selection, and up to the time when it was set aside, it was used almost wholly for business purposes.

It is further alleged that the representations were fraudulent, and made for the purpose of defrauding his creditors by withdrawing this property from the assignee's hands, and that it really constituted all the assets of the insolvent; that neither the plaintiff nor his assignor had any notice of the order setting aside the property, or of the representations, until the seventh day of May, 1884, and that, by reason of the imposition practiced upon the court in procuring the order, he became, and now holds the property as, a trustee for his creditors, including the plaintiff.

The prayer is that he be adjudged to hold the property in trust for his creditors, and that it be sold, and the proceeds applied to the payment of the debt of plaintiff, and other creditors who may come in. The defendants, other than Slaney, were made parties to the action because they claim some interest in or lien upon the property.

The demurrer was upon the grounds—*First*, that the complaint did not state facts sufficient to constitute a cause of action; *second*, that Mitchell should have been made a party plaintiff; *third*, that the action was barred by sections 836 and 843 of the Code of Civil Procedure.

The action was commenced on the ninth day of April, 1886,—more than six years after the homestead was set aside, and more than four years after the insolvency proceedings were terminated,—and it was brought to set aside a judgment, and to establish and enforce against the defendant a constructive trust. The plaintiff set forth in his complaint the facts in regard to his judgment; but this was only to show that he was a creditor, and as such entitled, with the other creditors, to the relief which he sought.

The theory upon which the action was commenced evidently was that the property was not subject to be selected as a homestead, and so the declaration filed did not constitute it a homestead, and that, as there was no valid homestead when the order was made setting it apart, the order was a nullity, and the property was still subject to the payment of the insolvent's debts. And this theory was supposed to be sustained by the decisions of this court. *Tiernan v. His Creditors*, 62 Cal. 286; *Laughlin v. Wright*, 63 Cal. 113; *Matzen v. Shaeffer*, 65 Cal. 81, 3 Pac. Rep. 92.

In this view of the case the principal question is, was the action barred by the statute of limitations? Whatever may once have been the rule, it is now well settled that the statute of limitations runs in favor of a defendant chargeable as a trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust. *Howell v. Howell*, 15 Wis. 55; *Haynie v. Hall*, 5 Humph. 290; *Wilmerding v. Russ*, 33 Conn. 67; *Kennedy v. Baker*, 59 Tex. 150; *Currey v. Allen*, 34 Cal. 254; *Perry, Trusts*, § 865. In such a case the statute begins to run when the wrong complained of is done, and under our Code the limitation is four years. Section 843, Code Civil Proc.; *Piller v. Southern Pac. R. Co.*, 52 Cal. 42.

As the plaintiff's action was commenced more than four years after the order staying all proceedings against the insolvent ceased to be in force, it was clearly barred, unless saved by the averment in the complaint that neither the plaintiff nor his grantor had any notice of the order setting aside the homestead, or of the false and fraudulent representations in the petition asking that it be set aside, until the seventh of May, 1884.

But these were matters of record in the court, which; with reasonable diligence, Levy, the assignor, might seasonably have known, and, it would seem, should have known. As no averment is made to the contrary, it must be presumed that he actually knew of the filing of the declaration of homestead, of the value and use of the property at that time, and that, notwithstanding the declaration, it did not become a homestead in fact; that proceedings in insolvency were commenced, and regularly conducted to an end; and that he, as a creditor, was entitled to have the property sold, and the proceeds distributed. Still, though no dividend was received, both he and the plaintiff slept on their rights for years. No reason being assigned why notice of the representations and order was not sooner had, the case would seem to be one where the maxim, *vigilantibus non dormientibus, jura subveniunt*, has peculiar application. The rule in such cases is that a party is presumed to know whatever he might with reasonable diligence have discovered: and when the fundamental facts upon which the alleged frauds rest, are matters of public record, open to his inspection, ignorance of the fraud will not excuse his laches, nor stay the running of the statute. *Smith v. Talbot*, 18 Tex. 775; *Nudd v. Hamblin*, 8 Allen, 130; *Manning v. San Jacinto Tin Co.*, 7 Sawy. 418, 9 Fed. Rep. 726.

It follows, in our opinion, that the action was barred, and the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, O.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 390

PEOPLE v. BROWN. (No. 20,277.)

(Supreme Court of California. May 31, 1887.)

QUALIFICATION OF JUROR—OPINION—CROSS-EXAMINATION.

Where a proposed juror, who was challenged for actual bias, stated on his examination that he had formed an opinion on the subject of defendant's guilt which it would require evidence to remove, but that he could give the defendant a fair trial, *held*, that the exclusion of questions asked by defendant's counsel, evidently designed to bring out the character and force of the opinion, was error.¹

Department 1. Appeal from superior court, Tulare county.

Trial for murder. Defendant was convicted. The point referred to in last paragraph of the opinion is the exclusion by the court of a question put by defendant to a witness, as follows: "*Question*. Was the wound inflicted on the breast of Luther Brown (deceased) made by the entry or exit of the bullet?" The objection was that no sufficient foundation had been laid for the introduction of such testimony, and that it did not appear that the witness was an expert on gunshot wounds and was a surgeon.

Oregon Sanders, J. W. Davis, and *P. Reddy*, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

TEMPLE, J. The defendant was tried upon a charge of murder, and was convicted of murder in the first degree. The appeal is from the judgment, and from an order denying a new trial.

On the trial, M. P. Troxler was examined as to his qualifications as a juror. He stated that he had heard some talk of the case, and had read accounts of the affair in the local newspapers, and he thought he read the evidence taken

¹See *People v. Crowley*, (N. Y.) 6 N. E. Rep. 386, and note; *Stoots v. State*, (Ind.) 9 N. E. Rep. 380; *State v. Vatter*, (Iowa,) 32 N. W. Rep. 506; *State v. Sopher*, (Iowa,) 30 N. W. Rep. 917; *State v. Saunders*, (Or.) 12 Pac. Rep. 441; *Steagald v. State*, (Tex.) 3 S. W. Rep. 771.

before the coroner, and had formed an opinion in reference to the guilt or innocence of the defendant. He was then asked by defendant's counsel, was that opinion favorable or unfavorable to the defendant? Objection was made that it was irrelevant, incompetent and immaterial, and the court sustained the objection. Defendant then asked: "What is your opinion *now*, from what you have read, as to the guilt or innocence of the defendant?" To which there was interposed the same objection, and the same ruling was made.

The court also refused to allow the following: "What impression did the reading of these articles make on your mind? Counsel then asked: Could you enter upon the trial of this case with the presumption that the defendant is innocent until he was proved guilty, or would you enter upon the trial presuming that defendant is guilty, and desiring to see him vindicated by the testimony of the witnesses here? *Answer.* I don't think I could. *Question by Counsel for the Defense.* That is, you don't think you could enter upon the trial of the case with the belief that the defendant is innocent? *A.* No, sir. *Q. by Counsel for Defense.* Do you think you could give the defendant a fair and impartial trial? *A.* I think I could, notwithstanding I have an opinion from what I have heard and read. It would take good evidence to remove that opinion. *Q.* In other words, you would be of opinion that defendant is guilty until he had proved himself innocent; isn't that the exact state of your mind?" Objected to as being irrelevant, incompetent, and immaterial.

All of these rulings against the defendant were duly excepted to, and the juror was challenged for actual bias. The juror proceeded to say further, in reply to the district attorney, that he could and would give the defendant a fair trial, etc. The court denied the challenge, and the defendant exhausted all of his peremptory challenges before the panel was completed.

The precise question before the court was as to the existence of a state of mind on the part of the juror which would or might prevent him from acting with entire impartiality, and without prejudice to the rights of defendant. It was evident the juror had a fixed opinion as to the guilt of defendant, which he said would require good evidence to remove. The purposes of the attempted examination was to ascertain, so far as possible, the extent of this opinion, its character, and whether it resulted to any extent from prejudice against defendant or his case. We think the examination was proper, and that the court erred in sustaining the objections of the district attorney. This matter was discussed in the case of *People v. Hamilton*, 62 Cal. 377. The precise point here made was, perhaps, not involved in that case, but we are satisfied with the reasoning upon this subject in that opinion.

Misapprehension upon this seems to have arisen from the fact of the former practice under a different statute, and the decisions based upon it. The former statute made an unqualified opinion upon the subject of defendant's guilt a disqualification, without reference to the state of the juror's mind in other respects. Of course, on such an issue, it was not important to know whether the opinion was favorable or unfavorable. But even then, when the challenge for actual bias was interposed, it was competent to ask the questions here excluded. Now, the whole inquiry is made upon the challenge for actual bias, and is not confined to the question as to whether the juror has a fixed opinion or not, but extends to all matter of prejudice which would tend to establish that the juror would not be impartial. Entertaining a fixed opinion that the defendant is guilty would seem, under the present statute, to be sufficient to sustain a challenge, unless the court finds something else, to-wit, that he can and will act fairly and impartially upon the matters to be submitted to him. The court is not bound to take the simple statement of the juror upon these matters, but counsel have a right to make such inquiries as will bring out the character and force of the conviction he has. How else

can the court determine whether he is able, notwithstanding his prejudice, to act fairly and impartially?

The other question raised may not arise upon the new trial, or, if it should, the circumstances may be very different. The cases upon the subject are very numerous, and from them it is very difficult, probably impossible, to deduce any rule or body of rules which would satisfactorily indicate when a witness may be allowed to give his opinion. A decision of this question, therefore, which may not again arise, would serve no practical end.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: MCKINSTY, J.; PATERSON, J.

2 Cal. Unrep. 761

HALEY v. HALEY. (No. 11,778.)

(Supreme Court of California. May 28, 1887.)

1 DIVORCE—GROUNDS OF—CHARGE OF UNCHASTITY.

A charge by a husband, in a cross-bill filed by him for divorce, that his wife was pregnant by some one other than himself when he married her, and that she concealed the fact from him, tends to cause the wife "grievous mental suffering," and is a sufficient ground to sustain a subsequent bill by the wife, where it appears that the charge was false and malicious, and that the husband's bill was dismissed.¹

2. SAME—EVIDENCE.

The provision of Civil Code Cal. § 130, that "no divorce can be granted upon the uncorroborated * * * testimony of the parties," has no application to a case where the wife seeks a divorce on the ground of a false and malicious charge against her by the husband of concealed pregnancy by another man at marriage, although she is the only witness who gave testimony as to what her feelings about the charge were. Where the court finds that the charge was false, and there is nothing in the record to negative the fact that the wife is a pure and virtuous woman, the presumption is that such a charge had its natural effect on such a woman, and caused her "grievous mental suffering."

3. SAME—DECREE—ASSIGNMENT OF JUDGMENT TO WIFE.

Where the court, upon decreeing a divorce in favor of the wife, finds that there is a judgment outstanding against her in favor of the husband, and that the judgment, which was wrongfully rendered, was for money which he had given her in consideration of the relinquishment by her of her rights in the homestead, so that he might sell it, the court may order the judgment to be assigned to her.

4. ESTOPPEL—JUDGMENT—DIVORCE.

A decree dismissing a bill filed by the wife for divorce, and also dismissing the husband's cross-bill, because the charges of neither party had been sustained, does not operate as an estoppel upon the wife to bring another bill against the husband on the ground that the charges in his cross-bill, which the court had found to be false, amounted to cruel and inhuman treatment.²

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

In 1884, some time between June 7th, at which date the parties were married, and September 19th, Presentacion B. De Haley, respondent, commenced suit in the superior court of Los Angeles county against her husband, Salisbury Haley, appellant, for divorce. The bill was based upon a charge of "cruel and inhuman treatment, in that he had accused her of having committed adultery." This suit, which is known and referred to in this statement as No. 3,449, resulted October 7, 1884, in a decree in favor of the wife of

¹See *Minde v. Minde*, (Mich.) 32 N. W. Rep. 868; *Whitacre v. Whitacre*, (Mich.) 31 N. W. Rep. 327, and note; *Vanduzer v. Vanduzer*, (Iowa.) Id. 956; *Burlage v. Burlage*, (Mich.) 32 N. W. Rep. 866; *Williams v. Williams*, (Tex.) 2 S. W. Rep. 823, and note; *Leach v. Leach*, (Me.) 8 Atl. Rep. 349.

²As to when a judgment is not an estoppel, see *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54; *Dicken v. Hays*, Id. 58; *Riverside Co. v. Townsend*, (Ill.) 9 N. E. Rep. 65, and note; *Weiss v. Guerinian*, (Ind.) Id. 399; *Richardson v. Richards*, (Minn.) 30 N. W. Rep. 457; *Elgin Nat. Watch Co. v. Meyer*, 29 Fed. Rep. 225.

absolute divorce. A motion was made by the husband, December 16, 1884, for a new trial, which was overruled, and an appeal was thereupon taken to the supreme court, which, May 14, 1885, reversed the superior court, and granted a new trial. *Haley v. Haley*, 7 Pac. Rep. 3. The motion for the new trial in the superior court was supported, in part, by the affidavit of the husband set out below. On May 8, 1885, the husband filed a bill for divorce against the wife. The substance of this bill is also set out below. This bill was dismissed, on advice of counsel, May 13, 1885, pending the appeal in No. 3,449. When the *remittitur* in that case reached the superior court, the husband filed a cross-complaint containing the substance of the bill filed by him May 8, 1885, and subsequently dismissed. A supplemental complaint was filed by the wife, June 17, 1885, setting out the affidavit used by the husband on his motion for a new trial, and the bill filed by him, May 8, 1885, and alleging statements by him to various persons that his wife was pregnant by some one other than himself, and that she had had a child by some other than himself. This bill was demurred to, and the demurrer was sustained. The court (BRUNSON, J.,) found January 14, 1886, as a matter of fact, among other things, "that defendant, during said marriage, and before plaintiff left his house, never accused her of being pregnant by some or any man other than himself, or desiring to have sexual intercourse with some or any man other than himself; nor did he taunt or accuse her of committing adultery, or of desiring to commit adultery with some or any man other than himself." As to the cross-complaint of the husband, the court found, among other things, "that at the time of said marriage, June 7, 1884, plaintiff was not actually or at all pregnant with child by the paternity of any individual." The complaint and cross-complaint were thereupon dismissed, and the divorce refused.

The wife then filed this bill, alleging in paragraphs 4, 5, and 6 as follows: "*Fourth*. Plaintiff alleges that, since said marriage was consummated, the said defendant has treated the plaintiff in a cruel and inhuman manner, and particularly in this: On or about the sixteenth day of December, 1884, the said defendant filed in this court an affidavit, verified by himself, in a certain action then and there pending between plaintiff and himself, which said affidavit was thereafter read by and made known to a number of persons, and is in words and figures, to-wit:

"IN THE SUPERIOR COURT OF LOS ANGELES COUNTY, STATE OF CALIFORNIA.

"*Presentacion Haley, Plaintiff, vs. S. Haley, Defendant.*

"S. Haley, being duly sworn, deposes and says that on December 12, 1884, the plaintiff in this action arrived from San Francisco, since which time affiant has seen her numerous times, and finds that she is in an advanced state of pregnancy; and, as she appears to affiant, she is from six to seven months advanced in pregnancy; that affiant first discovered that she was pregnant in July last past, in seeing that her belly, breasts, and feet were swelling, of her having nausea in the morning, since which time affiant, on every occasion of seeing her, discovered that she was advancing in pregnancy, and on the fourth of October, at the trial of this cause, affiant discovered unmistakable signs of pregnancy in plaintiff. Affiant and plaintiff intermarried June 7, 1884, and affiant had no connection with plaintiff until June 19, 1884.

"S. HALEY.

"Subscribed and sworn to before me this sixteenth day of December, 1884.

"A. W. POTTS, Clerk.

"By A. RIMPAU, Deputy Clerk."

"All of which statements in said affidavit contained were wholly and absolutely false and malicious, and became known to many persons in this com-
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munity, and were communicated to this plaintiff, by reason whereby she suffered grievous mental pain and anguish.

"*Fifth.* Plaintiff further alleges that on or about the eighth day of May, 1885, defendant caused to be prepared and filed in this court a complaint in a certain action entitled '*Salisbury Haley vs. Presentacion Ballestero De Haley*,' in which said complaint he charges plaintiff, to-wit: 'That heretofore, to-wit, on the seventh day of June, 1884, the plaintiff and defendant were intermarried as husband and wife. Now plaintiff shows to the court and avers that the defendant, by his inducement of this plaintiff to enter into marriage with her, perpetrated a grievous fraud upon this plaintiff, and that the defendant did willfully deceive and cheat this plaintiff as to the defendant's capacity to fulfill the duties, obligations, and ordinary incidents of marriage, in this: That at the time of the intermarriage of plaintiff and defendant, on the seventh day of June, 1884, as aforesaid, this defendant was in fact, unknown and unsuspected by this plaintiff, actually pregnant with child by some person other than this plaintiff, and that this plaintiff was entirely ignorant of the fact of this defendant's pregnancy at the time of the intermarriage of plaintiff and defendant as aforesaid. And plaintiff avers that such pregnancy of this defendant was not by this plaintiff, and plaintiff avers that he never had sexual intercourse with defendant prior to the marriage of plaintiff and defendant on the seventh day of June, 1884, as aforesaid.'

"*Sixth.* That each and every of said allegations and statements were false, unfounded, and malicious, and were made by the said defendant for the sole purpose of grieving the said plaintiff, and that, before the commencement of this action, the same were made known to this plaintiff, and that thereby she was subjected to great shame, and to grievous mental anguish and suffering, and was made sick, and her life rendered miserable and wretched. Wherefore plaintiff prays judgment."

There was a demurrer to the complaint, which was overruled. The husband then filed a cross-complaint, alleging desertion. On May 3, 1886, the court passed a decree dissolving the marriage, allowing the wife to resume her maiden name, and awarding her \$1,500 and costs. The decree was based on the following findings of facts:

"(1) That all the allegations of the complaint herein are true, and that the articles set forth in said complaint as cause of action are complete, are not misleading, nor are they mutilated.

"(2) The judgment made and entered in the action of *P. B. De Haley vs. S. Haley* on January 14, 1886, in said court, was not and is not an adjudication of any of the matters charged in the cross-complaint in this action, or of any of the issues tendered thereby.

"(3) That on the eighth day of April, 1886, the defendant herein filed a cross-complaint against the plaintiff praying for a decree of divorce upon the ground of desertion.

"(4) That the allegation of desertion pleaded in said cross-complaint is true.

"(5) That plaintiff and defendant intermarried on the seventh day of June, 1884, at the city and county of Los Angeles, state of California; that after said marriage, and on the same day, the defendant filed his homestead declaration upon certain lands and premises situated in said city of Los Angeles, and upon which he and the said plaintiff then resided; that said homestead declaration was in all respects duly made, certified, and recorded as the law required; that on the trial of the cause of *P. B. De Haley vs. S. Haley*, (No. 3,449,) this court awarded to the defendant, S. Haley, the said homestead, and to the plaintiff, P. B. De Haley, the sum of \$1,500, for and on account of her interest therein; that subsequent to said decree, and while the same was in full force, the said S. Haley, being desirous of selling said homestead property, paid to the plaintiff herein the said sum of \$1,500, whereupon, and by

reason of such payment, this plaintiff made, executed, and delivered her abandonment of said homestead in due form of law, and quitclaimed all her right, title, and interest therein, as directed by the said S. Haley. Thereafter the said judgment was, on appeal to the supreme court, reversed, and the cause remanded for a new trial, and said action was thereafter, and after the filing in this court of the *remittitur* from the supreme court, tried, and the prayer of the complaint denied; that subsequent to such determination of said action, the said S. Haley commenced an action in this court against the plaintiff herein for the recovery of the said sum of \$1,500 so as aforesaid awarded to her in lieu of her interest in the said homestead property, and the action herein last above referred to came on regularly for trial, and thereupon, to-wit, on the twenty-first day of April, 1886, a judgment in favor of S. Haley, plaintiff, and against the said P. B. De Haley, defendant, was duly made, given, and entered; and it appearing to the court that the money for which said last-named judgment was given, equitably and of right represented the interest of the said P. B. De Haley in and to the homestead so declared as hereinbefore found, it is further found that plaintiff herein is entitled to have awarded to her, as and for her interest in the estate and homestead of the defendant, S. Haley, the said judgment of \$1,500 and costs, and the whole thereof, rendered as aforesaid on, to-wit, the twenty-first day of April, 1886."

The husband thereupon took this appeal.

S. Haley and *D. Lyons*, for appellant. *Hupp & Glowner*, for respondent.

FOOTE, C. Mrs. Haley instituted an action for divorce against her husband, Salisbury Haley. She alleged and proved that, in a former action for divorce instituted by him against her, he had, in his pleading and affidavits filed in the cause, charged her falsely and maliciously, and for the purpose of grieving her, with having been pregnant at the time of their marriage by a man other than himself, and that she had concealed her condition from him, and by such concealment induced him to marry her. The averments of the complaint were found to be true.

We think that such a charge tends to cause "grievous mental suffering," and comes within the rule laid down in *Powelson v. Powelson*, 22 Cal. 358. The plaintiff testified that it did in fact cause her grievous mental suffering. It is contended, however, that, inasmuch as no other witness gave evidence as to what her feelings were, her testimony on this point is uncorroborated. But the court finds that the charges were false, and there is nothing in the record to negative the fact that Mrs. Haley was a pure and virtuous woman. This being the case, we think the presumption is that the charge had its natural and usual consequence, and that it is no more necessary to prove that it induces suffering than to prove that bodily injury is followed by pain. The court was entirely justified in its finding on that point.

The judgment made and entered in a former action between these same parties was not such an adjudication of the matters set up by the cross-complaint in the present action as would bar the plaintiff's right of recovery; for, although Mr. Haley's charges against his wife of a want of chastity, etc., had been previously passed upon by the trial court in the former action, yet that court found adversely to him on the point, and repudiated the charge as being untrue. Therefore it would be a violation of Mrs. Haley's legal right to say that because her husband had in that first action made groundless and cruel charges against her, on which the court had fixed the seal of disbelief, that she, in this action, may not, by her complaint, make such charges so made the proper basis of present judicial inquiry, with a view to determine whether such conduct on his part did or not entitle her to seek for and obtain a divorce from him.

We perceive no error in the trial court's assigning to her the judgment for \$1,500, which her husband had formerly obtained against her; for to enforce

that judgment would have been inequitable, since the money, which was the basis of the action wherein that judgment was recovered, had been voluntarily given to her by him on the settlement of a former suit, and he had no just right to recover it back.

Upon the whole record, we observe no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

72 Cal. 384

Ex parte McCARTHY. (No. 20,314.)

(Supreme Court of California. May 31, 1887.)

VAGRANCY—COMPLAINT.

Where the acts relied upon to establish vagrancy are that the accused was "an idle and dissolute person, who wandered and roamed * * * about the streets of the city at late and unusual hours of the night," the complaint is sufficient to charge the offense under Pen. Code Cal. § 647, defining who are "vagrants." If it sets out those facts, it need not allege that the person prosecuted is "without visible means of support," and, having "the physical ability to work, does not, for the space of 10 days, seek employment, nor labor when employment is offered."

On *habeas corpus*.

M. S. Wert and Martin Quinlan, for petitioner. E. B. Stonehill, Dist. Atty., for respondent.

SEARLS, C. J. The petitioner, Alice McCarthy, was convicted of vagrancy in the police court in and for the city and county of San Francisco, and upon an appeal to the superior court the judgment was affirmed. She now asks to be discharged upon the ground that the complaint against her stated no offense of which the court could take jurisdiction, and hence that the judgment is void.

The substance of so much of the complaint as is necessary to be stated is that Alice McCarthy, on and from the twenty-sixth day of April to the twenty-sixth day of May, 1887, at the city and county of San Francisco, committed a misdemeanor, and during said period "willfully and unlawfully was, has been, and during said time continued to be, and still is, an idle and dissolute person, who wanders and roams, and has during said time wandered and roamed, about the streets of said city and county at late and unusual hours of the night."

Section 647 of the Penal Code, under which petitioner was convicted, specifies various acts as constituting vagrancy, among which are common prostitutes, common drunkards, etc., including, also, idle and dissolute persons who wander and roam about the streets, etc., using the language of the complaint herein. The first clause of the section is in the following language: "Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for space of ten days seek employment, nor labor when employment is offered him, every healthy beggar who solicits alms as a business, * * * is a vagrant."

The contention of petitioner is that the statute is to be construed in the light of this first clause, and as though its requirements were repeated in connection with *each* of the other acts defined as constituting vagrancy, and that to charge a defendant with being a common drunkard, a healthy beggar, an associate of known thieves, etc., is not sufficient to constitute him a vagrant, without further charging him to be without visible means of living, etc. I do not so construe the statute. It enumerates in several groups certain acts which shall constitute vagrancy, and he or she who is guilty of the acts thus enumerated in any one of these groups is liable to the penalty of the statute.

People v. Frank, 28 Cal. 508. The complaint charges all of the acts specified in one of these groups, and is therefore sufficient. The fact that it states, in addition, some of the acts specified in other and independent groups of the same section does not invalidate it.

The case of *People v. Forbes*, 4 Parker, Crim. R. 611, relied on by petitioner's counsel, is not in point. In that case the defendant was shown to have been convicted as a vagrant in this, to-wit: "That she is a common prostitute and idle person." In that state (New York) there were two separate statutes under which a conviction of vagrancy could be had. One applied to "all common prostitutes who had no lawful employment whereby to maintain themselves," under which the defendant was presumed to have been convicted, and as the record only showed that she was a common prostitute, etc., and failed to show or charge that she was "without lawful employment," etc., it was held sufficient. Under our statute, as was well said in that case, every word which *defines the class or makes a part of the description*, is material and important, but those words which go to define any other class of vagrants need not be inserted. The doctrine of *People v. Forbes, supra*, applies to those of the charges set out in the complaint which fail to state all the requisite facts to constitute vagrancy, but has no application to the charge against defendant herein quoted, which, standing alone, is sufficient to maintain and uphold the judgment.

The court had jurisdiction of the prisoner, and she was convicted of an offense within the statute. The prayer of the petitioner is denied, and she is remanded to the custody of the sheriff.

72 Cal. 402

PEOPLE v. WATSON. (No. 20,282.)

(Supreme Court of California. May 31, 1887.)

LARCENY—ALLEGATION OF OWNERSHIP.

Where the information charges larceny from the person of one "Lizzie G.," and that the property was the personal property of "Lizzie G.," it is sufficient, under Pen. Code Cal. § 956, providing that "an erroneous allegation as to the person injured * * * is not material" when the "offense * * * is described with sufficient certainty in other respects to identify the act," although "Lizzie G." was a married woman, and the property stolen was bought with the money of her husband.

In bank. Appeal from superior court, San Francisco.

Indictment for grand larceny.

J. T. Rogers, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of grand larceny of a purse. The information charges larceny from the person of one Lizzie Golden, and that the property taken was the personal property of Lizzie Golden. On the trial the defendant asked the court to instruct the jury that if they find the said Lizzie Golden, at the time of the larceny, was a married woman, and that the purse was bought with the money of her husband, they should acquit the defendant. The court not only refused the instruction, but gave instructions of an exactly opposite effect.

Section 956, Penal Code, seems to settle this appeal: "When an offense involves the commission of, or the attempt to commit, a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." In this case there can be no question whatever as to the sufficiency of the description to identify the act.

The order and judgment are affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; MCKINSTRY, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

v.14p.no.2—7

(72 Cal. 393)

SCAMMON v. DENIO. (No. 11,909.)

(Supreme Court of California. May 31, 1887.)

1. CONTRACT—FOR BUILDING—ACTION.

In an action to recover for building a house for defendant under a contract, the court refused to allow for extra work claimed to have been done, the contract providing that claims for extras should be submitted to arbitration, and deducted the expense incurred by defendant in completing the house, plaintiff having refused, upon notice, to complete it, in which case defendant, under the contract, had a right to do so himself; *held*, that there was no error.

2. COSTS—OFFER OF JUDGMENT.

Under Code Civil Proc. Cal. § 997, providing for the entry of judgment upon an offer of compromise, if accepted within five days, and, in case plaintiff does not accept the offer, and fails to recover more than the amount of it, that he shall pay the costs from the date of the offer, plaintiff is not affected by an offer, not accepted by him, in case the trial comes on, and is concluded within five days after the making of the offer.

Appeal from superior court, county of Los Angeles.

Action to recover balance due on building contract, and to enforce a lien.

Barclay, Wilson & Redick, for appellant. *Wells, Van Dyke & Lee*, for respondent.

MCFARLAND, J. This action was brought by appellant (plaintiff in the court below) to recover \$1,348.10, the alleged balance due upon a written contract by which appellant was to build a house for respondent, and to enforce a mechanic's lien against the house and premises on which it was erected. The court gave judgment to appellant for \$483.72 only, and without costs or attorney's fee, and also gave judgment for respondent for all costs which accrued after the date of a certain offer to compromise herein-after mentioned. The judgment provides for the enforcement of the lien for the amount above stated. Appellant appeals from that portion of the judgment which allows him only \$483.72, and also from that portion of it which denies him costs and attorney's fees, and gives costs to respondent. The case was tried without a jury.

1. Appellant complains of the refusal of the court to consider evidence about certain extra work and materials which he claims to have done and furnished during the construction of the house. But the court finds that the contract provides that claims for such extras should be submitted to arbitration, and that appellant made no request or offer to so submit them, and the finding is apparently correct. The court finds that appellant neglected and refused, after notice, to furnish workmen and materials to finish the house, and that respondent was compelled to furnish, and did furnish, the same at an expense of \$58.45, which sum the court allowed respondent. This ruling is assigned as error. The court finds that respondent was allowed to do this by the contract; and, as the whole contract was introduced in evidence, although only a part of it is put into the transcript, we see no error in the finding. It does not appear that this expenditure comes within the arbitration clause of the contract, as contended by appellant. We think, therefore, that the judgment of the court below, as to amount found due, should not be disturbed.

2. On the day of the trial of the action, which was the day on which it regularly came on to be heard, but before the trial had actually commenced, respondent served on appellant a notice in writing offering to allow him to take judgment for the sum of \$500; and, as appellant finally recovered a little less than \$500, the court refused to allow him any costs, and gave judgment to respondent for costs accruing after the date of the offer. This ruling was made in supposed pursuance of section 997 of the Code of Civil Procedure. But that section, after providing for such an offer of compromise, proceeds as fol-

lows: "If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay defendant's costs from the time of the offer."

It will be observed that this section requires no affirmative action on the part of a plaintiff unless he elects to accept the offer, and then he must give and file a notice of acceptance. There is no provision for an affirmative refusal to accept, and he may give and file the notice at any time within five days. The offer, therefore, has no effect whatever until after the expiration of five days, unless before that plaintiff accepts in the mode provided. It is clear that the Code does not mean that a plaintiff, on the very eve of a trial, with his witnesses perhaps all present, and his expenses nearly all incurred, shall, on the spur of the moment, be forced to determine at once the important question whether he shall yield a part of what he may consider a just and legal claim, or run the hazard of losing all his costs and necessary disbursements, and having judgment against him for costs of the other party. The clear meaning is that he shall have five days in which to consider the proposal made by the defendant. And if, in the mean time, without acceptance by plaintiff in the manner prescribed, the trial shall have regularly progressed and been concluded, the offer of compromise, as against plaintiff, simply goes for naught. Whether or not, in such a case, after the trial had progressed, and plaintiff had discovered his case to be much weaker than he supposed, he could stop at any time, within the five days, and accept the offer, is a question that does not present itself here; but a case can easily be imagined where the question would be an exceedingly interesting one to a defendant who sought an advantage by serving the offer to compromise on the eve of trial. The above views are entertained by the courts of New York with respect to a similar provision in the Code of that state. *Herman v. Lyons*, 10 Hun, 111; *Pomeroy v. Hulst*, 7 How. Pr. 161; *Walker v. Johnson*, 8 How. Pr. 240.

It is true that the court found that appellant refused to accept the offer; but, in the first place, there is no provision for a refusal, except by a failure to serve and file a notice of acceptance, which may be done at any time within five days; and, in the second place, there is no evidence at all to support the finding. It was evidently based upon the mere fact that appellant proceeded to trial. But he had the right to go to trial on the day regularly set for it, and within the five days, without regard to respondent's offer. He could treat it at that time as of no avail. Section 1195, Code Civil Proc., provides that, in an action to enforce a mechanic's lien, the plaintiff may recover as costs money paid for recording the lien and a reasonable attorney's fee. The court found that the expense of recording was \$7.70, and that \$100 was a reasonable attorney's fee.

It is ordered, therefore, that the parts of the judgment which adjudge that plaintiff do not recover any costs, disbursements, or attorney's fees, and that defendant recover her costs accruing after the date of the offer of compromise be reversed, and the superior court is directed to modify its judgment so as to adjudge to appellant his costs, including his expenses for recording his lien and his attorney's fee of \$100, as found by the court, and so as to direct the sheriff to apply the proceeds of the sale of the premises to the satisfaction of the amount found due appellant, viz., \$488.72, together with his costs, including said expense of recording his lien, and his said attorney's fee, and not to apply any of said proceeds to the costs of respondent. In all other respects the judgment is affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(73 Cal. 387)

LASSEN CO. v. CONE. (No. 11,877.)

(Supreme Court of California. May 31, 1887.)

CONSTITUTIONAL LAW—LICENSE TAX—DISCRIMINATION.

A so-called license tax, levied by a board of supervisors on all sheep pastured in the county, from which those who list their sheep, and pay taxes on them, in said county, are exempted, held unconstitutional, under section 21, art. 1, Const. Cal., forbidding grants of special immunities and privileges, as a discrimination against sheep-owners in other counties.¹

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county.

Chipman & Garter and *E. V. Spencer*, for appellant. *E. R. Dodge*, and *A. L. Shinn*, for respondent.

FOOTE, C. This is an appeal from a judgment rendered against Cone, in favor of Lassen county, whereby there was recovered from him a certain sum of money, viz., \$500, being $2\frac{1}{2}$ cents upon each of 20,000 sheep, which he had pastured in that county, and for the further sum of \$100, as a penalty in not paying the first-named sum, which, by an ordinance passed before that time by the board of supervisors of said county, had been denominated a license tax.

The county claims the right to collect such license fee and penalty by virtue of section 35, part 27, of the county government act, the portion of which, as it is alleged, that gives power to make and enforce such an ordinance, being in these words: "To license for purposes of regulation and revenue all and every kind of business not prohibited by law." Deering, Pol. Code, 845.

The ordinance under consideration, as we think, discriminates in favor of those engaged in the business of raising sheep in Lassen county, as against persons who raise sheep and pay taxes upon them in other counties in the state, and, although denominated a license tax upon business, is in reality a tax upon property. It levies a tax of $2\frac{1}{2}$ cents per head upon all sheep which are pastured in that county, for any period of time during any given year, which tax is, however, *not* to be paid by those who list their sheep as taxable property in that county, and pay taxes on them as such. Thus it undertakes to force sheep-raisers from another county of the state to pay a tax upon property in Lassen county upon which they had already paid a property tax in another county, where it is listed and assessed for taxation. If this is a mere police regulation, why excuse those of the same class from paying it, if they pay a property tax upon it to Lassen county?

Does not this appear as if the two taxes were considered by the board of supervisors as interchangeable and similar? The sheep-raiser of Lassen county need not pay the so-called license tax, if he will pay in lieu thereof the property tax levied and assessed. Taxes for revenue is what the county wants, and to get it, as against those who do not have their property listed and assessed in that county, it levies upon the property of residents of other counties, who have already paid a tax upon it for revenue in their own county, that which is called a license tax, i. e., $2\frac{1}{2}$ cents upon each head of sheep that Cone grazes in Lassen county for a few months in the year, (upon his own land mainly,) upon which he has already for that year paid full property taxes in Tehama county.

It appears to us clear that this ordinance cannot be regarded as a police regulation, and that, so far as the defendant is concerned, it is a discrimination against him upon his property, as a citizen of this state, which is not applied to others of his class, and that it grants an immunity to the same class of persons in Lassen county which is not given to the defendant as one of that class. We are of opinion, therefore, that the ordinance in question is

¹See note at end of case.

violative of that part of section 21, art. 1 of the state constitution, which is as follows: "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens," and which applies as well to an ordinance as to a legislative act.

The judgment should be reversed, and the cause remanded, with directions to the court below to render judgment for the defendant on the findings.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion judgment reversed, and cause remanded, with directions to the court below to render judgment for the defendant on the findings.

NOTE.

Any law which imposes on any person any charge or burden greater than those which are imposed on all others, under like circumstances, is in conflict with the fourteenth amendment to the United States constitution, and therefore void. *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. Rep. 389, and note, 450; *Stockton Laundry Case*, 28 Fed. Rep. 611; *Barthet v. City of New Orleans*, 24 Fed. Rep. 563; *Custard v. Poston*, (Ky.) 1 S. W. Rep. 434; *Railroad Tax Cases*, 13 Fed. Rep. 724, and note, 782; *Town of Monticello v. Banks*, (Ark.) 2 S. W. Rep. 852; *City of St. Louis v. Spiegel*, (Mo.) 2 S. W. Rep. 839; *Town of Highgate v. State*, (Vt.) 7 Atl. Rep. 898; *Excelsior, etc., Co. v. Green*, (La.) 1 South. Rep. 873.

As to laws held not to violate the constitutional provisions requiring equal and uniform taxation, see *Bartlett v. Wilson*, (Vt.) 8 Atl. Rep. 321; *Wurts v. Hoagland*, 5 Sup. Ct. Rep. 1086; *Barbier v. Connolly*, Id. 357; *Pace v. State of Alabama*, 1 Sup. Ct. Rep. 637; *Claybrook v. City of Owensboro*, 16 Fed. Rep. 297.

72 Cal. 486

SIMMONS v. BRINKMEYER. (No. 11,568.)

(*Supreme Court of California. June 9, 1887.*)

MALICIOUS PROSECUTION—ACTION—EVIDENCE.

In an action for malicious prosecution for indecent exposure, a nonsuit was entered on the ground that the evidence failed to show want of probable cause for such prosecution. Plaintiff's evidence showing that, at the time of said alleged exposure, he did not know that he was in sight of any person, or in a place where he was likely to be seen, that there was in fact no indecent exposure, and that he supposed the place was frequently used for the purpose for which he was using it, *held*, that the nonsuit was erroneous, and the evidence should have been submitted to the jury.¹

Department 1. Appeal from superior court, San Bernardino county.
Curtis & Otis, for appellant. *Rowell & Rowell*, for respondent.

TEMPLE, J. This is an appeal from a judgment of nonsuit in an action to recover damages for malicious prosecution. The nonsuit was granted on the ground that the evidence failed to show want of probable cause in the prosecution complained of. There was no question as to the sufficiency of the evidence as to malice, or that the charge had been dismissed, and we think there was evidence to sustain the charge that the prosecution was without probable cause. The plaintiff was prosecuted for indecent exposure of his person; and, if his testimony in this case be true, there was no ground whatever for making such a charge against him. He testifies that he did not know that he was in sight of any person whatever, or at a point where any one was likely to see him, and, in effect, also, that there was in fact no improper exposure of his person. He further testified that, at the time, he supposed the place was one frequently used for the purpose for which he was using it, and did not know

¹ As to the province of the court and jury, respectively, in actions for malicious prosecution, see *Johnson v. Miller*, (Iowa.) 29 N. W. Rep. 743, and note; *McNulty v. Walker*, (Miss.) 1 South. Rep. 55, and note; *Wilson v. Bowen*, (Mich.) 31 N. W. Rep. 81, and note.

that the prosecuting witness or his family were likely to see him, or be offended by the act. If this be so, the mere fact that he was seen would not constitute a violation of the law. At all events, there can be no doubt that the evidence made a case for the jury.

Judgment reversed, and cause remanded for a new trial.

We concur: MCKINSTRY, J.; PATERSON, J.

(72 Cal. 494)

DAVIS v. BAKER. (No. 11,589.)

(Supreme Court of California. June 10, 1887.)

1. ATTACHMENT—LEVY—HOW MADE.

Under Code Civil Proc. Cal. § 542, requiring the sheriff in levying an attachment upon real estate, after recording the attachment papers, to serve them upon the occupant of the property if there is one, otherwise to post them upon the property, posting instead of serving is proper, if the officer, when he goes to make the levy, can find no occupant.

2. SAME—POSTING PAPERS.

In attaching a lot having a small building upon it, posting the attachment papers upon the building complies with the requirement of the statute that they shall be posted in a conspicuous place upon the property.

Department 1. Appeal from superior court, Butte county.

Action to quiet title.

Hundley & Gale, for appellant. *Park Henshaw*, for respondent.

TEMPLE, J. This is an action to quiet title, and the only question in the case is whether a writ of attachment was so levied as to constitute a lien on the premises prior to the conveyance under which the plaintiff claims title. The premises constitute one-half of a lot in the town of Chico, having a frontage of 33 feet; and extending back 132 feet. One Ashbrook, at the time of the levy, had an office upon the lot in a small building, the dimensions of which were said to be 12 by 15 feet. No copy of the writ or notice was left with Ashbrook, but the levy was made by posting on the house as though the premises were unoccupied. The sheriff was examined as a witness, and testified: "*Question*. Do you know whether or not, at that time, there was any one living on the premises? *Answer*. I do not. When I went there to serve the papers, I did not find any one in the house. I waited there quite a while without finding any one, and * * * I posted the papers on the house. Think there was a table, and perhaps a chair or so, but it did not look to me as though it was occupied by any one. There was a light burning in the room, and I waited a long time, but no one appeared. * * * I found nobody in possession when I went there, and no person came while I was there, and there was no occupant at all there that I saw."

It is insisted that the levy is void, because a copy of the writ and a notice was not served upon Ashbrook, who, it is claimed, was, at the time of the levy, an occupant within the meaning of section 542, Code Civil Proc.

The portions of section 542 which are material to this discussion are as follows: "The sheriff, to whom the writ is directed, must execute the same without delay, * * * as follows: (1) Real property * * * by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property if there be one. If not, then by posting in a conspicuous place on the property attached."

It must be admitted that the most ordinary meaning of the word "occupant" is "one who occupies or takes possession; one who has the actual use or possession, or is in the possession of a thing." Occupancy is said to be the

act of holding possession. It will be presumed that the word is used in its most usual sense, unless there can be discovered something in the statute itself which indicates a different use of the word in this particular instance. And we think such intent is readily found. The officer is required to execute the writ without delay. Promptness is generally essential to the beneficial use of the writ at all. The sheriff would be held responsible for any lack of diligence by which loss should accrue. It is not always easy to find out who is in possession of property. In view of the promptness required, it must have been intended that the occupant should be easily discoverable,—in fact, some one visibly occupying the property,—so that, when the officer visits the property for the purpose of completing the levy, he can determine then, by what he can see, whether he shall serve the copies by leaving with an occupant, or by posting.

Again, it was evidently intended that all real estate not by law exempt should be subject to be attached for the debts of the owner. But, if the word "occupant" means simply one in the actual possession of land, there would be a large amount of such property not declared to be exempt, and yet which could not be levied upon. One may be in the actual possession, and yet not be in the county or state. And there might be no other occupant. In such case, there could be no levy if the position of respondent be correct. One fearing an attachment would have but to lock up his place, and go out of the county to be beyond the reach of the writ, so far as his real estate is concerned, of which there was no other occupant. A construction which would lead to such a result is of course inadmissible. Subdivision 2 of section 542, Code Civil Proc., seems to favor this view. That provides for the levy of the writ when the property, though belonging to the debtor, stands on the records of the county in the name of another. It requires copies of the papers to be left with the occupant, if any, and also with such other person, or his agent, or at the residence of either, if within the county. That is to say, it specifically directs, when the property stands in the name of another, the papers shall be served upon him or his agent; and, if they cannot be found at the residence of either, while it omits to provide that, if the occupant cannot be found, it shall be left at *his* residence. Therefore we conclude, repeating what we have already said, the provision as to the occupant is a direction to the officer as to posting when he goes upon the land to complete his levy. If he find an occupant, he must leave the copies of the papers with such occupant; but, if he can find no such occupant, he must post them in a conspicuous place upon the land.

It is also claimed that the levy is void because it is not stated in the return that a copy of the writ, with a description of the property attached and the requisite notice were posted in a conspicuous place on the land. On the trial the officer testified that the papers were posted on the building which was upon the place. The return, *prima facie*, is sufficient. *Porter v. Pico*, 55 Cal. 172. Under the circumstances, we think the evidence must be held as showing a compliance with the statute in this respect. The land levied upon was a small lot, vacant except as to the portion occupied by the building used as an office. It would appear that the building must necessarily be the most conspicuous place on the land. The attention of the parties in the court below seems to have been engrossed with the question as to whether there was an occupant or not, and the particular point now under consideration was apparently not thought of. On the new trial, the whole matter can be more thoroughly investigated.

Judgment and order reversed, and new trial ordered.

We concur: MCKINSTRY, J.; PATERSON, J.

(23 Cal. 519)

Ex parte LEZINSKY and another. (No. 12,131.)

(Supreme Court of California. June 10, 1887.)

CONTEMPT—WITNESS—NOTARY PUBLIC—POWER OF COURT.

Under Code Civil Proc. Cal. § 1991, providing that disobedience to a subpoena may be punished by "the court or officer issuing the subpoena," the court cannot punish for disobedience to a subpoena issued by a notary public before whom a deposition is to be taken. The matter is governed by that section, and not by section 1209, "in respect to a court of justice, or proceedings therein."

Certiorari to superior court, Contra Costa county.

George Lezinsky, for petitioners. *Charles F. Hanlon*, for respondent.

MCFARLAND, J. Proceedings on *certiorari* to review the orders of the superior court in and for the county of Contra Costa adjudging the petitioners, Lezinsky and Mason, guilty of contempt of said court, and punishing them therefor by fine. The facts are these: In a certain action pending in said superior court the plaintiff therein served a notice upon the defendants therein that the deposition of the petitioner John Mason would be taken at a certain time and place before a certain notary public. The notary issued a subpoena requiring said Mason to appear before him at said time and place, and depose and testify as a witness. This subpoena of the notary was served on Mason, who appeared at the time and place mentioned; but, upon the advice of the other petitioner, Lezinsky, who is an attorney at law, and was attorney for an intervenor in the action, and who contended that plaintiff in said action had no right to proceed with it, or to take testimony therein, Mason refused to testify, or to be sworn. The notary certified these facts to the superior court, whereupon the court adjudged both of the petitioners guilty of contempt,—one for refusing to testify before the notary, and the other for advising him to refuse,—and imposed a fine upon each. And the question to be determined is, was such action beyond the jurisdiction of the court?

Proceedings in contempt, being in their nature arbitrary, can be upheld only in a case which comes within "the provisions of the law by which such proceedings are authorized; for mere presumptions and intendments are not to be indulged in their support." *Batchelder v. Moore*, 42 Cal. 414. And we are not able to find any "provisions of the law" which authorize a superior court to punish a person for contempt because he has refused to obey a subpoena issued by a notary public before whom his deposition was to have been taken upon notice. In such a case there is certainly no actual contempt of the court, because the party has committed no act in the presence of the court, nor has he, without the presence of the court, disobeyed any of its judgments, orders, or processes. Section 1986, Code Civil Proc., provides that, when a subpoena is issued to require attendance "before a court," it must be under the seal of the court; and that, when the attendance is to be "out of court, before a judge, justice, or other officer," the subpoena must be issued by such judge, justice, or other officer. And section 1991 provides that disobedience to a subpoena may be punished by "the court or officer issuing the subpoena." This means, construed with the context, by "the court issuing the subpoena," or by "the officer issuing the subpoena." It does not mean by "the court not issuing the subpoena." In such a case the offending party is not guilty of two contempts, or subject to two punishments. These two sections govern the matter under discussion, and not subdivision 10 of section 1209, which is "in respect to a court of justice or proceedings therein."

Counsel for respondent complains that a notary has no power to punish for contempt, (and whether or not he has we do not here decide,) and that, therefore, if the above views are correct, a party cannot enforce the taking of a deposition before such officer. But he would have had a similar grievance of more magnitude if the legislature had not provided at all for taking

testimony out of court. The right to take and use a deposition is a mere statutory privilege, and can be exercised and enforced only in the manner and to the extent provided by the statute which gives it. And if a party selects, out of the officers before whom depositions may be taken, one who cannot punish for contempt, he puts himself, so far as *that* method of enforcing the attendance of his witness is concerned, out of the reach of legislative grace, and must rely upon the provisions that the disobedient witness forfeits to the aggrieved party \$100, and all damages sustained by his failure to attend, and that, if he be a party, his complaint or answer may be stricken out. Sections 1991, 1992, Code Civil Proc. Whether or not the power to enforce the attendance of witnesses out of court should be enlarged, is a question for legislative determination.

The orders adjudging petitioners guilty of contempt, and punishing them therefor, are annulled, and the court below is directed to dismiss the proceeding.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; TEMPLE.

DENVER & R. G. RY. CO. v. NEIS.

(*Supreme Court of Colorado. May 18, 1887.*)

1. PRINCIPAL AND AGENT—PRINCIPAL'S LIABILITY TO THIRD PERSONS—AUTHORITY OF AGENT.

A resident railroad engineer has full authority to prescribe the conditions upon which a blacksmith shall do work for his company; and where he at first authorizes him to work for the "bosses" and other employes when requested by them, and subsequently instructs him to do work only on his written order, and finally tells him that verbal orders from himself and certain bosses (naming them) will be paid, it is incumbent on the blacksmith, in an action by him against the company for work done, to show that the orders for the work were given by the persons so authorized to contract with him.

2. APPEAL—DECISION—REVERSAL.

Where, in an action for work done against the principal on an account made up of many items, it appears that some of the items are for work done by direction of the agent, and the remainder for work done without, a judgment for the entire account should be set aside.

3. APPEARANCE—SERVICE—WAIVER.

Where counsel for the defendant makes a full and unlimited appearance, announces himself ready for trial, waives a jury, and permits a witness to be sworn on behalf of the plaintiff, before calling attention to his motion to quash the service of process, which had, in the first instance, been duly submitted to the trial justice, such conduct operates as a waiver of all objections on the ground of defective service.

4. EVIDENCE—COMPETENCY—CONVERSATIONS.

If what was overheard in a conversation is competent evidence, the fact that the witness who overheard it did not catch all that was said does not render such parts as he did hear inadmissible.

Appeal from the county court, Summit county.

This action was brought to recover upon an account for services rendered by plaintiff, Neis, as blacksmith. Reaugh was resident engineer of the defendant company, with entire control of its construction and business at the point where plaintiff claims to have done the work in question. Neis, who was a local blacksmith living at Recen, a place in the vicinity, was at first authorized by Reaugh to do blacksmithing when requested by the "bosses" or other employes of the company. But about August 1st a written notice from Reaugh was served upon him, directing him to do no further work at the company's expense save upon written orders of himself (Reaugh) or McHarg, (his clerk.) A few days later this instruction was modified so as to permit Neis to do work upon the verbal order of Reaugh, McHarg, Hoffman, or Donahue, the two latter being among the "bosses" employed under

Reaugh. For all work afterwards done upon written orders, or at the verbal request of the parties above named, with two possible exceptions mentioned in the opinion, Neis received full compensation from the company. It appears that the larger part of the account sued on was for labor performed at the verbal request of other bosses and employes than those mentioned, and after the giving of said notice to plaintiff. The cause was tried to the court without a jury, and judgment rendered in plaintiff's favor for the full amount of his claim. Appeal from this judgment.

Bennet, Mason & Hatens, for appellant. *W. E. Scott and R. H. Rhone*, for appellee.

HELM, J. The ruling of the county court upon the motion to quash the service of process was correct. By the record before us we are advised that defendant's counsel made a full and unlimited appearance in that court, announced himself ready for trial, waived a jury, and permitted a witness to be sworn on behalf of plaintiff, before calling attention to the motion, which had, in the first instance, been duly submitted to the justice, and presenting his jurisdictional objections thereunder. By these acts (not considering the effect of taking the appeal) all objections on the ground of defective service were waived. Counsel in argument deny the truthfulness of the record in this particular, and assert that they presented the question without making a general appearance, and before anything else was done in the county court. It is hardly necessary to say, what they frankly admit, that we must be governed by the record, which in this court imports absolute verity.

Nor did the court err in refusing to strike out a portion of the testimony given by the witness Cole. It was proper for him to detail so much of the conversation between Neis and McHarg as he overheard. The fact that some things may have been said in this conversation which he did not hear, did not render this part of his testimony wholly inadmissible. With the latitude allowed on cross-examination, the danger of injustice, adverted to by counsel, can hardly be said to exist. Besides, it may be further remarked that, even if this evidence were improperly admitted, we would not consider the error sufficient ground for reversal. The testimony objected to, with the accompanying admissions, was of very little importance, and could scarcely have received serious consideration.

Reaugh had full authority to prescribe the conditions upon which plaintiff should do work for the defendant company. It was competent for him, through his clerk, (McHarg,) to prohibit, as he did, any such work, except on written orders from himself or McHarg. It was perfectly proper, also, for him to enlarge this instruction or notice by excepting from its operation Hoffman and Donahue, two of the numerous "bosses" in the company's employ. It is clearly established that all the items in the bill sued upon referred to work done without written authority, and after plaintiff received the note above mentioned. Plaintiff, in rebuttal, testifies that on one occasion McHarg came with four or five wagons to be mended, and told him to do the work. He also says that Hoffman directed him to do some work for parties whom he previously refused because they had no written orders. His testimony concerning the wagons is directly contradicted by McHarg; but, as to these portions of his bill, the finding of the court below must be sustained. So far as there was conflicting testimony, it was one witness against another, and we will not presume to say that credit should have been given to McHarg instead of plaintiff.

But we are not advised as to the amount of these items, and they cover only a part (probably a small part) of the bill sued upon. With reference to the remaining portions of the account, we have this state of facts: McHarg testifies clearly and unequivocally that plaintiff did the work without any authority, verbal or written, from either himself, Reaugh, Hoffman, or Donahue. In answer to this evidence, there is simply the declaration by plaintiff, in rebuttal,

"that all the work done on that bill sued for was done by the written or verbal orders." It will be observed that he does not assert the work to have been performed upon the written or verbal orders of Reaugh or McHarg, or even upon the verbal orders of Hoffman or Donahue. The declaration of plaintiff is consistent with the proposition that the work referred to, or at least a part thereof, was done under the verbal orders of employes other than those from whom he was authorized to receive such orders. And this construction of the language is sustained by his own testimony in chief. He there admits that after August 12th the various wagon, corral, and stable bosses had work done without orders, expressly mentioning the name of Callihan, a stable boss. Thus this unimpeached testimony of McHarg is corroborated by that of plaintiff himself. The court allowed the full amount claimed by plaintiff upon his entire account. It is therefore clear that the judgment given covered, in part at least, work for which, under the testimony before us, plaintiff was not entitled to compensation. It will for this reason be reversed, and the cause remanded for further proceedings.

10 Colo. 94

CHAMBERLIN and others v. GILMAN. (CITY NAT. BANK OF DENVER, Intervenor.)

(Supreme Court of Colorado. May 18, 1887.

1. GARNISHMENT—ASSIGNMENT.

The keeper of a boarding-house for railroad employes made an agreement with the railroad company whereby the boarding dues of each employe were deducted from his pay, and forwarded in the form of a check to the boarding-house keeper each month. Subsequently he procured an advance of money from a bank on the credit of the amounts which were to fall due on the following pay-day, and by promising to turn such amounts over to the bank. The railroad company consented to transfer such payments to the bank. *Held*, that this constituted an equitable assignment of such sums so as to vest title in the bank as against a creditor of the boarding-house keeper, who garnished the same in the hands of the railroad company.

2. SAME—ACTS OF DEBTOR.

Subsequent declarations of the boarding-house keeper indicative of an intention to set apart such sums to the payment of his debt to plaintiff in garnishment are not admissible in evidence to impeach the title vested by the prior assignment.

3. SAME—CHECK.

The mere fact that the railroad company, after it had consented to the transfer of the indebtedness to the bank, continued to draw its check in favor of the boarding-house keeper, *held*, not to divest the bank of the title acquired under the equitable assignment.

4. SAME—NOTICE.

Whether the railroad company had notice of such assignment in no way affects the rights of plaintiff in garnishment, and therefore the admission of evidence of such notice is not prejudicial error.

5. FRAUDS, STATUTE OF—ASSIGNMENT OF CLAIM.

Such an assignment may be by parol, and is not affected by Gen. St. Colo. §§ 1523, 1527, which require sales and assignments of goods, and grants or assignments of trusts, to be evidenced in writing.

6. TRIAL—INSTRUCTION—GARNISHMENT.

Where the intervenor in a garnishment claims title through an equitable assignment of the fund, based, in addition to other evidence, upon verbal declarations and conduct, it is not error to refuse an instruction which assumes that the intervenor's title depends solely upon a written order.

STALLCUP, C., dissenting.

Appeal from county court, Arapahoe county.

L. C. Rockwell, for plaintiffs in error. *Benedict & Phelps*, for defendants in error.

RISING, C. The appellants brought an action against B. M. Gilman upon book-account, and garnished the Denver, South Park & Pacific Railroad Company as a debtor of Gilman. The garnishee answered that it had \$1,495.88

in its hands in checks it had drawn in favor of Gilman, and that said sum and checks were claimed by the City National Bank of Denver under some agreement between itself and said Gilman, and asked that the court make an order that said bank be brought into court as a claimant for this money, and prove its title thereto. The bank filed a petition of intervention, in which it was alleged that Gilman was, at the time of the commencement of this suit, and had been for many months prior thereto, the keeper of a boarding-house at Como, on the line of said railroad, and had, during such time, been accustomed to board divers employes of said company, but not for the company; that said company, in consideration that the rates of board should not exceed a certain just and reasonable rate agreed upon, had agreed to retain from the pay of its employes boarding with said Gilman, each month, such amounts as were severally due and owing from such employes to said Gilman; that at the end of each month a considerable portion of the pay of the company's employes was to be paid over to said Gilman, or, upon his order, to whom he might direct; that, at least three or four months prior to the service of the said garnishee summons, the said Gilman, being about to procure, by loan, from the said bank, money to enable him to maintain and carry on said business, and in order to secure said bank therefor, gave to the officers of said company orders and instructions to pay to the said bank all moneys due or to become due him under said agreement, and so to continue until otherwise directed, to which said company assented; that said bank, relying on said orders and instructions so given, and said company's assent thereto, advanced and loaned to said Gilman, solely upon the strength of the said orders, etc., \$1,500; that said company made payments to said bank as directed, and, upon the faith of such payments having been made, and that they would continue to be made, said bank made other advances and loans to said Gilman; that on the third day of April, 1882, while the orders and directions aforesaid were in force, it appeared that there was due to said Gilman, for board of employes of said company for the previous month of March, about the sum of \$1,500, which would be paid during said month of April; said bank, at Gilman's request, and relying solely upon the moneys to be paid to it by said company, again advanced and loaned to said Gilman the sum of \$1,500, having no other security for said loan than the payment to be made by said company as aforesaid; that, at the time of the service of the garnishee summons, said sum of \$1,500 was still unpaid, and said sum of \$1,495.88 was still in the hands of said company's officers, but held for said bank; and that the same was about to be paid over to it. Demands judgment for said sum of \$1,495.88.

Plaintiffs, answering the petition of the bank, admit that there is a contention between plaintiffs and said bank regarding the right of the money in the hands of the company; admit that there was due from the company to Gilman, for the month of March, at least the sum of \$1,500, and that the company has answered as garnishee in the action, and deny specifically all other allegations.

Judgment in favor of plaintiffs against Gilman upon the pleadings. Trial to a jury of the issues joined between plaintiffs and said bank as intervenor, and judgment thereon in favor of intervenor against the plaintiffs for its costs. From this judgment plaintiffs appeal.

The claim of appellee to the money in controversy rests upon a claimed equitable assignment of the money due Gilman from the railroad company for the board of its employes for the month of March, 1882, under an agreement between said Gilman and said company; and also upon the claim that, at the time of the service of the garnishee summons on the company, the officers of the company held this money as the money of and for the bank. Appellants' claim to the money rests upon the rights of an attaching creditor, and is based upon the claim that no interest in the March indebtedness of the employes of

the railroad company passed to the bank by reason of the transactions between Gilman and the bank.

What was the transaction between Gilman and the bank in relation to the loaning of money by the bank to Gilman? The witness Gilman testifies that about the first of December, 1881, he made an agreement with the bank to obtain money due him from the railroad company by turning over to the bank money which would be due him on the following pay-day; that he got about \$1,500 from the bank; that that sum was due him from the company at the last of the month; that he showed to Mr. Hanna, the cashier of the bank, how much the board-bills amounted to on their face, and that these bills would be likely to be paid about the twentieth of the month; that this arrangement was renewed again in January; that in January he told Mr. Hanna that he had to go south on account of his wife's illness, and that he wished to have this arrangement continued until his return; that his brother, C. S. Gilman, was fully authorized to act as his agent during his absence, and that his brother would go on and do every month just as he had done; that Mr. Hanna wished him to notify the pay-master of the fact that he was going away, and the arrangement was to be continued during his absence, and he said he would do so; that, before he went south, he saw the pay-master, and, in speaking about this arrangement with the bank, the pay-master said he would continue to do as he had done until further orders; that he returned from the south in April. The testimony of the witness Hanna corroborates the testimony of the witness Gilman, and further shows that Gilman told him how much the pay-rolls were after they were made up; that on the third day of April the bank loaned Gilman \$1,500; that the money was to be paid during the month; that witness thinks it was for the March indebtedness; that there was no difference between this transaction and previous ones; that the bank got the checks made by the company to Gilman each and every month until April.

We have given the substance of the evidence relating to the transaction of April 3, 1882, between the bank and Gilman, and relating to the facts leading up to that transaction.

In relation to the carrying out of the different arrangements made between Gilman and the bank, the witness Bush testifies that from November, 1881, to April, 1882, he was employed as clerk in the pay-master's office of the Denver & South Park Railroad. That Horace W. Fisher was pay-master, and witness' duties were to assist the pay-master in general. That each head of departments sent in to the time-keeper the time of the men in his employ. That Gilman sent in to the time-keeper any stops he might have against any of the employes. The time-keeper made up his pay-roll, and put against the several parties named the stops as required by Gilman; that is, he noted how much was to go from each man to Gilman. These rolls, after they were made up, were forwarded to the auditor at Omaha, examined, and checks made and signed for the several amounts, and the pay-rolls and checks were returned to Denver to the pay-master. When a part of a man's wages had been stopped for his board, a check would come for the amount due him, less the amount of "stop" for board. The amount of the stop would come in a check in favor of Gilman. That he heard Gilman say to the pay-master that he had made an arrangement with the bank to get money on the checks coming to him, and he desired to give the pay-master an order to pay over to the bank, from time to time, the checks coming to him. That, early in the spring, Gilman, who was going down south, came to the office, and told Mr. Fisher that he wanted to give him a continuous order to pay over to the bank the checks regularly, and said that he had authorized his brother Charles Gilman to receive them, and deliver them to the bank, and indorse his name on the back of them. That there were four or five payments before the last payment. That, upon Gilman's order, the pay-master transferred the checks to the bank. They were payable to the bank by Gilman's indorsement. The checks were indorsed by Gilman, and then transferred to the bank by Fisher, and the

bank's receipt taken. That he was present when payment was being made in April. That Charles Gilman called for the Gilman checks. That the Gilman checks had been marked paid on the roll, and countersigned by the pay-master, and all but two or three of them had been indorsed by Charles Gilman for his brother Ben when the garnishee notice came into the car. That the transaction in April was conducted as all their payments were previous to that order.

The witness Dunlevy testifies that he was connected with the City National Bank, and had been for three years and over; that he knew of checks being made payable to Benjamin M. Gilman by the South Park Railroad Company, which checks came to the bank during the months of December, January, February, March, and April. They were sent to the bank by Mr. H. W. Fisher, or brought by him personally. At no time while the bank was carrying Gilman, did he or his brother bring these checks.

We think the evidence shows an equitable assignment by Gilman to the bank of the March indebtedness of the railroad company to Gilman, and that the railroad company had notice of such assignment, and assented to it. The assignment of the indebtedness for the months of November, December, January, February, and March was a separate and distinct transaction for each month. At the time of the assignment, in each case, the indebtedness assigned existed, and the amount had been ascertained.

There can be no question but that an assignment can be made of such indebtedness, and that, under our statutes, the assignee takes a legal interest in the matter assigned. *Patton v. Coen and Ten Broeke C. M. Co.*, 3 Colo. 265; Pom. Eq. Jur. 1271, 1273. An assignment of a debt may be by parol, and may be inferred from the acts and conduct of the party. 1 Pars. Cont. 229.

In the argument much attention was given to the question of notice to the railroad company of the transfer of the indebtedness by Gilman to the bank. So far as the rights of the parties to this action to the money in controversy are concerned, the question of notice to the company is wholly immaterial. The rights of the parties to this action must be determined by the character of the transaction between Gilman and the bank in relation to this money. If, as between Gilman and the bank, the bank became the owner of the indebtedness, Gilman's creditors could not obtain any interest therein by attachment. The creditor can only reach the interest of the debtor, and after the assignment to the bank Gilman had no interest in this indebtedness. Pom. Eq. Jur. 694, 697, 700. The interest assigned is regarded as property. Pom. Eq. Jur. 1280, note 2. The notice to the debtor, in case of an equitable assignment, is to bind the debtor. In this case, the railroad company, as debtor, had notice, and acted upon the notice. The fact that the checks were drawn to Gilman by the railroad company does not change the ownership of the indebtedness. Gilman having assigned his interest therein to the bank, and the railroad company having notice of such assignment, and having assented thereto, could not reinvest Gilman with the ownership by drawing checks for the amount to Gilman. A payment by the company to Gilman would not, under the circumstances of this case, have released the company from its liability to pay the bank. It is plain, from the conduct of Gilman and the company, that the drawing of the checks to Gilman, and getting his indorsement thereon, was a matter relating to the manner of making payment to the bank.

Appellants' counsel cites the fourth subdivision of section 1521 and sections 1523 and 1527 of the General Statutes. We do not think the assignment by Gilman to the bank of the indebtedness of the railroad company to him comes within the statute of frauds.

Under our view of the law applicable to this case, under the evidence, the instruction given to the jury by the court below was more favorable to appellants than they had a right to ask. The instructions left it to the jury to determine from the evidence, not only whether there was an arrangement be-

tween Gilman and the bank by which Gilman turned over the indebtedness due him for March, and whether Gilman had ordered the railroad company to pay this money to the bank, but whether Gilman had indorsed the checks, and delivered them to the railroad company, to be delivered by it to the bank before the service of the garnishee summons. The jury were not instructed to find for the bank, unless they found in the affirmative all these facts, and the verdict for the intervenor amounts to such an affirmative finding. We see no error in the instructions of which appellants can complain.

Plaintiffs asked the court to instruct the jury "that the checks drawn by the railroad company to pay Gilman on March pay-roll of 1882 were never delivered by the company to Gilman or the bank, but the money called for on the same had been paid over, and is now in this court, to be disposed of under its order." The refusal to give this instruction is assigned for error. We think there was evidence sufficient to show a delivery of the checks by Gilman to the pay-master, to be delivered by him to the bank, if such delivery had been necessary to vest the ownership of the money in the bank, and to have given the instruction asked would have been error.

Plaintiffs further asked the court to instruct the jury that the bank "claimed the right to the money by virtue of an assignment of it by Gilman to itself, in and by virtue of a certain written order made by Gilman, and delivered to the South Park Railroad Company in January, 1882. The order is not produced, neither are the contents before you as evidence. Therefore you will not consider what its purport was, and on this branch of the case the intervening claimant has failed to make a case, and you should find for the plaintiffs." The refusal to give this instruction is assigned for error. The instruction asked for is misleading, in that the jury might assume that they were instructed that the bank claimed the money by an assignment from Gilman by virtue of a written order made by Gilman to the railroad company. It entirely ignores all the testimony relating to the transactions between Gilman and the bank. By what right the intervenor claimed the money was a fact for the jury to determine from the evidence. The instruction assumes a fact not proven. There was no evidence of such written order. The instruction was properly refused.

Plaintiffs asked the court to instruct the jury that "if they believe from the evidence that Gilman attempted in January, 1882, to give an order upon the Denver & South Park Railroad in favor of the City National Bank, to pay whatever money there might thereafter become due for the board of the employes of the said South Park Railroad Company to the bank until such order was revoked by Gilman; and that afterwards, and in April, 1882, the bank loaned \$1,500 on the strength of such order given it in January previous,—such order was not an assignment, in law or in equity, of the respective sums of money due from the boarders to Gilman, or from the railroad company to Gilman, as against the attachment of the plaintiffs, and you should find the issues for the plaintiffs Chamberlin & Aicher, as against the said bank." The instruction asked for is clearly erroneous. It seeks to determine the whole case upon an attempt to give a continuous order in January. That order might be held invalid for all purposes, and still, under the evidence, having no reference to that order, the jury might say that it was sufficient to show an assignment of the March indebtedness.

We find no error in the refusal to give instructions asked by plaintiffs.

The first, second, third, fourth, and fifth assignments of error are based upon the admission of testimony relating to the notice given by Gilman to the railroad company of his assignment to the bank of the indebtedness of the company to him, and the custom of the company in turning over checks upon order of the payees thereof. As the notice to the company in no way affected plaintiffs' right to the money in controversy, the testimony was immaterial, but, under the evidence and the instructions given by the court, its admission could not have prejudiced the appellants.

The court refused to allow plaintiffs to prove by witness Chamberlin "that, on or about the fifteenth or seventeenth of April, 1882, Gilman told witness that he was sorry that he could not pay the bill; that he was expecting some \$1,800 of the railroad company in a day or two, or the next pay-day; and that he was going to take that money, and divide it up between the plaintiffs, John D. Best & Co., and Struby, Estabrook & Co." There was no error in such refusal. Whatever Gilman might say after he had assigned his interest in the March indebtedness could not affect the interest of his assignee. Aside from this, there is nothing in the offer to show that the money he expected from the railroad company was the money due him for board of the employes of the company, but the amount spoken of would indicate that it was not the same.

Judgment should be affirmed.

MACON, C., concurs. STALLCUP, C., dissents.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

10 Colo. 125

CITY OF LEADVILLE v. MATTHEWS.

(*Supreme Court of Colorado. May 24, 1887.*)

MUNICIPAL CORPORATIONS—SALARY OF OFFICER—APPROPRIATIONS.

Under section 3326, Gen. St. Colo., which provides for annual appropriation bills by the city councils of municipalities, and that the objects and purposes for which appropriation is made shall be specified, an appropriation bill by the city of Leadville, which recites a total appropriation of a certain amount, subdivided into appropriations for the following specific objects or purposes, to-wit, "salary fund," "streets," "fire," "gas," "interest," and "contingent expenses," is a sufficient compliance with the statute to entitle a street commissioner duly elected, whose salary is fixed by ordinance or resolution of the city council, to resort to the salary fund for payment of his salary; and it is not necessary that the bill should specify each particular office, and the exact sum to be paid the incumbent thereof.

Appeal from the district court, Lake county.

C. H. Wenzell, for appellant. John Murphey, for appellee.

HELM, J. Matthews brought suit to recover for services rendered as street commissioner of the defendant city. Judgment was duly entered in his favor for the sum of \$400. But a single question is presented upon this appeal, viz.: Does the evidence show that the preceding city council made such an appropriation as is required by law for the payment of the street commissioner's salary during the fiscal year, when plaintiff acted in that capacity? The annual appropriation bill for the year mentioned is before us. It recites a total appropriation of \$125,000 to meet the entire municipal expenses. This sum was, by the bill, subdivided into appropriations for the following specific objects or purposes, to-wit, "salary fund," "streets," "fire," "gas," "interest," and "contingent expenses." This, we think, so far at least as the question at bar is concerned, a sufficient compliance with section 3326 of the General Statutes, upon which appellant relies. It is, in our judgment, not necessary that the annual appropriation ordinance or bill specify each particular office, and the exact sum to be paid the incumbent thereof. The street commissioner of Leadville is elected by the city council to serve for a definite period, unless sooner removed. His duties are defined by ordinance. By ordinance, also, or by resolution, a regular salary is provided for, and the amount thereof is fixed. He is an officer of the city, and, for aught that appears in the record before us, is entitled to be paid out of the "salary fund." The appropriation bill apportioned \$65,000 to this fund, and at the time plaintiff made demand for his pay upwards of \$5,000 remained therein unused.

The district court committed no error in ruling upon the matter complained of, and its judgment will be affirmed.

10 Colo. 110

EDGAR GOLD & SILVER MIN. CO. v. TAYLOR and another.

(*Supreme Court of Colorado. May 24, 1887.*)

1. COSTS—BOND—DISMISSAL OF ACTION.

Under Gen. Laws Colo. c. 20, §§ 1, 2, which provide that a non-resident plaintiff shall, before he institutes a suit, file a cost-bond, and that the court may, upon motion, dismiss any suit commenced without filing such bond, it cannot avail the plaintiff if he files such bond subsequently to the commencement of the suit, though before the service of summons.

2. SAME—MOTION.

In such case, a motion to dismiss, made by defendant upon entering his appearance, is made in apt time.

3. PRACTICE IN CIVIL CASES—DISMISSAL—WAIVER OF ERROR.

A motion to dismiss for plaintiff's failure to file a cost-bond in time is in the nature of a plea in abatement, and, if overruled, error in such ruling is not waived by answering over.

Appeal from district court, Gilpin county.

The plaintiff, a corporation organized under the laws of the state of New York, brought this action against Fernando C. Taylor, one of the appellants, to determine the rights to possession of certain mining premises, in support of an adverse claim. The action was commenced on the sixth day of March, 1882. A cost-bond was filed on the twentieth day of April, and the summons served on defendant on the twenty-second day of April, 1882. On the fourth day of May following, the defendant filed a motion to dismiss the action on the ground that the plaintiff was not a resident of this state, and that no cost-bond was filed before the commencement of the action. The court denied the motion, to which ruling and order defendant duly excepted. On the fifth day of July, 1883, the Mitchell Mining & Milling Company made application to the court to be substituted as defendant in the action in the place of Fernando C. Taylor, which application was denied, but applicant was granted leave to join with said Taylor as defendant, the answer of said Taylor to stand as the joint answer of said joint defendants; and thereupon the Mitchell Mining & Milling Company entered an appearance in the action, and contested the same to final judgment. Replication filed by plaintiff to amended answer of defendants on the seventh day of July, 1883. Trial to jury, and verdict that plaintiff is entitled to the possession of certain portions of the premises in controversy, and is entitled to recover \$50 for surveys, plats, and abstracts, and \$50 attorney's fees. Motion for new trial by defendants. Motion denied, and judgment entered on the verdict, from which both defendants appeal. There is no appearance in this court by the appellee.

"Section 1. In all actions on office bonds for the use of any person, actions on the bonds of executors, administrators, or guardians, *qui tam* actions on any penal statute, and in all cases in law and equity where the plaintiff, or the person for whose use an action is to be commenced, shall not be a resident of this state, the person or plaintiff for whose use the action is to be commenced shall, before he institutes such suit, file, or cause to be filed, with the clerk of the court in which the action is to be commenced, an instrument in writing, of some responsible person, being a resident of this state, to be approved by the clerk, whereby such person shall acknowledge himself bound to pay, or cause to be paid, all costs which may accrue in such action, either to the opposite party, or to any of the officers of such court; which instrument may be in form as follows: * * *

"Sec. 2. If any such action shall be commenced, without filing such instrument of writing, the court, on motion, shall dismiss the same, and the attorney for the plaintiff shall pay all costs accruing thereon. * * *

M. F. Ufford, for appellants.

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PER CURIAM. The first error assigned is that the court below erred in denying the motion of defendants to dismiss the action for want of the cost-bond required by law. The motion is based upon the provisions of sections 1, 2, c. 20, Gen. Laws, p. 189. The requirement of the first section is that the non-resident plaintiff shall, "*before he institutes such suit*, file, or cause to be filed, with the clerk," etc., the cost-bond therein specified and required; and section 2 declares that, if any such action shall be *commenced*, without filing the cost-bond required by section 1, the court, on motion, shall dismiss the same. This court has repeatedly held that this language is unequivocal, and leaves nothing to the discretion of the court. *Filley v. Cody*, 3 Colo. 221; *W. U. Tel. Co. v. Graham*, 1 Colo. 188; *Talpey v. Doane*, 2 Colo. 299. It follows that filing the bond subsequently to the commencement of the suit, and whether before or after the motion to dismiss is interposed, cannot avail the plaintiff. *Farnsworth v. Agnew*, 27 Ill. 42; *Sutro v. Simpson*, 14 Fed. Rep. 370.

The motion to dismiss was the first action taken by the defendant upon his appearance to the suit, and was in apt time. *Trustees v. Walters*, 12 Ill. 154; *Randolph v. Emerick*, 13 Ill. 346; *Robertson v. County Com'rs*, 5 Gilman, 565; *Roberts v. Fahs*, 32 Ill. 474; *People v. Cloud*, 50 Ill. 439.

The motion was in the nature of a plea in abatement, and the defendant, by answering over, did not waive his right to assign for error the decision of the court overruling the motion. *Puterbaugh*, Pl. 150; *Delahay v. Clement*, 3 Scam. 201.

For this error the judgment of the court below must be reversed, and the cause remanded, with a direction to the court below to dismiss the same.

10 Colo. 126

RAYNOLDS v. LARKIN.

(Supreme Court of Colorado. May 24, 1887.)

1. APPEAL—TO WHAT COURT—FORCIBLE ENTRY AND DETAINER.

Colorado act of 1878, providing that "all appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court, * * * and no appeal shall lie from a judgment of a justice of the peace in any cause, civil or criminal, to the district court," applies to actions of forcible entry and detainer in which, by force of section 13 of the forcible entry and detainer act, the appeal was formerly to the district court.

2. JUSTICES OF THE PEACE—JURISDICTION—FORCIBLE ENTRY AND DETAINER.

Gen. St. Colo. § 1495, being section 9 of the forcible entry and detainer act, which provides that "the district courts in their respective districts, and county courts and justices of the peace in their respective counties, shall have jurisdiction of cases arising under this chapter," gives jurisdiction to justices of the peace, in actions of forcible entry and detainer, coextensive with the boundaries of their respective counties, and is not restricted in its operation in that respect by section 1932, which, in general terms, limits the jurisdiction of justices of the peace to the townships in which they reside.

Error to county court, Arapahoe county.

This suit was brought before a justice of the peace under the forcible entry and detainer act. The premises sought to be recovered were not situate within the justice's precinct, nor was defendant a resident of such precinct. The cause of action, if any, accrued in another precinct, which had a duly-qualified and acting justice. Defendant made a special appearance, and moved to dismiss for want of jurisdiction over the subject-matter. The motion was overruled, default entered against defendant, and the cause tried. An appeal was then taken to the county court, and defendant renewed in writing his plea to the jurisdiction. The county court allowed the plea, and dismissed the action. From this judgment of dismissal the present appeal is taken.

F. J. Mott, Harmon & Cover, and *Markham & Dillon*, for plaintiffs in error.

HELM, J. A preliminary question is fairly presented by the record before us, viz.: Under our statutes relating to the subject, is there any appeal to *the county court* from judgments of justices of the peace in forcible entry or unlawful detainer actions? Section 13 of the forcible entry and detainer act reads as follows: "Hereafter, in all cases of forcible entry and detainer, or forcible or unlawful detainer, tried, or determined in any county court, or before any justice of the peace, either party may take an appeal to the district court of the proper county in the same manner and during the same time that is now provided by law for taking appeals from justices of the peace in other cases. * * *" The act mentioned does not authorize an appeal in this class of cases from justices of the peace to the county court. When the territory of Colorado became a state, the provision above quoted, having been previously enacted, continued in force. It was incorporated into the General Laws of 1877, and has remained without re-enactment to the present time. In 1877 the legislature adopted a statute reading as follows: "All appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court of the same county, and no appeal shall lie from a judgment of a justice of the peace in any cause, civil or criminal, to the district court." Gen. Laws, § 1599; Gen. St. § 1978.

The question stated at the beginning of this opinion resolves itself into the following: Did the latter provision operate to repeal so much of section 13 of the forcible entry act as directs that appeals from justices of the peace, in actions under that act, shall be taken to the district court, and did it authorize such appeals to be taken to the county court instead?

In the *first* place, we observe that the latter section is a subsequent statute, having been adopted several years after the passage of section 13 of the forcible entry act. *Secondly*, the act in which this section appears is an independent enactment. It does not purport to be *amendatory* of any existing statute. It is entitled "An act in relation to the jurisdiction of justices of the peace, and the practice in justices' courts." The argument, therefore, that it was the intention to simply amend the act in relation to justices and constables, and that for this reason the provision in question should be applied alone to suits provided for in that act, is entitled to but little weight. *Thirdly*, this provision, besides being expressed in general and comprehensive terms, *also contains negative words*. It not only declares that "all appeals from judgments of justices of the peace, both in civil and criminal actions, shall be taken to the county court," but it also expressly asserts that "no appeal shall lie from a judgment of a justice of the peace in any cause, civil or criminal, to the district court." The language used expresses a clear legislative intent to have all appeals in actions, *regardless of their nature*, thereafter taken from the justices to the county court. The general character of the two statutes under consideration, and the repugnancy of their language, in so far as it specifies the court to which these appeals shall be taken, forbid an interpretation allowing the earlier to stand wholly unmodified; and, applying well-known rules of statutory construction, we must give an affirmative answer to the question above propounded. Sedg. St. & Const. Law, 96 *et seq.*, and notes; Potter's Dwar. St. 154 *et seq.*, and notes.

The right of appeal from judgments of justices of the peace in these actions remains by virtue of said section 13. The repealing statute does not interfere with this right, or the procedure provided for its exercise. It simply changes the forum in which such appeals shall be tried, by substituting in relation thereto in the forcible entry provision the word "county" for the word "district."

The proposition that forcible entry and unlawful detainer causes are special proceedings, and not actions, we shall not consider at length. It is true that they are statutory remedies, and it is also true that, in some respects, the prescribed procedure differs from that governing the ordinary civil action un-

der the Code. But they are referred to in that instrument (section 267) as actions, and are frequently thus named in the forcible entry act itself. Section 1236, Gen. Laws, speaks of them as "the *action* of forcible entry and detainer, or unlawful detainer." Section 1248 reads: "Any *action* of forcible entry and detainer, or unlawful detainer," etc. Section 1249, referring to such causes, says: "In *actions* commenced before justices of the peace. * * *" We have no hesitancy in holding that these remedies are fairly covered by the word "actions," as used in section 1599, above considered.

We now pass to the principal question submitted for consideration. The objection under which this question arises challenged the jurisdiction of the justice of the peace over the *subject-matter*. It was therefore not waived by defendant's appeal to the county court. Section 1495 of the General Statutes, being section 9 of the forcible entry and detainer act, reads as follows: "The district courts in their respective districts, and county courts and justices of the peace in their respective counties, shall have jurisdiction of cases arising under this chapter. * * *" Counsel for plaintiff in error contend that this provision confers jurisdiction of cases under the statute upon justices of the peace *throughout* their respective counties. There is no other provision in the act mentioned that deals with the territorial jurisdiction of justices of the peace. And, were there no statute elsewhere in any way relating to such jurisdiction, there could hardly be two opinions upon the subject. The phrase, "in their respective counties," considered by itself alone, requires the interpretation given it by counsel. In fact, as we shall presently see, a similar phrase has been practically thus construed by this court.

But it is insisted that section 1932 of the General Statutes, which limits the jurisdiction of justices of the peace to the townships in which they reside, must be construed as applying to actions of forcible entry and unlawful detainer. In discussing this section, we shall assume that the word "precincts" must be substituted therein for the word "townships." See section 146, c. 23, Gen. St. So far as the two jurisdictional provisions under consideration are concerned, no argument in favor of an implied repeal or modification of section 1495 by section 1932 can be based upon the ground that the latter is a subsequent statute; for both sections were originally adopted, substantially as now existing, by the same legislature, and both were approved by the governor on the same day. Section 1932 is an amendment of the general act relating to justices of the peace and constables,—the act which treats of nearly all the various branches of jurisdiction conferred upon justices; but which, however, does not relate to or mention the actions of forcible entry and unlawful detainer. The section consists of a single affirmative declaration, with no negative words, and does not even declare that *all* suits shall be brought in the precincts specified. The forcible entry and detainer statute is, on the other hand, a separate and independent law, treating solely of the actions indicated by its title. Considering the language of the two provisions, and the circumstances attending their adoption, we cannot say that there is such a repugnancy as requires us to hold that an implied repeal of section 1495 took place, or that there existed in the legislative mind any intent to change or modify that provision. The law does not favor repeals or modifications of this kind. "They will not be adjudged to follow, unless there is such a positive repugnancy that the two statutes cannot consistently stand together. The legislative intent to substitute the new for the old law must clearly appear." *Schwenke v. Union Depot & R. Co.*, 7 Colo. 512, 4 Pac. Rep. 905.

The view that section 1932 was not *intended* by the legislature itself to repeal or modify section 1495 receives strong confirmation from the legislative procedure in the premises. The territorial legislature of 1861 adopted an act in relation to justices of the peace and constables. Section 1 of this act reads: "Justices of the peace shall have jurisdiction *in their respective counties* to hear and determine all complaints, suits, and prosecutions of the fol-

lowing descriptions: * * * Then follows a list of nearly all the causes of action over which justices of the peace are allowed to take cognizance. There was in the statute of 1861 no other provision relating to the territorial limits of the justices' jurisdiction. At the succeeding session, in 1862, the legislature adopted an act "amendatory" of the foregoing. Section 10 has come down to us as section 1932 above mentioned. It reads: "That suits shall be commenced before justices in the township in which the debtor or person sued resides, unless the cause of action accrued in the township in which the plaintiff resides, in which case the suit may be commenced where the cause of action accrued, or is specifically made payable." Sess. Laws 1862, p. 77; Gen. St. p. 620.

Under the act of 1861, "debtors were sued in tribunals distant from their places of residence, and the cost and vexation of litigation was thereby unnecessarily and oppressively increased. As a security against this abuse, this section (§ 10, Act 1862) was adopted, giving resident debtors a forum at their own doors." *Wagner v. Hallack*, 3 Colo. 176; *Denver, S. P. & P. R. Co. v. Roberts*, 6 Colo. 333. By enacting the precinct statute in 1862, the legislature unquestionably sought to curtail the territorial jurisdiction of justices of the peace conferred by the act of 1861. Thus, it will be seen, we have, in effect, both a legislative and a judicial declaration that the phrase, "in their respective counties," as used with reference to justices of the peace, conferred jurisdiction upon these courts *throughout* such counties. But at the session of 1862 the legislature also adopted a forcible entry and detainer act, in which the following language is used, (section 5:) "Justices of the peace, *in their proper counties*, and district courts, in their respective districts, shall have concurrent jurisdiction in all cases arising under this act." Though changes have since been made in this statute, the above provision, so far as justices of the peace are concerned, has always remained substantially the same; and, as we have already declared, there has never been any qualification in the act itself of the territorial jurisdiction thus conferred.

The foregoing circumstances indicate strongly that the legislature did not intend to restrict to the justices' precincts the trying of actions in pursuance of the forcible entry and detainer statute; for it clearly appears that, while engaged in considering and passing the forcible entry law, that body not only interpreted the jurisdictional phrase used therein, but gave it an interpretation contrary to the supposed limitation. They specifically expressed this limitation as to all other actions before justices courts; and the inference is irresistible that, had they intended the limitation to apply to this class of actions, they would have so declared.

We feel impelled to the conclusion that it was the legislative intent to give justices of the peace an exceptional territorial jurisdiction in this particular class of cases, a jurisdiction co-extensive with the areas of their respective counties.

The judgment of the county court is reversed.

10 Colo. 80

ALVORD v. STRICKLER, Receiver, etc.

(*Supreme Court of Colorado*. June 7, 1887.)

RECEIVER—CONTRACT—RELIEF.

The receiver of a bank, under the authority of the proper court, sold the bank's interest in certain mining property, partly on deferred payments due at times expressly stipulated in the agreement. The purchaser was unable to obtain possession, the property being in litigation, and in the hands of another receiver. The evidence not showing an agreement to put the purchaser into possession, *held*, that the court's refusal to compel its receiver to extend the time of the deferred payments was not reviewable.

Appeal from superior court of Denver.

Markham & Dillon and Patterson & Thomas, for plaintiff in error. *M. B. Carpenter and C. J. Hughes*, for defendant in error.

MACON, C. The facts of this case are, shortly, these:

In March, 1883, James M. Strickler, the respondent, was appointed receiver of the Exchange Bank of Denver, by the superior court of Denver. Among the assets of said bank was certain mining property in Summit county, Colorado, of the description following: The undivided one-half of the Wire-Patch placer claim, the undivided one-half of the Elephant, and the undivided one-half of the Frederick; the Great lodes; the undivided one-fourth of the Ontario lode; and all the interest, whatever the same might be, of the said J. M. Strickler, as receiver, in the Queen of the Forest, the Emperor, the Little Morgan, and the Triangle lodes, and the Wire-Patch ditch and water-rights, as the same were described in their respective location and relocation certificates. The interest of the said J. M. Strickler, as receiver, in the said Queen of the Forest, the Emperor, the Little Morgan, and the Triangle lodes, and in the Wire-Patch ditch and water-rights, was an uncertain, indefinite, and undescribed interest. On October 18, 1884, said Strickler, as such receiver, by authority of said superior court, entered into a contract with petitioner, C. C. Alvord, to sell him this property for \$125,000, \$42,000 of which, in furniture then in the St. James Hotel in Denver, was to be paid down, and the balance of the price, \$83,000, was to be paid on or before the eighteenth day of October, 1885; and by the agreement in writing then and there entered into between the parties it was stipulated that default in the payment at the agreed time was to determine the contract, and Strickler was to keep what had been paid by Alvord, and to release Alvord from all liability for the balance remaining unpaid. It was further agreed that Alvord might go into possession of the property, and mine therein, and retain all profits therefrom, until the twelfth day of April, 1885, after which date he (Alvord) should pay to Strickler one-half of the net proceeds of the mines. By the agreement it was further provided that time should be of the essence of the contract; and that upon any default on Alvord's part in the payment of any of the sums provided to be paid in the future, at the times fixed therefor, the said agreement should cease and determine, and Alvord should forfeit to Strickler all sums before that time paid under said agreement.

On the thirtieth of August, 1884, by reason of litigation between Strickler, as receiver of the said Exchange Bank, on the one side, and one Murphy, Litton, and McCarty on the other, as to the title to this property, or some part thereof, one Charles A. Walker was appointed receiver of the same, by the district court of said Summit county; and on or about the twenty-third day of September of that year said Walker took possession of the same, and worked and mined in the Elephant lode until the twenty-third of October following, on which day he quit work thereon, and discharged all his employes. About the twenty-fifth of October, 1884, Alvord, in company with one Cronkhite, (who had a contingent interest in the agreement for the sale of the property,) went to Breckenridge, and demanded possession of the Elephant lode from the said receiver, Charles A. Walker, who offered to put Alvord or Cronkhite in possession if they, or either of them, would indemnify him, which they refused to do, and therefore failed to get possession. Afterwards, Murphy took possession of the Elephant lode, and held it during the winter and spring, until about the twentieth of April, 1885, when Cronkhite was let into possession, under the receiver, Charles A. Walker, and held it continuously until the trial of this cause. While Walker was in possession as receiver aforesaid, he contracted an indebtedness in working the Elephant lode of about \$3,000, which on the third day of December, 1884, was made a lien on the property by the district court of said Summit county; but at the trial of this case no steps had been taken to enforce such lien, and by a subsequent order of said

court the receiver was required to pay off said lien out of the first net proceeds of the mine. While Murphy held possession of the mine, during the winter of 1884-85, and spring of 1885, he worked it unskillfully, and left it in a ruinous and dilapidated condition; and, when he quit the same, took away the ladders, ore chutes, railroad tracks, ore cars, and all the tools and implements belonging thereto, so that when Cronkhite took possession he found it necessary to expend considerable money in putting the mine into condition for profitable working. Strickler furnished him \$250 for this purpose, but Alvord nothing. Cronkhite increased the indebtedness on the mine to \$6,000 in putting it in repair. These facts are undisputed.

In this posture of affairs, Alvord, on the thirtieth day of September, 1885, filed his petition in the superior court of Denver, praying to be relieved from the payment of the remaining \$83,000, to become due, under the contract, on the eighteenth day of October ensuing, and for an extension of the time for such payment one year after he should obtain possession of the premises. His prayer was founded on the averments that he executed the agreement to buy the property under the belief that he could obtain the money for the last payment by working the Elephant lode, which belief Strickler well knew and encouraged; that during the negotiations for the purchase Strickler promised and assured him that he should have the possession of the property, so that he could work and mine it, and that but for such assurances he would not have agreed to buy it, nor made the contract of the eighteenth of October, 1884, and that Strickler knew that he would not have done so, and also knew that he depended upon the proceeds of the property for the means with which to meet the deferred payment of \$83,000. Furthermore, he averred that the property was in litigation, and was in the hands of a receiver, and in debt, of all which facts he was during the negotiation for and at the execution of the contract in ignorance, but that the said Strickler was cognizant of them all, and concealed the same from him; that after the execution of the contract he went to Summit county, and endeavored to get possession of the Elephant lode, and could not, and that Strickler not only did not put him into possession, but actively prevented him from obtaining it; and that he had never had the possession, and had no means with which to pay the deferred payment of \$83,000. Several other facts are alleged, among which are the erection of a mill, the orders of the district court of Summit county, etc., but they are immaterial, and need not be stated.

Respondent answered, and denied that he knew Alvord depended on the proceeds of the property to pay the \$83,000; denied that he encouraged the belief that he could do so by working the said property; denied that, pending the negotiations, he promised or assured Alvord that he should have possession of the property, or any part thereof; denied that Alvord was ignorant of the fact that the property was in litigation, was in the hands of a receiver, or that it was in debt; and denied that by any act, or refusal to act, by him, he kept Alvord out of possession.

The cause was heard upon written and oral evidence, the written evidence being made exhibits in the case, which appear in the record, and the court proposed to petitioner a modification of the agreement as to time, which he rejected, whereupon the petition was dismissed, from which decree the petitioner appealed to this court.

Eleven errors are assigned as ground of reversal of the decree of the court below, but counsel for appellant relied in argument upon the sixth assignment only, which is that "the court erred in its finding that the equities of the case were in favor of the defendant." In fact, counsel for appellant, in their brief and argument, at page 2, say: "The main, in fact the only, points of controversy in the case are these: Did Strickler contract or agree to put Alvord in possession of the mining property? and, if so, did he put him in possession?" In this view of the case, (and it is a correct one,) the objec-

tions to the admission of evidence, and the exceptions to the refusal of the court to allow certain questions to be answered, are of no weight, and cannot affect the solution of the questions raised in the record. The proofs do not support this view of the case, and the petition amounts to no more than an application to the court to compel its receiver to make a supplemental contract with the petitioner. Whether such authority exists in courts, it is not necessary to decide; but it is clear that the refusal so to do in this case is not reviewable, and therefore the decree of the superior court of Denver should be affirmed.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the decree of the court below is affirmed.

10 Colo. 81

CARBONATE TOWN Co. v. IVES and another.

(Supreme Court of Colorado. June 7, 1887.)

APPEAL—PREREQUISITES—PAYMENT OF COSTS.

Under Gen. St. Colo. §§ 1979, 1981, requiring a party appealing from the judgment of a justice to file an appeal-bond, and pay the costs of granting the appeal, within 10 days, the payment of such costs within that time is not a prerequisite of the right of appeal, when it is waived by the justice, by filing the transcript in the appellate court without such payment.

Error to county court, Arapahoe county.

Teller & Orahood, for plaintiff in error. *M. B. Carpenter*, for defendants in error.

MACON, C. On the twenty-fourth of December, 1883, defendants in error recovered judgment against plaintiff in error, before one J. L. CROTTY, a justice of the peace, within and for Arapahoe county, from which plaintiff in error appealed to the county court of said county, and gave notice thereof in open court, upon the rendition of said judgment.

On the thirty-first day of December, 1883, it filed its appeal-bond, which was approved by the said justice of the peace. Afterwards, and before the expiration of the 10 days prescribed by the statute regarding appeals, counsel for plaintiff in error called on two occasions at the office of the said justice of the peace for the purpose of paying to the said justice the costs of granting said appeal, but on both occasions the justice of the peace was out, and the counsel found no one authorized to receive such fees. Again, on the fourth day of January, 1884, counsel called at the office at the same place for the same purpose, and endeavored to pay the said fees. The said justice, then being busy in the trial of a case, desired counsel to call at another time. On the next day said fees were tendered the justice, of which he accepted \$1.50, and transmitted transcript of the case into the county court. On the same day, defendants in error, appellees in the county court, filed their motion to dismiss the appeal because the fees of the said justice of the peace had not been paid within 10 days from the rendition of the said judgment; which motion the county court granted, and dismissed the appeal.

In this case there is but one question for decision, which is: is the payment to the justice of the peace of the cost of granting the appeal from his judgment, within 10 days of the rendition thereof, a condition precedent to the right of appeal? Sections 1979, 1981. We hold it is not. The requirement of the statute that the party desiring an appeal shall, within 10 days, file a bond for the security of the successful party, is reasonable and imperative; and upon the filing of such bond within that time, which the justice of the peace approves, perfects the appeal. But whether the transcript shall be

sent to the appellate court by the justice of the peace depends upon the fact that the appellant pays to the justice of the peace the cost of taking the appeal. If the justice of the peace chooses to give credit for such costs, or donate his services in preparing the transcript, he may do so, and, if he sends the papers from his court into the appellate court, the appellant has the right to insist that his case shall be heard. No one can be heard to complain in the appellate court of the omission to pay the costs of granting the appeal to the justice of the peace, except the justice himself. This provision of the statute is one made for the protection of the justice of the peace, which protection he may waive, and such waiver is conclusively established by the fact that he has sent into the appellate court the transcript of his docket. *Lick v. Madden*, 25 Cal. 211; *People v. Harris*, 9 Cal. 573.

In this case the justice of the peace accepted his fees after the expiration of 10 days from the rendition of the judgment appealed from, and sent the transcript up to the county court. Certainly the fact that he had not been paid within the 10 days prescribed by the statute does not oust the jurisdiction of the county court. *Bray v. Redman*, 6 Cal. 287.

We think the county court erred in dismissing the appeal, and that the judgment should be reversed.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment of the county court is reversed, and the cause remanded.

10 Colo. 59

MCDONALD v. CLOUGH and others.

(*Supreme Court of Colorado. May 18, 1887.*)

1. PARTNERSHIP—LIABILITY OF PARTNERS—INSTRUCTION.

In an action brought by plaintiff against "A. & M.," as copartners, for goods sold and delivered, the refusal of an instruction that, if M. had told the plaintiff that he would not be responsible for goods furnished A., then the plaintiff could not recover for goods furnished after that time, *held* not erroneous, as it ignores the question of partnership between A. and M., and as in fact no goods were sold after the notice given by M.

2. SAME—EXISTENCE OF PARTNERSHIP—EVIDENCE.

In an action against a partnership for goods sold, where one of the partners denied his liability on the ground that the partnership was dissolved at the time the debt was contracted, and offered in evidence writings of dissolution of prior date, but which referred to R. McDonald & Co., while the firm sued was Atkinson & McDonald, and where the other partner testified positively to the existence of the partnership at the time in question, and the testimony of four other witnesses was to the same effect, *held*, that the verdict of the jury, that there was a partnership, would not be disturbed.

3. TRIAL—DOCUMENTS IN EVIDENCE—PROVING ACCOUNT.

The omission of plaintiff, in an action against a partnership for goods sold and delivered, to produce his books containing the account, or to offer in evidence a copy of the account, which was shown to one of the partners while on the witness stand, and admitted by him to be correct, *held* not a fatal error, where the partner, while examining the copy of account, and admitting its correctness, named the total amount of the indebtedness.

4. PARTNERSHIP—SECRET PARTNER—LIABILITY.

The fact that the plaintiff sold goods to a partnership in ignorance, at the time of the sale, of the existence of a secret partner, will not prevent recovery against the secret partner for the goods sold.

Appeal from county court, Arapahoe county.

This suit was brought by N. H. Clough & Co. against John Atkinson and R. P. McDonald as copartners under the firm name of "Atkinson & McDonald." Plaintiff demanded of defendants the sum of \$195.50 upon a book-account for goods sold and delivered to the defendant partnership. The trial

in the county court resulted in a verdict and judgment in plaintiffs' favor for the full amount of the demand. The instruction mentioned in the opinion, asked by defendant McDonald, and refused by the court, reads as follows: "If the jury believe from the evidence in this case that McDonald told N. H. Clough, one of the members of said firm, that he (McDonald) would not be responsible for Atkinson's account, or for goods furnished Atkinson, then the jury are instructed that the plaintiffs cannot recover anything for any meat delivered after that time."

The remaining facts are sufficiently stated in the opinion.

J. P. Brockway, for appellant. *John A. Clough, Jr.*, for appellees.

HELM, J. This cause was originally begun before a justice of the peace. Therefore, upon the retrial on appeal in the county court, there were no written pleadings.

The instruction discussed under the first assignment of error nowhere appears in the record before us; nor is there in the record an objection or exception on the part of appellant to any instruction given for appellees. Either of these considerations would absolutely forbid our further noticing this assignment. The county court committed no error in refusing the instruction asked by appellant, who was one of the defendants below. This instruction wholly ignores the question of a partnership between McDonald and Atkinson, and the notice mentioned was given after the asserted liability accrued. If such partnership existed at the time the goods were sold and delivered, and if they were actually delivered to and received by the firm, a declaration by one of the partners subsequent to the transaction, that he would not be responsible for the account, could not in law relieve him of such responsibility. Besides, as no meat was sold or delivered after the conversation on May 22d between McDonald and Clough, in which the former denied his liability, there was no evidence upon which to base the instruction refused. The existence of the defendant copartnership when the account sued on accrued, is involved in considerable doubt. Had the jury found differently upon this question, we would not disturb their verdict, but there is a good deal of proof to support their finding. The testimony of five witnesses tends to sustain plaintiffs' theory in relation thereto. Defendant McDonald denies the partnership, but defendant Atkinson, who was one of the five witnesses mentioned sworn for plaintiffs, directly contradicts the testimony of McDonald in this particular. If the written dissolution of March 18th, offered in evidence, referred to the defendant firm, it would probably be decisive. It would show that, prior to that date, such a partnership existed, and that it then terminated. But the firm sued is "Atkinson & McDonald." The firm spoken of in the dissolution agreement is "R. P. McDonald & Co." Atkinson testifies that the latter partnership was engaged in *brick laying*, while the former was entered into for the purpose of *brick making*, and that another copartnership "writing" was drawn and executed when the firm of Atkinson & McDonald was formed, which writing was left with a Mr. King, who drew it. Since the proofs upon this issue are conflicting, and since it is the peculiar province of the jury to pass upon the credibility of witnesses, and resolve conflicts in testimony, we shall decline to reverse the case upon the assignment of error now under consideration.

The remaining assignment discussed relates to the sufficiency of the evidence to sustain the judgment. Plaintiffs committed a serious oversight in not producing their books, and proving the account therefrom, or offering in evidence the copy of the account identified by Atkinson; but we are of opinion that, under all the circumstances disclosed by the record before us, this mistake should not be held fatal. An itemized bill or copy of the account was shown to defendant Atkinson while giving his testimony. He examined the same, and repeatedly said he believed it to be correct. He also testified (still

looking at the bill) that the indebtedness as represented thereby was \$195.55. Here was a clear and positive admission by one of the defendant copartners that the different entries constituting the entire account were correct, and that the total demand of \$195.55 was just. By this and other testimony the jury were informed that plaintiffs had sold and delivered to defendants a quantity of meat that had not been paid for; that the just and reasonable value of this meat was \$195.55, which amount was due the plaintiffs. For this sum the verdict was returned, and the judgment entered.

While McDonald, the only appellant, denies his individual liability in the action at bar, he in no way controverts or challenges the correctness of the account itself, or the amount claimed. He simply treats it as a personal obligation of Atkinson with which he has nothing to do. We are not advised by the record that the copartnership of Atkinson & McDonald had been dissolved prior to the trial in the county court; but, were such dissolution an admitted fact, there is much and weighty authority to sustain the reception in evidence, against McDonald, of Atkinson's declarations and admissions upon the witness stand concerning the correctness of the account; also the amount due thereon. Many cases, both in England and America, adhere to the rule that a partner's declarations and admissions, after dissolution of the firm, concerning transactions with the firm in the line of its business before such dissolution, are admissible against his former copartner. *Pars. Partn.* (2d Ed.) 199, 200, note *p*; also, *Id.* 404 *et seq.* But it may be sufficient to say that McDonald is not in position to attack the admission of this testimony, as he reserved no exception thereto at the trial.

We shall decline to hold that the verdict was not warranted by the evidence. As counsel contend, the proofs point strongly to the conclusion that plaintiffs did not know of the partnership when they sold the meat and gave the credit. But, if such were the fact, it would not prevent a recovery against McDonald. A secret or unknown partner is held liable for debts incurred in the partnership business, because, while he adds no credit to the firm, he shares in the advantage secured through its existence. *Pars. Partn.* (2d Ed.) 32.

The judgment is affirmed.

10 Colo. 149

COUNTY OF SAGUACHE v. DECKER and others.

(*Supreme Court of Colorado.* June 15, 1887.)

COUNTIES—LIABILITY—BOARD OF HEALTH.

Colorado act of February 24, 1877, (Gen. Laws, §§ 2093, 2094,) provided for the care of persons infected with dangerous diseases by the board of health of the town, city, or county where such person may be, and provided that the county commissioners should constitute the board of health of the county. The subsequent act of April 4, 1877, (Gen. St. § 3312,) "in relation to municipal corporations," empowered town trustees to appoint boards of health, and to do all things necessary or expedient for the promotion of health and the suppression of disease. *Held*, that the two acts may stand together, and that, under them, necessary expenses incurred by a board of health appointed by town trustees in caring for an infected person are chargeable to the county.

Appeal from district court, Saguache county.

Appellees, on the ninth day of July, A. D. 1883, presented to the county commissioners of Saguache county, and asked to have allowed, the following bills for services rendered and necessities furnished in small-pox cases in the town of Bonanza, in said county: Mrs. Alice N. Hunt, bath-tub, \$15; Mrs. Anna Gray, nurse, \$40; Decker Bros., drugs, etc., \$35; Decker Bros., drugs, etc., \$24; W. L. Taylor, guard, \$17.50; W. L. Taylor, guard, \$63; John M. Brown, messenger, \$63; Edward Nathan, guard, \$129; Edward Nathan, guard, \$46.50,—which bills were disallowed by the commissioners; from which appeal was duly taken to the district court for said county, and was

there duly heard on the fifteenth day of September, 1883, upon the following stipulation:

"The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The points agreed upon are as follows: That there is now, and has been since the year 1881, within the county of Saguache, state of Colorado, an incorporated town designated and known as the town of Bonanza City; that said town has now, and has had since 1881, a duly elected and qualified board of trustees; that the board of trustees of said town for the years 1882 and 1883 appointed a board of health of, in, and for said town, which said board of health qualified and acted as such board of health in pursuance of such appointment; that said board of health, so acting, were notified that certain persons residing within said town of Bonanza City aforesaid were infected with a disease dangerous to the public health, to-wit, small-pox; that on receiving such notice, said board of health proceeded to act as provided in sections 2093 and 2094 of the General Laws of the state of Colorado, which action was as follows: They purchased through one of their members, J. R. Ramsey, physician of the board, medicine, drugs, etc., from Decker Bros., as shown by bill presented to board of county commissioners, and certified as part of record and proceeding had before said board, and that they deemed the same necessary for the safety of the sick and the inhabitants of the town; that the physician deemed a bath-tub necessary for the safety of the sick, which the said board purchased from Mrs. Alice Hunt, as per bill rendered commissioners; that they employed Anna Gray as a nurse, which they provided to take care of the sick; that the infected persons could not be removed without endangering their health; that, they, the said board of health, provided for said infected persons in the houses in which they were; that said board of health thought it necessary for the safety of the inhabitants that two guards, one at night and one by day, be employed to guard said premises and prevent the spread of said disease, for which purpose they employed W. L. Taylor and Edward Nathan, as per bills presented to county commissioners, and made part of this record; that said board of health deemed it necessary for the safety of the inhabitants that a messenger be employed to bring to and take from the infected premises such things as were needed by the nurses or sick, for which purpose they employed J. M. Brown, as per bill rendered county commissioners, and made part of the record hereto; that, after the disease had been suppressed, the several parties presented their bills to the county commissioners for payment; that the board of county commissioners had no notice of the contracting of such bills till presented; that the board of county commissioners disallowed said bills, on the ground that the county was not liable therefor.

"The points in controversy, and upon which the decision of the court is asked, are as follows: The foregoing bills having been contracted by a duly appointed and organized board of health within the county of Saguache, when said board of health is the board of health of an incorporated town, is or is not the county liable therefor?"

Upon the foregoing statement of facts, the district court found as follows: "That there is due from the defendant to the respective plaintiffs individually, by occasion of the premises specified in said statement of facts, as follows: To J. W. Decker, the sum of fifty-nine dollars and fifty cents; to Mrs. Alice A. Hunt, the sum of fifteen dollars; to Mrs. Anna Gray, the sum of forty dollars; to W. L. Taylor, the sum of eighty dollars and fifty cents; to Edward Nathan, the sum of one hundred and seventy-six dollars; and to John M. Brown, the sum of sixty-three dollars." Whereupon the court entered judgment against the county of Saguache for said several sums in favor of the said plaintiffs, respectively, and for costs; from which judgment the defendant appealed to this court.

George Tucker, for appellant. *J. M. Denny*, for appellees.

STALLCUP, C. Is the county liable for these charges? is the question here presented and argued. It is urged upon the part of the appellees that the county is liable for these charges, under the provisions of sections 2643 and 2644 of the General Statutes of 1877, which are sections 2093 and 2094 of the General Laws, and are as follows:

"Sec. 2643. When any person coming from abroad, or residing within any town, city, or county within this state, shall be infected, or shall lately before have been infected, with the small-pox, or other sickness dangerous to the public health, the board of health of the town, city, or county where such person may be, shall make effectual provisions, in the manner in which they shall judge best, for the safety of the inhabitants, by removing such sick or infected person to a separate house, if it can be done without danger to his health, and by providing nurses and other assistance necessary, which shall be at the charge of the county to which he belongs.

"Sec. 2644. If any such infected person cannot be removed without danger to his health, the board of health shall make provision for him, as directed in the preceding section, in the house in which he may be, and in such case they may cause the persons in the neighborhood to be removed, and may take such other measures, in respect to the same, as they may deem necessary for the safety of the inhabitants."

The title of this act is, "An act to preserve the public health." It was approved February 24, 1877, and the first section thereof provided that the county commissioners should constitute the board of health of the county.

Upon the part of the appellant, it is conceded that, if these provisions were not repealed, the county is thereby liable; but it is urged by appellant that by force of the provisions of section 3312 of the General Statutes, being a subsequent enactment, the above-quoted provisions of the former act in this regard are necessarily repealed.

The said provisions of said section 3312 are as follows: "The city council and board of trustees in towns shall have the following powers: * * * *Thir'd.* To levy and collect taxes for general and special purposes on real and personal property. * * * *Forty-sixth.* To appoint a board of health and prescribe its powers and duties. *Forty-seventh.* To enact and establish hospitals and medical dispensaries, and to control and regulate the same. *Forty-eighth.* To do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." The title of this act is, "An act in relation to municipal corporations," and was approved April 4, 1877.

There is no repeal of the former provisions by the latter. The two do adjust and stand together. By these provisions of the legislature, the whole of the county may be required to pay the charges incurred in staying the spread of contagious disease therein, instead of that portion thereof constituting the certain community wherein the disease is first discovered. Repeals by implication are not favored. *Scotfield v. White*, 7 Cal. 400; *People v. San Francisco & S. J. R. Co.*, 28 Cal. 254; *Walker v. State*, 7 Tex. App. 245; *Chesapeake & O. R. Co. v. Hoard*, 16 W. Va. 270; *Parker v. Hubbard*, 64 Ala. 203.

The judgment should be affirmed.

RISING and MACON, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

10 Colo. 174

HURD and others, Property Owners, etc., v. HAMILL and others.

(*Supreme Court of Colorado. June 15, 1887.*)

1. TAXATION—FAILURE OF TAX TITLE—LIABILITY OF COUNTY.

Under Gen. Laws Colo. 1877, requiring the county to indemnify a purchaser at tax sale, who, in consequence of the mistake of the assessor or other official, does not get a good tax title, and making such official responsible for his mistake to the county, a county is bound to indemnify a purchaser who purchased at a sale occurring after the act took effect, although the error of the assessor, which invalidated the title, was made before the act took effect, and consequently the county could not recover of the assessor.

2. COUNTIES—AUTHORITY OF COMMISSIONERS—DEFENDING SUIT.

If a county is possibly liable to a purchaser at tax sale for failure of his title, the county commissioners may assume the defense of a suit against such purchaser and the county treasurer, to test the title, and, in such case, the county will be liable for the costs and lawyer's fees.

Appeal from district court, Clear Creek county.

L. C. Rockwell and W. T. Hughes, for appellants. *Morrison & Fillius and Thos. J. Cautlon*, for appellees.

RISING, C. At a tax sale made by the county treasurer of Clear Creek county, in December, 1877, the defendant Hamill became the purchaser of certain premises, upon which taxes had been levied as the property of William H. Cushman, paying therefor the sum of \$3,928.09, being the amount of taxes, interest, and penalty, and thereupon said county treasurer made and delivered to said Hamill a certificate of sale for said premises. In an action brought by John B. Trevor and James B. Colgate against said Hamill and Lewis L. Roberts, as county treasurer of said county, in the circuit court of the United States for the District of Colorado, a decree was entered on the twenty-seventh day of May, 1881, adjudging and decreeing that the assessment upon which the taxes were levied upon said premises for the year 1876 was void, and the sale void, and that the tax certificates issued thereon should be canceled, and for naught held. On June 8, 1881, said Hamill presented to the board of county commissioners of Clear Creek county a bill against said county for the sum of \$3,928.09, with interest thereon at 25 per cent. per annum from the third day of December, 1877; the said sum of \$3,928.09 being the amount paid by said Hamill at tax sale for the premises described in the tax certificates ordered canceled by decree of the court. The board of commissioners allowed said bill to the amount of \$4,058.50, for the county and state proportion of the money to be refunded to said Hamill on account of said illegal tax sale, and issued a county order to said Hamill for said sum. On April 1, 1881, Morrison & Fillius presented to said board of county commissioners a bill against said county, for the sum of \$200, for legal services and expenses rendered and expended in the suit brought by Trevor and Colgate against Hamill and Roberts, and the same was allowed, and an order issued therefor April 6, 1881. On June 1, 1881, the bill of Edward F. Bishop, clerk of the United States court, against the defendants in said action of Trevor and Colgate against Hamill and Roberts, for the costs in said case, was presented to said board of commissioners for allowance, and the same allowed, and an order issued therefor for the sum of \$60.10. This action was brought to restrain the board of county commissioners from levying, and the county treasurer from collecting, a tax to pay said orders issued to said William A. Hamill, Morrison & Fillius, and W. F. Bishop; and to obtain a decree directing said board of county commissioners to pass resolutions rescinding the action of said board in the allowance of said bills, and the issuance of said orders. Upon trial, judgment dismissing the complaint, and against the plaintiffs for costs.

The only question raised by the assignment of errors is, was the allowance of said bills, and the issuance of county orders therefor, authorized by the law of the land?

As to the bill of William A. Hamill, we think the action of the board of county commissioners was authorized by, and was in conformity with, the provisions of section 2345 of the General Laws of 1877, which are as follows: "When, by mistake or wrongful act of the treasurer, clerk, or assessor, or from double assessment, land has been sold on which no tax was due at the time, the county shall hold the purchaser harmless, by paying him the amount of principal, and interest at the rate of twenty-five per cent. per annum; and the treasurer, clerk, or assessor, as the case may be, and his sureties on his official bond, shall be liable to the county for all losses sustained by the county from sales made through their mistakes or misconduct." It is conceded by appellants that the assessment of the Cushman property was void by reason of an error of the assessor in making an assessment of the same in 1876, but it is claimed by appellants that the provisions of the statute quoted do not affect this case, for the reason that the statute was not in force until March 20, 1877. The argument of appellants is that the intent of the law-making power was to hold the county harmless, as well as the purchaser at tax sale, and that this intent is evidenced by the provision in the statute making the officers of the county therein named liable to the county for all losses sustained by reason of its liability to the purchaser at tax sales. If, therefore, the officer, by whose error or mistake the tax proceedings were invalidated, cannot be held liable to the county, under the statute, for such error or mistake, then the county cannot be held liable to the purchaser; that as the assessment, which was invalidated by the error of the assessor, was made before the act of 1877 took effect, the assessor cannot be held liable to the county under the statute, and for that reason the county cannot be held liable in this case. We do not think the argument well founded. The statute had taken effect, and was in force, at the time Hamill became the purchaser at tax sale. The provisions of the statute must be held to apply to such sales. The statute being in force when the sale was made, the purchaser is protected by its provisions, and the liability of the county to him cannot be made to depend upon the liability of the officer who made the mistake or committed the error to the county. The liability of the county is created by the mistake or wrongful act of its officers. When created, its enforcement is not made to depend upon any contingency. The provision of the statute, making the officers liable, shows the intent to save the county harmless, but it does not show an intent to make the liability of the county depend upon the liability of the officers.

It appears from the evidence that the county employed the law firm of Morrison & Fillius to assist the county attorney in the defense of the suit brought against Hamill and Roberts by Trevor and Colgate. By reason of the possible liability of the county to the holder of the tax certificates sought to be canceled by said suit, the county had such an interest in that litigation that it was the duty of the board of county commissioners to do all that could be done to sustain the validity of the tax certificates. It also appears from the evidence that Hamill tendered the defense of said action to the county, and that the county made the defense by its board of commissioners. Under the law, the board of commissioners, in the proper discharge of their duties, could not have done less; and it follows that the county is liable for services and expenses of the counsel it employed, and for the costs in the case the defense of which it assumed.

The judgment should be affirmed.

MACON and STALLOUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is affirmed.

10 Colo. 146

SCHOFIELD *v.* FELT.

(Supreme Court of Colorado. June 15, 1887.)

1. APPEAL—BOND—AUTHORITY TO EXECUTE—INSUFFICIENCY.

To warrant the execution of an appeal-bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond; and, when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced; but, under Gen. St. Colo. § 1988, the appeal should not be dismissed because the appellant does not, upon the bond being declared insufficient, ask leave to file one that is sufficient. Under such circumstances, the court should enter a rule, to be made absolute on the appellant's failing to file such bond within a reasonable time.

2. SAME—PERFECTING APPEAL—PAYING COSTS.

Where the appeal-bond has been filed and approved, and an appeal accordingly prayed, within the 10 days fixed by Gen. St. Colo. § 1979, the failure to pay to the justice the costs of the appeal within that time is no ground for dismissing the appeal.

Error to county court, Arapahoe county.

On motion to dismiss an appeal from justice's court.

On the fifteenth day of November, 1883, judgment for \$80 was rendered in a case pending before GEORGE L. SOPRIS, justice of the peace in Arapahoe county, against said Schofield, the defendant therein, and in favor of said Felt, the plaintiff therein. On the twenty-third day of November, 1883, the said Schofield filed with said justice his bond for appeal of said case to the county court, and accordingly prayed appeal thereon. The said bond was then duly approved by the justice. On the third day of December, 1883, the said Schofield paid the said justice two dollars, the cost of granting the appeal, and the said justice then certified the case to the county court, and a transcript of the justice's record was thereafter filed in the county court. On the twenty-second day of December, 1883, the said Felt filed in the county court his motion to dismiss the appeal, for the following reasons: "(1) Because said Schofield did not pay, or cause to be paid, the cost of granting the said appeal from the said justice within 10 days from the rendering of the judgment; (2) because said Schofield has not filed any appeal-bond at all in said case in the county court; (3) because said Schofield did not perfect his appeal in said case within 10 days from the rendering of judgment; (4) because said Schofield did not procure, or cause to be procured, the granting of said appeal within 10 days from the rendering of the judgment. On the twenty-fourth day of January, 1884, the said motion was submitted upon the record in the case, and was sustained by the court, and the appeal thereupon dismissed. Exceptions were duly reserved, and the case comes here on error, and the one error assigned is that the court erred in sustaining said motion and dismissing said appeal.

P. L. Hubbard, for Schofield, plaintiff in error. *C. H. Burton*, for Felt, defendant in error.

STALLCUP, C. Two questions are presented for consideration. The first is as to the sufficiency of the bond for appeal to the county court. The record shows that the appeal-bond was executed as follows: "LOTT SCHOFIELD, by P. L. HUBBARD, his duly-appointed Agent for the Purpose of executing this Bond. A. L. SCHOFIELD, Surety." It is urged by counsel for defendant in error that the bond was insufficient, in that it was not executed by the principal in person. To warrant such execution of the bond, authority therefor of equal rank with the bond was necessary, and should have accompanied the bond; and when the authority of the agent to execute the bond was challenged, as it was by the motion to dismiss the appeal, the authority for so executing the bond should then have been produced if any such authority existed. On the failure to make such showing, the court was warranted in adjudging the appeal-bond insufficient; but the court was not warranted in the

dismissal of the appeal therefor, notwithstanding the appellant failed to ask leave to file a sufficient bond, as by such absolute dismissal the appellant was denied the right provided for such cases by section 1986 of our General Statutes, which is as follows: "If, upon the trial of any appeal, the bond required to be given shall be adjudged informal or otherwise insufficient, the party who shall have executed such bond shall in nowise be prejudiced by reason of such informality or insufficiency: provided, he will within reasonable time, to be fixed by the court, execute a good and sufficient bond." This is a copy of the statute of Illinois upon the same subject. The appellant was entitled to reasonable time in which to file a sufficient bond, and it was the imperative duty of the court to enter a rule that, unless the appellant filed a sufficient bond by the day named in the rule, the appeal would be dismissed. *Wear v. Killeen*, 38 Ill. 259.

The second question presented is as to the cost of the appeal. Must a payment thereof be made to the justice within 10 days after rendering the judgment to warrant the appeal, notwithstanding the appeal-bond had been filed and approved, and an appeal accordingly prayed, within the 10 days? Sections 1979, 1980, and 1981 of our General Statutes provide for such appeals. The payment of the costs of the appeal to the justice, thereby required, is not a jurisdictional provision. The justice may refuse to act until such costs are paid. It is merely a provision in his behalf to enable him to require the payment of such costs. *Carbonate Town Co. v. Ives*, ante, 120.

The judgment should be reversed, and the case remanded, with directions to the county court to proceed in accordance with this opinion.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded.

RANDS and others v. BRAIN.

(*Supreme Court of Utah*. June 13, 1887.)

EXECUTORS AND ADMINISTRATORS—WIDOW AND CHILDREN—ALLOWANCE—TITLE.

Comp. Laws Utah, § 850, authorizing the probate court, where the whole estate of a decedent does not exceed \$1,000, to "assign for the use and support of the widow, and minor child or children if there be no widow, the whole of the estate," only gives to the widow the use of the property assigned to the family, and, where the family consists of a widow and minor children, the widow does not become the absolute owner of land so assigned, to the exclusion of the heirs and members of the family, and cannot convey it absolutely to a third person.

C. C. Whittemore, for respondents. Arthur Brown, for appellant.

HENDERSON, J. This is an action of ejectment. The plaintiffs claim title to the disputed premises as heirs at law of Joseph Rands, deceased, who died intestate in 1875. His estate was administered in the probate court in 1879, and the premises in dispute being the only property belonging to the estate, and of the value of only \$500, it was by the probate court "set apart for the use of the family of the deceased, consisting of the widow and four minor children," under section 850, Comp. Laws 1876, p. 304. The widow thereupon conveyed the premises, by warranty deed, to the defendant. She has since died. The defendant claimed title to the entire premises under this deed. The court below refused to receive this deed as evidence of such title in the defendant, and held that the assignment in the probate court, under the statute above referred to, did not vest the title in fee in the widow alone, so that she could convey it absolutely to a stranger, to the exclusion of the

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other members of the family and heirs of the deceased; that the statute only gave her the *use* of the land,—and the only question before us is whether the court construed the statute correctly.

The defendant contends that, under this statute, when the family consists of the widow and minor children, and the probate court sets real property apart for the use of the family, the fee in the land is transferred absolutely to the widow, to the exclusion of all the heirs; and that the deed of the widow to the defendant conveyed the title to him. The statute is as follows:

"Sec. 850. If, on the return of the inventory of any intestate estate, it shall appear that the value of the whole estate does not exceed the sum of ten hundred dollars, the probate court, by a decree for that purpose, shall assign for the use and support of the widow, and minor child or children if there be no widow, the whole of the estate, and there shall be no further proceedings in the administration unless further estate be discovered."

This section is but one of a large number relating to the settlement and distribution of the estates of decedents and probate procedure, and its provisions can only be understood by considering all of the provisions bearing upon the subject. Section 701, p. 273, provides that "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purpose of administration." Section 845 provides that the widow or minor children may remain in the homestead until letters of administration are granted. Section 846 provides that, at any time after the return of the inventory, the probate court may upon its own motion, or on application, "set apart for the use of the family of the deceased all of the real and personal property which is by law exempt from execution." Section 847 authorizes the court to make further allowance out of the estate for the support of the widow and children, if the amount already set apart is insufficient for that purpose. Section 849, being the section immediately preceding the one under consideration, and part of the same act, is as follows: "When property shall have been set apart for the use of the family in accordance with the provisions of this act, the same shall pass to such surviving family in equal shares: provided, the portion inherited by the widow, upon her death, pass to the heirs of the deceased husband."

We are of opinion, considering all these provisions of the statute, that section 850 only gives to the widow the use of the property assigned to the family; and that when the family consists of a widow and minor children, and the property is "set apart for the use of the family," the widow does not become the absolute owner of such property, to the exclusion of the heirs and members of such family. It is unnecessary to determine in this case, what interest the widow would take if there were no other members of the family, and the assignment in the probate court was to her alone, or the respective rights of adult and minor heirs. The order of the probate court, in this case, expressly determined that the family consisted of the widow and four minor children, one of whom is a party plaintiff to this suit, and the assignment of the probate court was "for the use of said family." No doubt the use intended is the ordinary use of such property as is assigned. If it is personal property, that could only be used by consumption, then such use might be made of it, and the widow, as the succeeding head of the household, would administer and direct its use. But the other members of the "family" would still retain and have a substantial right and interest in the property. The construction of this statute contended for by the defendant might lead to results entirely foreign to its object. Suppose the widow had adult children by a former husband, and the minor children of the deceased constituting the family are her step-children, and she had died the next day after this assignment was made in the probate court,—then, according to the claim of the defendant, this property would have descended to her children, to the exclusion

of the children of the deceased. The authorities cited by the defendant as favoring his construction of the statute are under statutes materially different from the one under consideration. In the case of *Nevin's Appeal*, 47 Pa. St. 230, cited by defendant, and which was relied upon as being most in point, the statute provided that "the widow or the children of any decedent, dying testate or intestate, may retain either real or personal property to the value of \$300." There were no minor children who were members of the family, and the widow selected and retained the property, and the contention was between her and the adult heirs; and the court, in deciding that the widow was entitled to the possession of the property, say: "Regard for the manifest intention of the legislature requires us to hold that children who are adults, who are not members of the immediate family of the decedent, but have gone out from the paternal home to provide for themselves, are not the beneficiaries intended."

The following cases, while they construe statutes materially different from the one under consideration, favor the construction contended for by the plaintiff: *Abbott v. Abbott*, 97 Mass. 136; *Gaskell v. Case*, 18 Iowa, 147.

The statute is very vague and indefinite, and therefore difficult of construction and application. This has been recognized by the legislature, and in Sess. Laws 1884, pp. 407, 408, these provisions were re-enacted. The same general policy was retained, but many of the uncertainties and inconsistencies were obviated and corrected.

We think there was no error, and the judgment below should be affirmed.

ZANE, C. J., and BOREMAN, J., concur.

PEOPLE v. CHALMERS.

(Supreme Court of Utah. June 13, 1887.)

1. CRIMINAL PRACTICE—OPENING OF COUNSEL—STATEMENT OF EVIDENCE.

On the trial of defendant for assault with intent to kill, the prosecuting attorney, in stating the case to the jury, said that he expected the evidence to show that defendant, after the assault, made forcible resistance to the officers when making his arrest, and threatened their lives if they should do so. *Held* not error, as the conduct of the defendant could properly be shown in evidence as indicating consciousness of guilt, and the prosecuting attorney had a right to refer to any admissible fact of which he expected to offer evidence.

2. JURORS—OATH OF—STATUTES.

On March 2, 1887, a jury having the requisite legal qualifications was selected, accepted, and sworn, according to the existing law, to try a criminal case in a Utah court. On March 3d, congress passed a law requiring all jurors to take an additional oath. *Held*, that the act of congress did not affect the case, as it only applied to such jurors as might be sworn in a case after the law took effect, and that the court properly refused to require the jurors to take the additional oath.

3. CRIMINAL PRACTICE—DEGREES OF CRIME—ASSAULT—CONVICTION.

Defendant was tried for assault with intent to murder, on an indictment that alleged that defendant, "with a pistol loaded with gunpowder and bullets, in and upon one J. P. made an unlawful and felonious assault, and did shoot off one of the bullets at and against the person of the said J. P." *Held*, that the indictment in effect charged a battery, as defined by Comp. Laws Utah 1876, p. 592, and that the jury were authorized to find defendant guilty of the battery, under Laws 1878, § 301, providing "that the jury may find the defendant guilty of an offense, the commission of which is necessarily included in that with which he is charged."

4. SAME—NEW TRIAL.

Where there is a conflict in the evidence, and it does not appear that the jury labored under a mistake in considering their verdict, or that they were actuated by any improper motive, a new trial should not be granted.

Geo. S. Peters, for the People. *A. G. Sutherland*, for appellants.

ZANE, C. J. The appellant was tried on an indictment charging him with an assault on one John Pitt with intent to murder. In stating the case to the

jury, the prosecuting attorney said that he expected the evidence to be offered would show that the defendant, after the assault, made forcible resistance to the officers when making his arrest, and threatened their lives if they should do so. To this statement, counsel for the defendant objected, but the court overruled the same, and the counsel excepted, and assigns such ruling as error. The conduct of a person accused of crime, in attempting to prevent an arrest by resistance to lawful authority, or by flight, is admitted in evidence against him as indicating consciousness of guilt. The acts and voluntary expressions of a person accused of crime, at the time of his arrest, are always admissible in evidence against him. *People v. Abbott*, (supreme court of California,) 4 Pac. Rep. 769. It is proper for a prosecuting attorney, in stating a case, to mention any admissible fact of which he expects to offer evidence. The court must take the word of an attorney as to the evidence he expects to offer.

On the second day of March, 1887, a jury having the requisite legal qualifications was selected and accepted, and the oath then prescribed by law was administered. On the next day "An act to amend an act entitled 'An act to amend section 5352 of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March 22, 1882," went into force. The twenty-fourth section of this law in terms required all jurors to take an additional oath. On the next day (it being March 4th) the counsel for the defendant moved the court to require the jury to take this last-mentioned oath, which motion the court denied, and the counsel excepted, and assigns that ruling as error. Our view is that the intention of congress was to apply the additional test to such jurors as might be sworn in a case after the law should take effect; that it was not the intention to disqualify such as were competent at the time they entered upon the trial. Jurors to try a case are selected for a particular duty, and their qualifications should be determined before they enter upon its discharge. If the members of a jury cannot be changed during the trial, their qualifications ought not to be, because the application of new tests may involve a change of individuals, and such a change might acquit a guilty party without an actual trial, and thereby defeat the ends of justice. If any of the jurors, when required to take the additional oath, had refused, the court would have been compelled to discharge him, and the case would there have ended. It would have been the same as an acquittal. If a juror, during the trial, becomes so sick as to be unable to discharge the duties imposed upon him as such, or becomes insane, or is removed by death, the same consequences would not follow, because it would be the result of a natural cause,—a cause above and overruling human power. The necessity would be overwhelming. The accused party is placed in jeopardy when the jury is sworn. In contemplation of law, the trial then commences. A discharge of the jury trying a party charged with felony, unless for an overwhelming necessity, or at the request of such party, effects his acquittal. *McFadden v. Com.*, 23 Pa. St. 12. Such a discharge because of a refusal to take the new oath would not have been at the instance of the defendant.

Counsel for defendant also urges that the jury was not authorized to find the defendant guilty of a battery on the indictment upon which he was tried. It is alleged, in the indictment, that the defendant, with a pistol loaded with gunpowder and bullets, in and upon one John Pitt made an unlawful and felonious assault, and did shoot off one of the bullets at and against the person of the said John Pitt. "A battery is any willful and unlawful use of force or violence upon the person of another." Comp. Laws Utah 1876, p. 592. The indictment describes a battery as defined in the statute. It is stated that the assault was upon Pitt, and that the bullet was shot at and against his person. Section 301, Laws Utah, 1878, provides that "the jury may find the defendant guilty of an offense the commission of which is necessarily included in that with which he is charged." While an assault with

intent to murder might be charged without describing a battery, this charge does include that offense. The acts constituting the crime, as charged in the indictment, include those essential to the description of a battery. At common law there could be no conviction for a misdemeanor on an indictment for a felony. The reason upon which the rule was established, was that persons indicted for a misdemeanor had certain advantages at the trial, such as to make a full defense by counsel, and to have a copy of the indictment, and a special jury not then permitted in felony. Such reasons do not exist in this territory, and we therefore disregard the rule. When a minor offense is included in a greater, the defendant may be acquitted of the latter, and convicted of the former, unless the allegation is in a form not charging the lower. Bish. Crim. Law, note 1, §§ 780, 794; Whart. Amer. Crim. Laws, §§ 616, 617.

Finally, it is insisted that the court erred in overruling the motion for a new trial because the evidence showed that the defendant committed the battery in necessary self-defense, as he alleges. There was a conflict in the evidence as to whether the injured party assaulted the defendant before the shot was fired by the latter. It does not appear that the jury labored under a mistake in considering their verdict, or that they were actuated by any improper motive. We are of the opinion that the evidence was sufficient to authorize the verdict.

Finding no error in the record, we affirm the judgment of the trial court.

BOREMAN and HENDERSON, JJ., concur.

HEDGES v. DAM and others. (No. 11,612.)

(Supreme Court of California. June 13, 1887.)

1. PLEADING—AMENDMENT—RIGHT OF.

Defendant filed a demurrer to plaintiff's complaint, and thereafter, and before the issue of law raised by the demurrer was heard, filed an amended demurrer by leave of court, a copy of the same being served upon the attorney of plaintiff before the motion for leave to amend was made. *Held* permissible, under Code Civil Proc. Cal. § 472, which provides that "any pleading may be amended after demurrer, and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party."

2. COUNTIES—ACTION AGAINST SUPERVISORS—COMPLAINT.

In an action against the members of the board of supervisors of a county for having wrongfully allowed certain claims, a complaint which does not show the nature of the claims allowed, or wherein the acts complained of are unlawful, and simply alleges that the defendants "wrongfully paid out large sums of money," and "that the said claims were wrongfully and without authority of law ordered paid," states mere conclusions of law, and is insufficient.

3. SAME—JURISDICTION.

Such a complaint does not charge a cause of action, under the provisions of section 4086, Pol. Code Cal., which prescribes the jurisdiction of the county commissioners.

4. SAME—PARTY PLAINTIFF.

Where an action is prosecuted in behalf of a county by a tax-payer, instead of the district attorney, facts must be alleged in the complaint showing a refusal or neglect on the part of the district attorney to institute the action.

In bank. Appeal from superior court, Yuba county.

Cross & Simonds, for appellant. E. A. Davis and A. L. Hart, for respondents.

PATERSON, J. 1. This action was commenced on the thirty-first of July, 1885. A demurrer was filed on August 11, 1885. Thereafter, and before the issue of law thus raised was heard, the court, on motion of counsel for defendants, allowed defendants to file an amended demurrer. The attorneys for plaintiff were served with a copy of the amended demurrer before the

motion was made, and were present in court at the hearing. Section 472, Code Civil Proc., provides that "any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or *after demurrer and before* the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party. * * *" The amended demurrer, having been served and filed before trial of the issues of law raised by the original demurrer, took the place of the original, and the court committed no error in allowing it to be filed. Appellant contends that the "pleading" referred to *after demurrer* is the complaint; but the section says *any* pleading, and, of course, a demurrer to the complaint is a pleading, and, for the purpose of raising an "issue of law," is as important as the complaint.

2. The complaint does not state facts sufficient to constitute a cause of action. It alleges that "said board of supervisors misappropriated, wrongfully, unlawfully, and illegally allowed and paid out, large sums of money, and ordered the same to be paid out of the county treasury of said Yuba county, which sums of money were paid out upon demands presented against said Yuba county to said board of supervisors, which demands were not legal demands against said county of Yuba, nor had said board of supervisors any authority or right to allow or audit or order them paid. But said board of supervisors, as such, did examine, allow, audit, and order paid all of the said illegal demands, well knowing them to be illegal demands, and all of said demands were paid out of the county treasury of said Yuba county because the said board of supervisors did examine, allow, audit, and order the same paid." Then follows a list of 49 names, with simply dates and the amounts set opposite thereto, amounting in the aggregate to \$13,007.08, and the complaint concludes with the following allegation: "That each and all of the said demands were wrongfully, unlawfully, and without authority of law allowed and ordered paid by said board of supervisors, and by reason of being so allowed and ordered paid were afterwards in fact paid out of the county treasury of said county, whereby the said county treasury has been depleted to the extent of the said amount of \$13,007.08." The defendants Flathman, Dam, and Babb were the three members of the board who voted for the allowance and payment of said claims, and the other defendants are sureties on their official bonds. There is nothing to show the nature of the claims allowed, and the complaint is clearly insufficient. Allegations that the members of the board "misappropriated, wrongfully, unlawfully, and illegally allowed and paid out, large sums of money," and "that the said demands were wrongfully, unlawfully, and without authority of law allowed and ordered paid," are mere conclusions of law. It has been held repeatedly that the facts must be stated showing wherein the acts complained of are unlawful, wrongful, or illegal. *Payne v. Treadwell*, 16 Cal. 220; *Branham v. San Jose*, 24 Cal. 585; *People v. San Francisco*, 27 Cal. 655; *Triplett v. Munter*, 50 Cal. 644; *Smith v. Ling*, 68 Cal. 324, 9 Pac. Rep. 171. If plaintiff bases his right to maintain the action under the provisions of section 4086, Pol. Code, it is sufficient to say that the complaint does not charge even in the general language of that law.

3. No reasons are set forth in the complaint why this action is prosecuted by and in the name of plaintiff, a tax-payer, instead of by the district attorney, in the name of and in behalf of the county. It is not alleged even that any demand was made by plaintiff either for the money, or for the institution of an action for its recovery. The county is the real party in interest, and the district attorney is the proper person to prosecute actions in the name of the county. Pol. Code, § 4256, subd. 3; section 136, County Government Act. If it be admitted that a tax-payer has the right, even in the absence of an express statutory authority, to prosecute actions of this kind, yet we think facts should be alleged showing a refusal or neglect on the part of the proper officer to institute an action. Judgment affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

McFARLAND, J.; TEMPLE, J. We concur in the judgment on the last ground stated, and also agree to the views expressed in relation to the amended demurrer.

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COLLINS v. ANGELL and others. (No. 9,642.)

(*Supreme Court of California*. June 13, 1887.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—PRACTICE—WAIVER.

A judgment creditor secured an order from the court, requiring the judgment debtor to appear before a referee, and answer concerning his property, which order was obtained on an affidavit that was not filed until the filing of the report of the referee. *Held* that, after service of the affidavit and order on the debtor, and after he had appeared before the referee, and gone through the examination without objection, any irregularity was waived.

2. SAME—NECESSITY OF AFFIDAVIT.

But, where an execution has been returned unsatisfied, the judgment creditor has a right to an order requiring the debtor to appear and answer concerning his property without an affidavit, under section 714, Code Civil Proc. Cal., which provides for supplementary proceedings against debtors.

3. SAME—INTEREST IN PROPERTY—ORDER TO ASSIGN.

Where, in supplementary proceedings against a judgment debtor, he is ordered to assign all his "right, title, and interest" in certain letters patent to his creditor, it is immaterial that he claims to have no property in the patents.

4. SAME—ASSIGNMENT OF JUDGMENT—EFFECT.

A judgment creditor, after execution returned unsatisfied, in supplementary proceedings against the debtor, stated in his affidavit that he had assigned his judgment. *Held* that, even if the proceedings were based upon the affidavit, the order requiring the debtor to appear and answer concerning his property should not be reversed, on the ground that the creditor was not the real party in interest, since the supplementary proceedings could not be regarded as a new action.

5. SAME—INTERPLEADER.

The refusal of the motion of a judgment debtor in supplementary proceedings against him, when he has been ordered to assign his interest in certain letters patent "for leave to commence an action to interplead certain other parties to compel them to litigate their claims to the said patents," is not error.

Department 2. Appeal from superior court, San Francisco.

Gray & Haven, for appellant. *S. W. & E. B. Holladay*, for respondent.

McFARLAND, J. Plaintiff having recovered judgment against defendants for \$2,742, with interest and costs, and an execution issued thereon having been returned wholly unsatisfied, he procured an order from the judge of the court in which the judgment was rendered, requiring defendants to appear before the court commissioner, as referee, at a certain time and place, to answer concerning their property. Defendant H. B. Angell appeared before the referee, who took the evidence offered, and reported the same to the judge. Thereupon the court made an order that said defendant execute and deliver to A. B. Forbes, a receiver appointed for that purpose, assignments of his right, title, and interest in and to certain letters patent issued to him by the United States, to be thereafter sold in such manner as should be directed, for the satisfaction of respondent's said judgment. From this order the defendant Angell appeals.

Appellant's first contention is that the order requiring him to appear before the referee was void, and therefore all subsequent proceedings invalid, because the affidavit made by the respondent at the time said order was made was not filed by the clerk until the filing of the report of the referee. This contention goes upon the assumption that there is a radical distinction between the provisions of section 714 and those of section 715 of the Code of Civil Procedure. But, admitting this to be so, the point is too inconsiderable to

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bear the weight it is expected to carry. It would have been more regular, of course, to have filed the affidavit before its presentation to the judge. And, no doubt, it would have been filed immediately at any time, or a new proceeding would have been commenced, upon suggestion or objection by appellant. But, after service of the affidavit and order upon appellant, he appeared before the referee, and went through with the examination without any objection whatever. Thereupon the report of the referee, together with the affidavit, were filed; and the order appealed from was made after such filing. Under these circumstances the point that the whole proceeding is void for want of jurisdiction is untenable.

Bryant v. Bank of California, 7 Pac. Rep. 128, cited by appellant, decides no more than that, when papers are offered to prove a judicial record, it must appear that they came from the files of the court and the custody of the clerk. But, as the execution in this case had been *returned* unsatisfied, respondent was entitled to the order without any affidavit, as provided in section 714 of the Code of Civil Procedure. The main distinction between that section and section 715 seems to be that, under the latter, supplementary proceedings *may be* commenced before the return of the execution, provided it has been issued, and that in such case an affidavit is necessary showing that the judgment debtor has property which he refuses to apply to the satisfaction of the judgment. In other respects, the proceedings under these two sections, and those which follow on the same subject, seem to be the same. The fact appearing in the affidavit, if the latter is to be considered at all, that respondent, upon information and belief, had some knowledge of certain specific property of appellant, is immaterial.

Appellant also makes the point that it does not appear from the evidence that he had any property in the letters patent. But there was evidence to that effect, and the conclusion to which the court came upon the question is not assailable upon the ground that there was no evidence to support it. Moreover, appellant was only ordered to assign all his "right, title, and interest" in the patents. Appellant, assuming that this proceeding is equivalent to a new suit, and that the affidavit should be regarded as a creditor's bill, contends that the order should be reversed because respondent states in the affidavit that he has assigned the judgment, but still claims a contingent interest in the same. This view, however, would not be correct, even if the order had been made under section 715, and necessarily based in part upon an affidavit. It would still have been a proceeding in the original case, auxiliary and supplementary thereto, and not a new action. But, as before stated, the order was based on the record facts of the judgment and the returned execution. The affidavit merely informed the judge of those facts which an inspection of the record would have disclosed. The affidavit on the trial of an issue involving the extent of respondent's interest in the judgment might, like any other declaration, be admissible as an item of evidence, but in other respects it has no virtue.

Appellant also appeals from another order—or rather from another part of the same order—"refusing to grant the motion of said H. B. Angell for leave to commence an action to interplead plaintiff and Elizabeth A. Risdon with certain other parties to compel them to litigate their several claims to said patents." This motion was based on section 386, Code Civil Proc.; but, as that section refers to cases where "an action is pending," it is doubtful if it applies at all to a "proceeding" like this. Assuming, however, that it might apply here, the section provides for an application to "substitute" some other person as defendant in place of the moving party, not "for leave to commence an action to interplead" other parties. And then the defendant must be in the position of a stakeholder having no interest in the litigation, which is not the position of appellant here. Lastly, the appellant could have commenced his proposed action without any "leave."

No questions as to the requirements of a legal assignment of patent rights, or as to what title purchasers from the receiver would get, arise in this case. The orders appealed from are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

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MERRIAM v. BOARD OF SUPERVISORS OF YUBA CO. (No. 11,611.)

(*Supreme Court of California*. June 13, 1887.)

INJUNCTION—COUNTY SUPERVISORS—ILLEGAL PAYMENT OF CLAIMS.

In California an injunction to restrain the anticipated action of the board of supervisors of a county, in paying certain alleged illegal claims, will not be granted, it being hardly claimed that there is an excess of jurisdiction on the part of the board. McFARLAND, J., dissenting.

In bank. Appeal from superior court, Nevada county.

This action was commenced by Joseph Merriam, a tax-payer, on behalf of the tax-payers of Yuba county, to restrain the supervisors from paying certain attorney's fees, and other claims against the county, alleged to be illegal, amounting to about \$10,000. The defendant filed a demurrer, and afterwards obtained leave to file an amended demurrer, based upon the incapacity of the plaintiff to sue, and that the complaint did not state facts sufficient to constitute a cause of action.

E. A. Forbes, E. A. Davis, and A. L. Hart, for respondent. Cross & Simonds, for appellant, Yuba county.

TEMPLE, J. It is not necessary to consider the alleged error in allowing the amendment to the demurrer, as the only questions which we find it necessary to consider arise upon the general demurrer, which are the same in each demurrer filed. The case appears to be clearly within the rule laid down in *Linden v. Case*, 46 Cal. 171. In other states, it is true, such suits have been maintained, although the rulings do not seem to be uniform upon the subject. It is hardly claimed here that there is an excess of jurisdiction. It may be that facts exist which would justify the board in allowing the claims. We must presume that the board will do its duty, and we cannot assume that the claims will be allowed improperly. How can the plaintiff know, or this court decide in advance, that the claims will not be rejected for the objections alleged against them by petitioner? Besides, as stated in *Linden v. Case*, *supra*, even if the board should allow them, the county and tax-payers are not without remedy. The auditor ought not to draw his warrant for an illegal demand even, although allowed by the board, and, if he does so knowingly and willfully, he is personally responsible, and may be made to refund the money thus illegally paid. The same rule applies to the treasurer. The warrant drawn by the auditor would be no excuse for the payment of a claim known to be not a lawful charge. Then the district attorney is required to look after the affairs of the county, and it is his duty of his own motion to commence suits to recover moneys illegally paid out. Section 4086, Pol. Code; section 8, County Government Act. The members of the board would themselves be individually responsible for moneys willfully paid out without authority of law. They are trustees of the funds for certain specified purposes, and cannot, except by violating their oaths, allow them to be applied to other purposes. They act judicially, it is true, and will not be held accountable for mere errors, but they will not be excused on the ground that they have acted honestly, merely because they do not steal the funds. If they willfully appropriate moneys for a purpose not authorized by positive law, they are liable civilly and criminally. If other safeguards are needed, the legislature can provide them. It is not the province of the courts. Judgment affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; PATERSON, J.

McKINSTRY, J. I concur in the judgment on the authority of the decision in *Linden v. Case*, 46 Cal. 171.

McFARLAND, J. I dissent, and that *Linden v. Case* should be overruled.

72 Cal. 523

BROWN and others v. CENTRAL PAC. R. CO. (No. 11,383.)

(*Supreme Court of California. June 13, 1887.*)

MASTER AND SERVANT—LIABILITY OF MASTER—CONTRIBUTORY NEGLIGENCE—FELLOW-SERVANTS.

A mixed train of 20 cars, run by a crew consisting of the conductor, head, middle, and rear brakemen, and engineer and fireman, parted, on a clear night, while running down a slight grade. The forward part, on which were the engineer, fireman, and head brakeman, went on some distance before the separation was discovered. The brakeman, who, under the rules, had control of the detached part of the train ordered it backed, to couple with the part left. That part had continued down grade of its own momentum. There was a collision, and the conductor was killed. At the time of the accident the rear and middle brakemen—the latter by the conductor's express orders—were in the baggage car with the conductor. The engine gave no signals as it came back. *Held*, in an action by the heirs of the conductor, that he was guilty of negligence in not having the two brakemen at their stations, and that the head brakeman was also guilty of negligence in backing up, and that there could be no recovery, as the conductor's death had been caused by his own negligence as well as by that of his fellow-servants.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

This is an action to recover damages brought by the widow and children, as heirs, of Gilman George Brown, deceased, for the death of the latter, through the alleged negligence of defendant, a railroad corporation. Plaintiffs had a verdict and judgment for \$10,000 and costs, from which judgment, and from an order denying a new trial, the defendant appeals.

On rehearing. See 12 Pac. Rep. 512.

Glassell, Smith & Patton, Creed Haymond, and W. C. Belcher for appellant. *Howard, Brousseau & Howard*, for respondents.

HAYNE, C. Since the former decision (12 Pac. Rep. 512,) the case has received a thorough discussion, which has induced a change of view.

Gilman G. Brown was conductor on one of the defendant's trains running between Los Angeles and Yuma. During the night of April 7, 1877, his train parted. The forward portion, on which were the engineer, the fireman, and the head brakeman, ran ahead of the rear portion, on which were the conductor and the two other brakemen. When the forward portion had got considerably in advance, the head brakeman discovered what had occurred, and he thereupon had the engine stopped, and, going upon the top of the rear car, signaled the engineer to back. The engineer obeyed the signal, and, the other portion of the train coming on of its own momentum, a collision occurred, which caused the death of the conductor. His widow and heirs bring this action against the company.

Nothing can be plainer than that, if two bodies keep moving towards each other on the same track, a collision must result. It is evident, therefore, that somebody on those trains must have been guilty of negligence. Who was it,—those on the forward portion, or those on the rear portion, or both? We think that there was negligence on both sides.

1. The track being slightly down grade, the head brakeman ought to have known that it was imprudent to back. He ought to have kept his portion of the train moving on, "even to the next station, if necessary," or, at least, he should have allowed ample time to elapse before starting back to see what had

become of the other portion of the train. The course adopted was, under the circumstances, dangerous in the extreme, and was one of the main causes of the accident. But the blame rests upon him, and not upon the engineer. The uncontradicted evidence is that when a train parts, under the circumstances shown in this case, the head brakeman becomes the conductor of the portion on which he is, and has control of the engineer. Rule 44 is not in conflict with this. The injunctions laid by that rule upon the engineer are not intended to prevent his obeying the higher authorities. If the conductor or head brakeman is there, the engineer must obey his instructions, and the evidence shows that he did obey them. This being the case, the evidence introduced to show the incompetence of the engineer becomes immaterial. The negligence was that of the head brakeman; and since he was the fellow-servant of the deceased, and no want of care in his selection is imputed to the company, it cannot be held liable for what occurred. And if it be said that, conceding the engineer did right in obeying the signals to back, yet that, in backing, he ought to have sounded his whistle and rung his bell, the answer is that the inducing cause of the accident was backing at all, and that, this having been done, there is only a bare possibility that the taking of the precautions mentioned would have made any difference, especially in view of the fact that neither of the brakemen on the other portion of the car was at his post, and that nobody there was aware that the train had parted.

2. There seems to have been even greater negligence on the part of those on the rear portion of the train. They were not aware that the train had parted. This resulted from the brakemen not being at their posts. The middle brakeman and the end brakeman were in the baggage car with the conductor. They should have been at their posts; one towards the middle of the train, and the other at the end. In view of what happened, it was especially important for the middle brakeman to have been attending to his duties. He testified as follows: "*Question.* Had you been there could you have had an opportunity of finding out that these rear cars had become detached and uncoupled? *Answer.* Most assuredly I should have seen it." There was not the shadow of an excuse for his absence. He had been called into the car by the deceased to assist in calling off way-bills, a thing which he should not have been taken from his post to do, and was allowed to lounge there after the calling off of the way-bills had been concluded, which was inexcusable. There is some testimony that he was "sick" at the time; but it is not pretended that he was incapacitated from attending to his duties; and nothing short of incapacity would have justified the conductor in jeopardizing the lives and property on the train by allowing the brakeman to neglect his duty.

The rear brakeman was in the car, "assorting out some mail that I had to distribute." It is not suggested that he had any connection with the post-office, and we do not understand what business he had with the mail. Just before the accident he had taken a seat in the baggage car. He says: "I had no more than seated myself in the end of the coach than the collision took place."

All this showed negligence on the part of the deceased. It was his duty as conductor to see that the brakemen were at their posts. He not only did not do this, but he was the direct cause of the absence from duty of the most important of them. He was therefore directly chargeable with the consequences.

Either of the foregoing grounds constituted a defense to the action; and the evidence in support of each is uncontradicted. If it be said that the presence of the middle brakeman at his post might have made no difference, because he might not have discovered the parting of the train, the answer is that he testifies that he would have discovered it; and this testimony is not only uncontradicted, but is in accordance with all the probabilities. And if it be objected, with reference to the other ground, that if the engineer, when

backing, had blown his whistle and rung his bell, it might have apprised those on the rear portion of the train of their danger, the answer is that backing at all was, under the circumstances, the fatal move, and that, in view of the state of things on the rear portion of the train, there is no reason to suppose that the precautions mentioned would have made any difference in the result.

But if we assume that the accident might possibly have been avoided in the contingencies mentioned, the negligence of the fellow-servant in the one case, and the contributory negligence of the deceased in the other, being clearly shown, and directly conducing to the accident, the mere possibility that it might or might not have been avoided in a certain contingency is but slight evidence; and the provision of the Code is that slight evidence will not support a verdict. Code Civil Proc. § 1835.

We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

GODCHAUX v. CARPENTER and others. (No. 1,243.)

(Supreme Court of Nevada. June 2, 1887.)

HIGHWAYS—PROCEEDINGS TO ESTABLISH—JURISDICTIONAL DEFECTS.

The board of county commissioners of a county granted a petition for the establishment of a public road. The petition did not disclose the names of the owners of land through which the road was to pass, nor did the records of the board show that they had found that a majority of the tax-payers of the district, according to the last previous assessment roll, had signed the petition, as required by statute. They simply found that a majority of the resident tax-payers had signed the petition. *Held*, on a review of the action of the board by writ of *certiorari*, that its compliance with the statute was a jurisdictional fact, which must appear, and that its action was null and void.

Application for writ of *certiorari*.

M. S. Bonnfild and *H. F. Bartine*, for petitioner.

LEONARD, C. J. This is an application for a writ of *certiorari* to review the action of the board of county commissioners of Humboldt county, in this state, in making the following order, May 5, 1886, to-wit: "The board, having under consideration the petition of Edward Lyng and other resident tax-payers of Willow Point road-district, praying for the location, opening, and establishing, for public use, of a public road and highway, described in said petition, and situated in said road-district, and evidence having been produced before the board, and heard by it, in said matter, and it appearing to the board therefrom that said petition was signed by a majority of the resident tax-payers of said Willow Point road-district, and was in all respects in conformity with the law in such case made and provided, the board granted said petition, and appointed P. W. Cunningham, a disinterested person, as road viewer on its part, with such powers and authority as are provided by law."

Plaintiff is the owner of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 10, township 39 N., range 39 E., through which said road, if opened, will pass. The statute provides that, "at any time when a majority of the resident tax-payers of a road-district, according to the last previous assessment roll, shall petition the county commissioners of their respective counties for the location, opening for public use, establishment, change, or vacation of any public road or highway, or road to connect with any highway, heretofore established, any

street, or alley in any incorporated town in such county, setting forth in such petition the beginning, course, and termination of such road or highway, street or alley, proposed to be located and opened for public use, established, changed, or vacated, together with the names of the owner or owners of the land through which the same will pass, said petition may be presented to the county clerk of said county, and the clerk shall lay said petition before the board of county commissioners at their next meeting after the reception of said petition, and thereupon said board of commissioners shall, within 80 days thereafter, proceed to locate, open to public use, establish, change, or vacate such road, highway, street, or alley. Before opening any new road, street, or alley, or changing same, through private property, such property shall be condemned for public use, as follows: * * *

It is alleged in the petition filed in this court that plaintiff will sustain great damage and injury by the opening of said road, and that, unless restrained, defendants intend to and will proceed to locate, establish, and open said road, through plaintiff's said land, until the same is completed, to plaintiff's irreparable damage, and that, for several reasons stated, the board exceeded its jurisdiction in making the order before recited.

It is well settled that a board of county commissioners is a body possessing but limited and special powers; that, when its power or authority to do any particular thing is questioned, the record must show affirmatively all the facts necessary to give it authority to perform the act complained of, and that, when this is not the case, the presumption is against its jurisdiction. *Swift v. Commissioners of Ormsby Co.*, 6 Nev. 97; *State v. Board of Commissioners*, 12 Nev. 19; *Curran v. Shattuck*, 24 Cal. 435; *Finch v. Tehama Co.*, 29 Cal. 454.

It is just as well established, also, that "the exercise of the right of eminent domain, whether directly by the state or its authorized grantee, is necessarily in derogation of private rights; and the rule is that the authority is to be strictly construed. * * * What is not granted is not to be exercised." *Lance's Appeal*, 55 Pa. St. 26.

Stanford v. Worn, 27 Cal. 172, was an action to condemn lands for state prison purposes, under a statute passed to that end. The court said: "In order to render proceedings of this character effectual for any purpose, the provisions of the statute by which they are authorized must be strictly followed. The power must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings. When certain steps are authorized by statute in derogation of the common law, by which the title of one is to be divested and transferred to another, every requisite having the semblance of benefit to the former must be strictly complied with." *Atkins v. Kinnan*, 20 Wend. 241. "The right to appropriate private property to public uses lies dormant in the state, until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriation. Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which the fact is determined, must be held to be, for this purpose, 'the law of the land,' and no further finding or adjudication can be essential, unless the constitution of the state has expressly required it. When, however, action is had for this purpose, there must be kept in view that general, as well as reasonable and just, rule, that whenever, in pursuance of law, the property of an individual is to be divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceedings will be ineffectual. Those provisions must be regarded as in the nature of conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance." *Cooley*, Const. Lim. 657. And see

Nichols v. Bridgeport, 23 Conn. 208; *Kroop v. Forman*, 81 Mich. 144; *Sharp v. Speir*, 4 Hill, 86; *Bensley v. Water Co.*, 13 Cal. 315; *Dalton v. Water Commissioners*, 49 Cal. 222; *Mitchell v. Railroad & C. Co.*, 68 Ill. 286; *Sharp v. Johnson*, 4 Hill, 92.

The last case shows that the twenty-fourth section of the act incorporating the village of Williamsburgh provided as follows: "The trustees of said village shall or may, on an application in writing of a majority of the persons owning the property described in any such application, and who are intended to be benefited thereby, or whose property shall be assessed for the payment of the expenses attending the same, and upon such application they are hereby fully authorized and empowered to, widen and alter all public roads, streets, and highways already laid out in said village." The court said: "Let us see what authority the trustees had to proceed. They had a paper signed by fourteen persons, in which they 'suggest the propriety of having the street opened.' * * * Although the petitioners say that they are 'inhabitants in and about North Third street,' they do not 'suggest' that they own a single foot of land in the street, or elsewhere; nor is any land 'described' in the application, as the statute requires. There are only fourteen petitioners, while there are forty-four different assessments. * * * The burden lay on the defendant of showing that the application came from 'a majority of the persons owning the property,' and he has not only failed to show it, but the evidence is nearly or quite conclusive that a majority did not apply. The trustees, therefore, had no authority whatever to open the street, and the plaintiff's land in the site of the street has not been taken according to law. She owns it still."

We quote also from the court's opinion in the case of *In re Grove St.*, 61 Cal. 444. The case shows that the second and third sections of the act "to provide for the opening of streets in the city of Oakland" provided that proceedings should be commenced by petition of five or more residents and freeholders within said city, addressed to the city council; the petition to contain, among other things, "a statement that, in the opinion of the petitioners, the public interests require that the improvement asked for (describing it generally) should be made." But the statement of the residents and freeholders to the city council was that, "in the opinion of the petitioners, the improvement asked for *should be made*." Said the court: "It may be said it is enough if the freeholders express a desire that the street be opened, or other improvements made. This must be all required by the statute, since it must be presumed the legislature has not attempted to give the power—power which it could not give—to five or more residents and freeholders of deciding whether 'the public interests require' a municipal improvement; in other words, its necessity or expediency. But the statute does not purport to confer such power upon the petitioners. The fourth section of the act provides that, at the regular meeting next after the meeting at which the petition of freeholders is presented, 'the council *may*, by resolution, determine the lands to be benefited,' etc. Thus the ultimate power of determining the necessity and expediency of the work is placed in the city council. The power, however, like every other power of the council, is derived from the charter or statute, and can be employed only in the manner and with the limitations prescribed in the statute. The statute authorizes the city council to proceed with the acts looking to the opening of the street only after a certain petition shall be filed with the clerk. It was for the legislature to prescribe, and the legislature has prescribed, what the petition shall contain. Until a petition is presented containing substantially all that the law declares shall be inserted in a petition to initiate the proceeding, the council has no power or jurisdiction to act with reference to the opening of a street. A statement in the petition that, in the opinion of the petitioners, an improvement 'should be made,' is not in substance the same as a statement that, in

the opinion of petitioners, 'the public interests require the improvement should be made.'"

In the case before us it was the duty of the board, and consequently within its jurisdiction, in 30 days after March 2, 1886, (its first meeting after the petition was filed having been held on that day,) to proceed with the acts looking to the opening of the road in question, as the statute required; provided, the petition contained—*First*, a majority of the resident tax-payers of Willow Point road-district, according to the last previous assessment roll; and, *second*, the beginning, course, and termination of the said road; and, *third*, the names of the owners of the land through which the same would pass.

The statute does not require, in terms, the first fact to be stated in the petition, but it does the second and third. If we admit that the first fact may have been determined by the board, upon evidence presented, although not shown by the petition, (*Hetzel v. Board of Commissioners of Eureka Co.*, 8 Nev. 309.) yet it must appear affirmatively, from the records of the board, that the board found as a fact that "a majority of the resident tax-payers of Willow Point road-district, according to the last previous assessment roll," had signed the petition. What the board did find is that "said petition was signed by a majority of the resident tax-payers of said Willow Point road-district. It was not found that a majority of the resident tax-payers of the road-district, according to the last previous assessment roll, had signed it. The board found that a majority of the then resident tax-payers of the road-district had signed the petition, while the statute required a majority according to the last previous assessment roll.

Eleven persons signed the petition before it was filed, and four after filing. The most that can be claimed is that the board found that, at the time of the hearing, 15 constituted a majority of the resident tax-payers of the road-district; that at that time there were not more than 29 in all. But these findings do not show that no more than 29 resident tax-payers of the road-district appeared upon the last previous assessment roll. That may have shown more than 29, and hence more than 15 may have been required to constitute the requisite number under the statute. The legislature had the right to require the majority to be estimated from the number appearing on the last previous assessment roll, and it did so. It could have required a petition, signed by every resident tax-payer, or by a number less than a majority.

In the present case the board had no power to locate the road in question without finding as a fact, from competent evidence, that a number of resident tax-payers of the road-district, exceeding one-half the number appearing upon the last previous assessment roll, had signed the petition. This was a jurisdictional fact, without which the board had not power to make the order complained of. Again, under the statute, it was just as necessary to insert in the petition the names of the owners of the land through which the road would pass as it was to set forth therein the beginning, course, and termination of the road. The statute declares that all these facts shall be stated in the petition; and, aside from the fact that their insertion is a statutory requirement, they ought to be in the petition for the protection of land owners, and the guidance of road viewers.

It is unnecessary to consider other questions raised by counsel for plaintiff.

The order of the board of county commissioners of Humboldt county, dated May 5, 1886, granting the petition of Edward Lyng and others, to locate, establish, and open the road therein described, and to run in part through the lands of Louisa Godchaux hereinbefore mentioned, is declared and adjudged to be null and void, and plaintiff will have judgment for her costs.

(36 Kan. 725)

In re Petition of SECREST and others.

(Supreme Court of Kansas. June 8, 1887.)

1. CRIMINAL PRACTICE—PRELIMINARY HEARING—WAIVER—EFFECT.

Where a defendant charged with murder in the first degree waives a preliminary examination for such offense, he not only waives his right to be let to bail, but also to have the facts of the alleged offense examined into on *habeas corpus*; but, where said waiver is made under fear of personal violence, he will not be estopped by reason of such waiver.

2. BAIL—MURDER.

A person charged with murder in the first degree is entitled to be let to bail where the proof is not evident, nor the presumption great.

(Syllabus by Clogston, C.)

Original proceedings in *habeas corpus*.

The facts are these: That the petitioners are in the custody of the sheriffs of Ford and Finney counties under a warrant of commitment issued by a justice of the peace of Wichita county, upon the complaint charging them with murder in the first degree. The defendants appeared before the justice of the peace, and waived preliminary examination. Bail was refused by the court, and the defendants now petition for a writ of *habeas corpus*, asking that the charge against them be examined into, and that they be discharged or let to bail.

J. W. Ady, for petitioners. *Waters & Chase*, for respondents.

CLOGSTON, C. The respondent insists that because the petitioners have once waived a preliminary examination for the offense of murder in the first degree, that they are not now entitled to have the charges against them investigated, or be let to bail. We will first consider this question. A defendant who is charged with murder in the first degree, and who has waived a preliminary examination for such offense, not only waives his right to be let to bail, but also to have the facts and circumstances of the alleged offense examined into on a writ of *habeas corpus*. But to this rule there are exceptions. Where, at the time of such waiver of examination, there is good ground to believe that, if an examination is gone into, personal violence will be used against defendants, and under such apprehension an examination is waived, they will not be estopped by reason of such waiver. To be estopped, they must have waived their right to an examination from a free choice, after a fair opportunity to have had an impartial examination. No mere imaginary danger would be enough to justify it, but a well-grounded belief, founded upon such information or observation as would be calculated to excite fear of bodily harm in the mind of a reasonable person under like circumstances. After a careful examination of the vast amount of testimony in this case, we are of the opinion that the defendants waived their preliminary examination from fear of personal violence. It must be remembered that, at the time of their arrest, great excitement prevailed in that county, and great animosity and bad feeling existed between Leoti and Coronado, two rival towns situated within three miles of each other. This feud and animosity had grown up over a county-seat contest and quarrel; and, after defendants were arrested, they were taken from Coronado to Leoti, and confined in the second story of a frame building. Large bodies of armed men were in the town, and many threats of violence were made by the friends of the men who had been killed. Under the fear of further bloodshed, the adjutant general went from Topeka to that county to prevent, if possible, additional trouble; and he, together with other citizens, counseled and advised the defendants to waive their examination. Under these circumstances, we can readily see how they might waive their examination, and without losing their right afterwards to

have the charges against them investigated; and in doing so they are not estopped from this inquiry.

The second question to be considered is, are the defendants entitled to be discharged or let to bail? The constitution and as well the statutes of this state provide that, where persons are charged with an offense punishable by death, they shall not be admitted to bail where the proof is evident or the presumption great. The evidence in this case is voluminous and conflicting on many questions. On one question, however, there is no dispute. Three persons were killed, and some others wounded, and under such circumstances as to constitute murder, if unexplained; and, as far as defendants are concerned, no explanation has been given. But, in view of the fact that the question of guilt or innocence of the petitioners must be submitted to a jury for their determination, we express no opinion in the case further than to say that, on the evidence submitted to us, the petitioners must be held for trial, and under all the circumstances, as we now understand them, (necessarily submitted in an unsatisfactory way,) they are entitled to be let to bail.

It is therefore recommended that petitioners be remanded into the custody of the officers having them in charge, and that they be let to bail, and be required to give bonds for their appearance at the next term of the district court of Wichita county in the sum of \$3,000.

BY THE COURT. It is so ordered; all the justices concurring.

HART PIONEER NURSERY CO. v. SCRUGGS.

(*Supreme Court of Kansas. June 11, 1887.*)

ERROR—TO JUSTICE COURT—PRACTICE.

A ruling of the justice of the peace on the trial, in admitting testimony or excluding the same, against and over the objections of a party thereto, cannot be reviewed by the district court on petition in error.

(*Syllabus by Clogston, C.*)

Error from McPherson county.

This action was originally brought in justice court, and taken on petition in error to the district court, and at the April term, 1885, the judgment of the justice was affirmed. Defendant now brings the record to this court for review. The facts are stated in the opinion.

Frank G. White, for plaintiff in error. *Lucien Earle*, for defendant in error.

CLOGSTON, C. Scruggs brought an action against the Hart Pioneer Nursery Company, to recover for services claimed to have been rendered by him as salesman for the defendant. At the trial before the justice he obtained a judgment for the amount claimed, being \$79.45, and costs. The cause was taken to the district court on error. Judgment of the justice affirmed by the district court, and now brought to this court for review.

Plaintiff complains of the ruling of the justice on the trial in admitting in evidence certain parts of a deposition, and a letter written by the plaintiff in error, over the objections of the plaintiff, for the reason that the same was incompetent, and, upon examination of the evidence admitted and objected to in the deposition, we are of the opinion that the same was incompetent and improperly admitted. But, if this be correct, can it avail the plaintiff? Defendant in error insists that the plaintiff had no remedy by petition in error. This we think correct, and it has so been held by this court in *Rice v. Harvey*, 19 Kan. 144, and cases therein cited. Again, this court has since that case repeatedly held that the erroneous admission or exclusion of evidence cannot be reviewed by petition in error. See *Thompson v. Brooks*, 29 Kan. 504, and *Theilen v. Hann*, 27 Kan. 778. Therefore, within these authorities, it is im-

material even if the justice did err in the admission of evidence; the remedy is not by error, but by appeal.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

NOTE. Upon a motion for a rehearing of the above-entitled case, made at the May sitting of the court for 1887, it was ordered at the June sitting of the court that the original opinion and syllabus handed down be corrected in accordance with the facts disclosed in the record,¹ and therefore that the foregoing opinion and syllabus be substituted therefor; but the motion for a rehearing was overruled.

WAITE v. TEETERS and another.

(*Supreme Court of Kansas. June 11, 1887.*)

1. JUDGMENT—RES ADJUDICATA—LANDLORD AND TENANT.

An action of forcible entry and detainer by a landlord against a tenant for the restitution of the whole or part of a farm does not necessarily involve the ownership of the corn grown by the tenant upon the farm during his occupancy; and a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such corn, or to any after-action brought by either party.²

2. DEPOSITION—WHEN ADMISSIBLE—NON-RESIDENT WITNESS.

No person can be compelled to attend for examination on the trial of a civil action except in the county of his residence; and hence the fact that a witness is temporarily in or passing through another county, at the time and place of the trial therein, is no objection to the reading of his deposition previously taken for use at such trial.

3. TRIAL—NECESSITY OF EVIDENCE—JURORS' KNOWLEDGE.

A question arose in the trial respecting the value of unripe and unharvested corn which was alleged to have been wrongfully converted at a place remote from a general market, and no testimony was presented to the jury of the value of such corn at the time and place of conversion. *Held*, that the knowledge of the value of that particular corn is not common to persons generally, and a direction to the jury that they might use their general knowledge in determining its value was misleading and erroneous.

(*Syllabus by the Court.*)

S. D. Pryor, for plaintiff in error. *Dalton & Madden and Jennings & Troup*, for defendants in error.

JOHNSTON, J. This was an action brought by Jacob Teeters and Peter McKinley against R. B. Waite to recover for the conversion of a one-half interest in the corn grown upon 60 acres of land, the damages being placed at \$300. It appears that on the eleventh day of February, 1884, Waite leased his farm in Cowley county to C. J. Hess and L. F. Hess for a term of one

¹See former report of this case, 13 Pac. Rep. 575. The statement that "plaintiff made no motion for a new trial" is omitted from the above opinion, and the first paragraph of the syllabus dispensed with.

²A judgment in an action of forcible entry and detainer is not a bar to an action in ejectment for the same premises between the same parties. *Riverside Co. v. Townsend*, (Ill.) 9 N. E. Rep. 65.

A judgment is not available as an estoppel unless the particular controversy was necessarily tried and determined. *Seamster v. Blackstock*, (Va.) 2 S. E. Rep. 36; *Hosford v. Wynn*, (S. C.) 1 S. E. Rep. 497; *Kirkpatrick v. McElroy*, (N. J.) 7 Atl. Rep. 647; *Bigley v. Jones*, (Pa.) Id. 54; *Dicken v. Hays*, Id. 58; *Gilmer v. Morris*, 30 Fed. Rep. 476; *Steam-Gauge & Lantern Co. v. Meyrose*, 27 Fed. Rep. 213; *Geneva Nat. Bank v. Independent School-Dist.*, 25 Fed. Rep. 629; *Oliver v. Cunningham*, 7 Fed. Rep. 689; *Smith v. Town of Ontario*, 4 Fed. Rep. 386; *Richardson v. Richards*, (Minn.) 30 N. W. Rep. 457; *Nichols v. Marsh*, (Mich.) 28 N. W. Rep. 699; *Brigham v. McDowell*, (Neb.) 27 N. W. Rep. 384; *Morse v. County of Hitchcock*, Id. 637; *Shirland v. Union Nat. Bank*, (Iowa,) 21 N. W. Rep. 200; *Fish v. Benson*, (Cal.) 12 Pac. Rep. 464; *Reynolds v. Lincoln*, Id. 449; *Kilander v. Hoover*, (Ind.) 11 N. E. Rep. 790.

year, and the lease, as well as the statute, provided that the lessees should not underlet the premises to any other person without the consent of the lessor in writing having been first obtained. A few days after the lease was executed, the Hesses sublet a portion of the farm to Teeters and McKinley for the same rental provided for in the original lease. It is claimed that Waite was fully informed with reference to this underletting, and that, with his consent, Teeters and McKinley planted and cultivated 60 acres of corn upon the farm. In July, 1884, the Hesses sold their interest in the lease to Waite, and left the premises; and in August of the same year a disagreement arose between Waite and Teeters and McKinley with regard to the lands which they had sublet, and Waite instituted an action of forcible entry and detainer before a justice of the peace, which resulted in a judgment in favor of Waite. Later, Waite refused to allow Teeters and McKinley to go upon the farm, and harvest the corn which they had planted and cultivated, or to remove the same from the premises. They then brought the present action, alleging that Waite had wrongfully converted and appropriated 1,000 bushels of their corn to his own use, and the jury awarded them a verdict for \$179.59. The plaintiff in error invokes the doctrine of *res judicata*, and insists that the court erred in not holding that the judgment rendered in the action of forcible entry and detainer before the justice of the peace between the same parties is a bar to the present action. We agree with the trial court that the doctrine does not apply in this case. Only such matters as were directly in issue, and determined in the former action, are *res judicata* and conclusive upon the parties in the subsequent litigation. In the first action, the only question that was or could be litigated was whether the defendants in error had made an unlawful and forcible entry upon the premises of the plaintiff, or, having made a lawful and peaceable entry upon the lands, were unlawfully and by force holding the same. The action for the conversion of the corn grown on the premises, although between the same parties, was wholly different in form, and in the issue involved, from the first one. The plaintiff in the first action might be entitled to a restitution of a part of the premises only, or in fact to a restitution of all the premises, without affecting the defendant's ownership of the property situate on the land, or the corn which had grown upon the premises and was owned by them, and without affecting their right to go upon the premises for the purpose of taking the corn away. It does not clearly appear that the right of the defendants to the corn which they had planted and cultivated was adjudicated or necessarily involved in the first action; but, apart from this consideration, the ruling of the district court must be sustained. The action of forcible entry and detainer is of a summary character, and the legislature has expressly provided that judgments in such actions, either before a justice of the peace or in the district court, shall not be a bar to any after-action brought by either party. Comp. Laws 1879, c. 81, § 160.

Objection is made to a ruling permitting the deposition of C. J. Hess to be read. The objection is that he was in the county of Cowley when the trial was had. There is testimony tending to show that the witness was temporarily in the county on the morning of the day of trial, and expressed a purpose of going at once to his home; but it does not appear that the defendants in error had any knowledge of his presence in the county, or that his attendance at the trial could have been procured by them. The witness had removed from Cowley county, and was a resident of Comanche county, when the deposition was taken, as well as when the trial was had. The mere fact that the witness was temporarily in or passing through the county on the day of trial is no objection to the reading of his deposition that had been regularly taken. No person can be compelled to attend for examination on the trial of a civil action except in the county of his residence, (Civil Code, § 328;) and the deposition of a witness may be used in a civil case when the witness does not reside in the county where the trial is to be had, (Civil Code, § 346.)

The next objection made by the plaintiff in error is to the following instruction: "That the measure of damages, if you find that the corn was converted, was the value of the corn as it stood in the field at the place and time of the conversion, and, in arriving at such value, you may take into consideration the kind and character of the corn, the number of acres, where it was situated, and all the circumstances of the case; *and you have also a right, in arriving at the value of the corn, to call to your aid what knowledge you possess in common with mankind generally.*"

As the evidence is presented here, we think that part of the instruction which directed the jury that they might use their own knowledge in determining the value of that particular corn was misleading and erroneous. The value of the corn was to be determined as it stood in the field, and at the time the alleged conversion occurred, which was September 10, 1884. It was then unripe and unharvested, and no witness undertook to state what it was then worth. Not a syllable of testimony was offered in regard to its value per bushel, by the acre, or other measure, in that neighborhood, or in fact anywhere. The case cited, of *Railroad Co. v. Richards*, 8 Kan. 101, correctly decides that, in making up their verdict, the jury are to use the knowledge and experience which they possess in common with mankind generally, but the court there distinctly says that the jury cannot use and apply the knowledge they may have of the particular case on trial; and that, if any juror has such knowledge, he should be sworn. Here the court directed the jury that they might use their knowledge in finding the value of this particular corn standing unripe and unharvested in a place somewhat remote from a general market. There was testimony offered of the quality and location of the corn, and the jury could take notice that corn such as that described was of some value, and this would have justified a finding of nominal value; but from the verdict we see that far more than nominal damages were allowed. The jury could apply their general knowledge and experience to the facts in arriving at a conclusion upon many other matters; but the value of unripe corn standing in a particular field, somewhat distant from a railroad and a market, was not common knowledge, and was a fact to be proven in the case. The jury, collected, as it probably was, from all occupations, may have been constituted, in part, from farmers resident in the locality, who were conversant with the demand and supply of corn like that in controversy, and also of other facts sufficient to enable them to form a correct opinion upon its value; but such information is special, and not common to even other members of the jury following a different occupation, and who resided in other parts of the county, and can be used only when given in testimony. *Union Pac. Ry. Co. v. Shannon*, 33 Kan. 446, 6 Pac. Rep. 564; *Railroad Co. v. Richards*, 8 Kan. 101.

In view of the lack of testimony upon this phase of the question, and of the misleading character of this instruction, we think the court below should have granted a new trial. Its judgment will therefore be reversed, and the cause remanded for that purpose.

(All the justices concurring.)

SAWYER v. FORBES and others.

(Supreme Court of Kansas. June 11, 1887.)

1. JUSTICE OF PEACE—PROCEDURE—DISMISSAL—APPEAL.

In an action commenced in justice's court against T. and other defendants, the plaintiff may dismiss as to any or all of the defendants, and, after said motion is sustained by the court, plaintiff cannot assign said ruling on his motion to dismiss as error, and thereon have said judgment and ruling reversed on petition in error.

2. ERROR—TO JUSTICE'S COURT—JURISDICTION.

Where a petition in error is filed in the district court to reverse a judgment of the justice of the peace, said action stands regularly for hearing at the next regular

term of said court; but when the parties appear at an adjourned term of said court, and present said petition in error to the court for hearing, and make no objections thereto, the district court at said adjourned term has jurisdiction to hear and determine said cause.

(*Syllabus by Clogston, C.*)

Error from Barber county.

This action was originally commenced in justice's court in Barber county, Kansas. Trial before the justice of the peace, and judgment for defendant for costs. Action taken to the district court on petition in error, and at the April, 1885, adjourned term of the district court of Barber county, July 15, 1885, the judgment was affirmed; and the record is brought to this court by the plaintiff in error for review. The facts are stated in the opinion.

Martin & Overstreet, for plaintiff in error. *Orner & Sample*, for defendants in error.

CLOGSTON, C. The record shows that this action was commenced by the plaintiff in error before a justice of the peace in Barber county, Kansas, against M. C. Thompson, C. H. Forbes, R. G. Eckert, and John Pearson, for \$45, for labor in erecting a bridge, and that on the day for trial plaintiff and defendant Thompson appeared before the justice; that the other defendants made no appearance; that the plaintiff moved to strike the names of all the defendants from the docket except defendant Thompson, and Thompson agreed to said motion, and the motion was sustained by the justice; that the case was called for trial as between plaintiff and defendant Thompson, and the justice found in favor of the defendant, and rendered judgment against the plaintiff for costs. The record contains none of the evidence given at the trial, and shows no motion for a new trial, nor any exceptions to any of the rulings, orders, or judgment by either party. Said cause was taken by the plaintiff to the district court on petition in error. Summons in error issued out of the district court May 27, 1885, returned June 1st, and on July 15th the case came on to be heard in the district court, before F. E. GILLET, judge *pro tem.*, and the judgment of the justice of the peace affirmed by the said court.

The only errors assigned by the counsel for plaintiff in error in this court are—*First*, that the court erred in affirming the judgment of A. D. McCANDLESS, justice of the peace; *second*, that the court erred in rendering judgment against the plaintiff at said April adjourned term of said court. As to the first assignment of error, we find nothing in the record to warrant this complaint. And as to the second assignment of error, plaintiff is right; the action did not properly stand for trial at the adjourned April term of said court, but would stand regularly for its hearing at the next regular term of the court after the summons was issued; but the record fails to show that the plaintiff made any objection to the hearing at said adjourned term of the court, but appeared and presented his case without objection. This he might do if the defendant was willing, and by so doing they submitted their cause to the jurisdiction of the court. This having been done, the court committed no error in hearing the cause at said adjourned term. Yet, if this had been error, the plaintiff could not have complained. There was nothing for a court to do in the premises except to affirm the judgment of the justice of the peace.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

BEEBE and another v. DOSTER.

(Supreme Court of Kansas. June 11, 1887.)

LIMITATION OF ACTIONS—TAX TITLES—ABSENCE FROM STATE.

Absence from the state on the part of a tax-deed holder will not prevent section 141 of the tax law from so operating as to bar any suit or proceeding brought against the tax-deed holder, or his heirs or assigns, for the recovery of the property, or to defeat or avoid the tax deed, if such suit or proceeding is not commenced within five years from the time of the recording of the tax deed.

(Syllabus by the Court.)

Error from Marion county.

L. F. Keller, for plaintiffs in error. Frank Doster and C. N. Sterry, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment, brought in the district court of Marion county, Kansas, on December 25, 1884, by Frank Doster against Walter B. Beebe and G. L. Mastin, to recover certain real estate in said county. The action was tried by the court without a jury, and the court found generally in favor of the plaintiff, and against the defendants, and rendered judgment accordingly; and the defendants, as plaintiffs in error, bring the case to this court for review.

The defendant in error (plaintiff below) claims title to the land in controversy under a quitclaim deed executed by Elias W. Tuttle, the original patentee, to the plaintiff below, on October 11, 1884. The plaintiffs in error (defendants below) claim title under a tax deed executed by the county clerk of Marion county to Walter B. Beebe, on May 12, 1875, in pursuance of a tax sale of the land made on May 8, 1872, for the taxes of 1871, and the payment of the subsequent taxes for the years 1872, 1873, and 1874; which tax deed was recorded on May 17, 1875. The tax deed is regular in form, and valid upon its face. The defendants below have been in the actual possession of the property since May or June, 1883, and it may be for a longer period of time. Walter B. Beebe, the holder of the tax deed, is a resident of Ohio, and a non-resident of Kansas, and has not been within the state of Kansas for a period of time aggregating five years since the tax deed was recorded, although he has visited Kansas every year since that time, and has stayed in Kansas from three to eight months each time. Neither the plaintiff, Doster, nor his grantor, Tuttle, has ever been in the actual possession of the property.

The first question arising in this case is whether the five-year statute of limitations contained in section 141 of the tax law of 1876 (Comp. Laws 1885, c. 107, § 141) has so run as to bar any action brought for the recovery of the land purporting to be conveyed by the tax deed, or to defeat or avoid the effect of such tax deed. This question has been elaborately argued by counsel on both sides. The defendants below claim that, as more than five years elapsed from the time of the recording of the tax deed to the time when this action was commenced, the statute of limitations has completely run in its favor, and therefore that all action tending to defeat or avoid its force or effect is completely barred; while the plaintiff below claims that, as the holder of the tax deed has not in the aggregate been within the state of Kansas for the period of five years from the time of the recording of the tax deed until this action was commenced, such statute of limitations has not completely run, and that the present action is not barred; and he claims this solely upon the ground that section 21 of the Civil Code applies to this question, and modifies and limits the force and effect of the provisions of said section 141 of the tax law, and prevents such section 141 from running or operating while the holder of the tax deed is absent from the state of Kansas. The question, then, is really this: Does section 21 of the Civil Code apply to and modify or limit the force and effect of the provisions of section 141 of the tax law? We

shall now proceed to consider this question; and, in doing so, it will be necessary to consider many of the other sections of the statutes.

Article 3 of the Civil Code contains and includes all the sections of such Code from section 13 to section 25. Section 15 of such article reads as follows: "Sec. 15. Civil actions can only be commenced, within the periods prescribed in this article, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation." Section 16 prescribes limitations for the commencement of real actions, and, among other limitations upon the bringing of actions for the recovery of real property, it fixes two years after the recording of a tax deed within which to bring the action, and fifteen years as a general limitation. Section 18 prescribes limitations for the commencement of personal actions. Section 21 reads as follows: "Sec. 21. If, when a cause of action accrues against a person, he be out of the state, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." Section 141 of the tax law reads as follows: "Sec. 141. Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of land for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within five years from the time of recording the tax deed, and not thereafter." Section 128 of the tax law reads as follows: "Sec. 128. The lands of minors, or any interest they may have in any lands sold for taxes, may be redeemed at any time before such minor becomes of age, and during one year thereafter. And the lands of idiots and insane persons so sold, or any interest they may have in the same, may be redeemed at any time within five years after such sale, in the manner provided in this act."

The plaintiff below claims that section 21 of the Civil Code modifies and limits section 141 of the tax law, for the following reasons:

(1) Section 21 of the Civil Code is general in its terms, applying to *all* causes of action and to *all* limitations. It says, "When a cause of action accrues," etc.,—meaning when *any* cause of action accrues, whether the same is mentioned in the Civil Code or not,—"*the period limited for the commencement of the action shall not begin to run,*" etc.,—meaning *the period limited by any statute* shall not begin to run, *whether this statute is a part of the Civil Code, or is some other statute*, and that the time of the absence of the holder of the cause of action from the state shall *in all cases* be excluded in computing the period within which the action may be brought. It is claimed that, notwithstanding section 15 of the Civil Code, section 21 of the Civil Code includes "*special cases*" of limitation prescribed by *other statutes* than the Civil Code, as well as the general cases of limitation prescribed by such Code.

(2) This is the construction, it is claimed, given by the supreme court of Kansas in the case of *Bonifant v. Doniphan*, 3 Kan. 26, to section 28 of the Civil Code of 1859, which section 28 corresponds to section 21 of the present Civil Code, which decision has never been overruled, but has since been approved and followed. *Hart v. Horn*, 4 Kan. 232, 237, 238; *North Missouri R. Co. v. Akers*, Id. 453.

(3) Since the decision of the case of *Bonifant v. Doniphan*, which was rendered at the July term of the supreme court of Kansas in 1864, all the statutes which have any application to this case have been re-enacted, and evidently with the construction already put upon them by the supreme court.

(4) Section 21 of the Civil Code, and section 141 of the tax law, both relate

to limitations of actions; and, being *in pari materia*, must be construed together, and one as limiting and modifying the other. Section 21 of the Civil Code must be construed as limiting and modifying section 141 of the tax law.

(5) Unless section 141 of the tax law is thus limited and modified, and construed not to operate in favor of a tax deed while the holder thereof is a non-resident and absent from the state, such section, it is claimed, must be held to be unconstitutional and void, for the reason that, while the holder of the tax deed is a non-resident, and absent from the state, no action can be brought for the recovery of the land, or to set aside the tax deed, or to defeat or avoid the same, and the original owner has no other remedy; and therefore the original owner might be deprived of his property by the operation of the statute, if construed independent of section 21 of the Civil Code, without ever having any opportunity to have his day in court, or to be heard in court, and indeed without having any remedy; and the case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, is cited as authority for the claim that no remedy exists or could exist in Kansas against a non-resident person absent from the state.

(6) It is also claimed that any other construction than that section 21 of the Civil Code limits and modifies section 141 of the tax law would render section 141 of the tax law unjust and inequitable, and would be a construction "contrary to the true legislative intent."

(7) It is also claimed that tax laws must be construed liberally as towards the original owner of the land, and strictly as towards the tax-deed holder.

(8) It is also claimed that this court has already decided that absence of the tax-deed holder from the state prevents the limitation prescribed in said section 141 from operating in favor of either the tax deed or the tax-deed holder, and authorities are referred to as supporting this claim; but they do not. This court has never so decided.

On the other hand, it is claimed by the defendants below as follows:

(1) Section 141 of the tax law is complete within itself, and in five years after the recording of any tax deed will absolutely bar any suit or proceeding having for its object the defeat or avoidance of the tax deed, except in certain cases mentioned in the law itself,—as where the taxes have been paid or the land redeemed from the taxes, or where the owner of the land is under some one of the disabilities mentioned in section 128 of the tax law; and with the further exceptions which must, upon general principles, be understood to exist,—as where there is a *want of power* in the taxing officers to make a good tax title, as where the land is not taxable, and where there is a *want of power* in the tax-deed holder to legally and honestly take or hold a good tax title,—as where some trust relation exists between the parties, making it fraudulent on the part of the tax-deed holder for him to assert title as against the original owner. And this claim is also made particularly for the reason that this section says in positive terms that except in certain cases, not including non-residence nor absence from the state, the action "*shall be commenced within five years* from the time of recording the tax deed, and not thereafter;" and it is claimed that this section means what it says.

(2) This section was placed by the legislature in the tax law, and not in the Civil Code, and there is nothing in any of the statutes that makes the Civil Code, with reference to limitations, have any application to this section. Also there is a limitation of actions with regard to tax deeds, and also modifications of this limitation placed in said article 3 of the Civil Code; and as the legislature evidently had the subject of limitations of actions with regard to tax deeds, and modifications of such limitations, under consideration when they enacted that article, it must be presumed that they placed in such article all the limitations of actions with regard to tax deeds which they intended should be modified or controlled or limited in any manner whatever by any of the provisions of said article, and that any limitation of actions will regard

to tax deeds not found in that article must be free from all modification or control by any of the provisions of said article; in other words, the legislature had the question of the limitation of actions with regard to tax deeds under consideration when they enacted the Civil Code and the tax law, and they placed a certain two-year limitation with regard to tax deeds in the Civil Code because they intended that such limitation should be controlled and modified by the other provisions of the Civil Code; but they placed the aforesaid five-year limitation in the tax law because they intended that such limitation should not be controlled or modified by any of the provisions of the Civil Code.

(3) The tax law itself enumerates certain exceptions to the five-year limitation contained in said section 141, as where the taxes have been paid or the land redeemed or some disability exists; and therefore, in accordance with well-settled rules of statutory construction, we should not look to other statutes to find other exceptions. *Expressio unius est exclusio alterius*.

(4) The Civil Code contains general provisions relating to limitations, as said section 21 of the Civil Code. The tax law contains only the *special* provisions found in said sections 141 and 128, and it is well settled that general provisions do not control special provisions, but the reverse.

(5) Section 21 of the Civil Code was enacted in 1868, while section 141 of the tax law was enacted in 1876, eight years afterwards. Hence, if there is any conflict between them, section 141 of the tax law will modify and control section 21 of the Code, and not be modified by it, as is claimed by the plaintiff below.

(6) It has further been claimed that section 21 of the Civil Code applies only to *personal* actions, and not to *real* actions, as follows: "The evident intent of the legislature in framing said section 21 was to apply it only to those actions which are mentioned in section 18, and denominated as actions 'other than for the recovery of real property,' being actions which are usually spoken of as *personal* as distinguished from *real* actions. The words of the section, 'If, when an action accrues against a person, he be out of the state,' etc., naturally suggest such classification and application. And, on the other hand, it is quite certain that real property sought to be recovered in any action cannot 'abscond' or 'conceal' itself, nor 'remove itself out of the state.' It is always here, and always within the jurisdiction of the court; and section 72 of the Code provides, among the cases where non-resident defendants may be brought in by service by publication, for those actions 'which relate to or the subject of which is real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a non-resident of the state.'" 4 Kan. Law J. 349. It is admitted, however, that the supreme court holds adversely to this claim. *Morrell v. Ingle*, 23 Kan. 32.

(7) It is also claimed that it was clearly not the intention of the legislature that section 21 should apply to limitations not prescribed by the Civil Code. Said section 21 is a part of article 3 of the Civil Code, which article includes sections 13 to 25. Section 15 of that article provides that "civil actions can only be commenced, within the periods prescribed *in this article*, after the cause of action shall have accrued; but where, in *special cases*, a different limitation is prescribed by statute, *the action shall be governed by such limitation*;" and, as section 15 and section 21 of the Civil Code are in the same article, they must be construed together; and as section 15 says that the Code limitations are to be governed by "*this article*," "*but where, in special cases, a different limitation is prescribed by statute, the action shall be governed by such limitation*," it cannot be supposed that section 21, which is *general* in its terms, was intended to modify or affect any of the "*special cases*" of limitation which might be found in a *tax law*.

(8) Statutes of limitation are now regarded favorably as statutes of repose;

and this, even where they operate in favor of tax titles. *Leffingwell v. Warren*, 2 Black, 599, 606.

(9) Upon the theory of the defendants below, as well as upon the theory of the plaintiffs below, an owner of land has ample remedies to protect the land from tax titles. Take the present case as an illustration: The owner of the land is presumed to have known the law,—that the land was taxable, and that it was taxed for the year 1871. He could have paid the taxes any time from November 1, 1871, up to May 8, 1872, when the land was sold for the taxes; and, if he had done so, the present tax title could not have had any existence; or, if there were any irregularities in the tax proceedings, he had ample remedies from the beginning up to that time, before the county board or in the courts, to have such irregularities corrected or his rights adjusted. After the land was sold for the taxes on May 8, 1872, he had over three years, and until May 12, 1875, when the tax deed was executed, within which to redeem his land from the taxes; or, if there were any irregularities in the tax proceedings, he still had the power to have such irregularities corrected or his rights adjusted by proceedings in the courts. After the tax deed was executed, he had over five years, or until May 17, 1880, within which to commence an action to determine the regularity and validity of the tax deed. After May 17, 1875, when the tax deed was recorded, he had his action of ejectment specifically given for the recovery of the land by section 143 of the tax law; and this, without reference to whether the land was in the possession of the tax-deed holder or not. Or he could at any time have taken possession of the land, and have stopped the operation of the statute of limitations in favor of the tax deed, and have started in operation the statute of limitations against the tax deed, and in two years have barred all action against him for the recovery of the land under the tax deed. Civil Code, § 16, subd. 3. In this way all his rights would have been settled and adjusted in two years. Or he could have commenced an action to set aside the tax deed, or remove the cloud created by it; and while the tax-deed holder was a non-resident of the state, and absent therefrom, he could have obtained service of summons by publication. Civil Code, § 72. And it is claimed that the decision in the case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, will not prevent the maintenance of such suits upon service of summons by publication where the only object of the suit is to affect the land as a thing, and not to affect the original owner personally, or to compel him to do something personally. Besides, the owner might and could have obtained service of summons upon the tax-deed holder personally; for he visited the county in which the land is situated every year from 1872 up to 1880, and remained in the county each time for the period of from three to eight months. Also the original owner could have commenced his action of ejectment against, and could have obtained personal service of summons upon, G. L. Mastin, who, in less than five years after the recording of the tax deed, took the actual possession of the land in controversy under the tax-deed holder; for Mastin resided in the county.

(10) It is also claimed that the statutes would be valid, and the tax deed good, even if the statutes were so construed as not to give the original owner any remedy except such as the plaintiff below admits that he has; and he admits that the original owner has all the remedies above mentioned except that he cannot sue a non-resident tax-deed holder while he is absent from the state. He admits that the original owner has the following remedies, to-wit: *First*, to pay his taxes before sale; *second*, to redeem his land from the taxes after the sale, and before the issuance of the tax deed; *third*, to show, at any time prior to the complete running of the five-year statute of limitations, such irregularities in the tax proceedings as would invalidate the sale; *fourth*, or to take and hold the actual possession of the land, and thereby prevent the five-year statute of limitations from operating, and to start a two-year statute of limitations in operation in his own favor; *fifth*, to show at any time, even

more than five years after the recording of the tax deed, a want of power in the taxing officers to create a valid tax title; or, *sixth*, a want of power in the tax-deed holder to take or receive a valid tax title; or, *seventh*, that the original owner was under some legal disability.

(11) It is claimed that, under the statutes of Kansas, all tax proceedings with reference to real estate are in their very nature proceedings *in rem*, merely to enforce the payment of the taxes, and to enforce the lien of the taxes upon the land; and that all the statutes with reference to the taxes, tax liens, and tax titles are equally as binding upon the tax-deed holder as upon the original owner of the land, and that they are equally binding upon both; that, when the land is sold for the enforcement of the taxes or tax lien, any power given to the original owner to redeem his land from the taxes, or to defeat or avoid the sale for any reason other than that he has discharged the taxes or the tax lien, or a want of power in the taxing officers, or the party receiving the tax title, is a mere privilege, not a constitutional right, and can be exercised only in the manner prescribed by the statutes; and that unless he does so redeem his land, or otherwise defeats or avoids the tax title within the manner prescribed by the statutes, the tax title becomes absolute. On the other hand, the tax-deed holder, being a party to the tax proceedings, is as much bound by the statutes relating to such proceedings, wherever he may be and wherever he may reside, as the original owner of the land is, and his tax deed may be defeated in the very manner prescribed by the statutes. Although he may be a non-resident of the state, and not within its boundaries, and although no personal service of summons can be had upon him, but only service by publication, yet if the original owner of the land commences an action against him under section 143 of the tax law for the recovery of the land, and obtains service by publication only under section 72 of the Civil Code, and in such action obtains a judgment setting aside the tax deed or declaring it void, or otherwise defeating it, the tax-deed holder will nevertheless be as much bound by the judgment as though he resided within the state and upon the land, and was personally served with summons in the action. The tax-deed holder takes his tax deed subject to be defeated in the manner prescribed by statute. The statutes enter into the transaction, and form a part thereof. The case of *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. Rep. 586, can have no application to such a case.

(12) It is further claimed by the defendants below that the supreme court has already decided that the limitation contained in section 141 of the tax law will operate in favor of all tax deeds, whether held by residents or non-residents, and by persons in the state or out of the state; and the cases of *Walker v. Boh*, 32 Kan. 354, 4 Pac. Rep. 272; *Harris v. Curran*, 32 Kan. 580, 4 Pac. Rep. 1044; and *Doyle v. Doyle*, 33 Kan. 721, 725, 7 Pac. Rep. 615,—are cited as authority therefor.

The case of *Bonifant v. Doniphan*, 9 Kan. 26, relied on by the plaintiff below, simply decided that a limitation contained in section 2 of an act entitled "An act amendatory to an act entitled 'An act to establish a Code of Civil Procedure,' passed February, 1859," was modified by the provisions of section 28 of the Code of Civil Procedure referred to. This amendatory act, being an amendment to the Civil Code referred to, was of course intended to be a part of the same, and to be construed in connection with its other provisions. This decision has been followed in two or three other cases heretofore cited. There is some *dictum*, however, in the opinion in that case to the extent that said section 28, which corresponds to section 21 of the present Civil Code, had application to "special cases" of limitation found in other statutes than the Civil Code; but such *dictum* was unnecessary for the decision of the case, and has never since been followed nor referred to.

The case of *Walker v. Boh*, 32 Kan. 354, 4 Pac. Rep. 272, relied on by the defendants below, was decided upon the theory that the limitation contained

in section 141 of the tax law is not modified, controlled, or limited in any respect whatever by any of the provisions of the Civil Code. The case, however, would have been decided in precisely the same way in which it was decided if it had been decided upon the other theory, that the provisions of the Civil Code, including section 21 of the Civil Code, do modify, control, and limit the said limitation contained in section 141 of the tax law.

The other cases cited by counsel for both parties have only such a remote, if any, application to the present case, that we do not think that they require any comment.

It is our opinion that section 141 of the tax law is not controlled or modified by any of the provisions of the Civil Code, and especially not by the provisions of section 21 of the Civil Code. It was placed in the tax law, and not in the Civil Code, although another tax-deed limitation is placed in the Civil Code. Its provisions are limited by other provisions of the tax law, which would indicate that it was the intention of the legislature to place all modifications of its provisions in the tax law. Its provisions are *special*, while the provisions of section 21 of the Civil Code are *general*, and *general* provisions do not, as a rule, control *special* provisions; but the reverse. It was enacted eight years after section 21 of the Civil Code was enacted; and, its provisions being special, it constitutes one of the "special cases" mentioned in section 15 of the Civil Code. It was certainly not the intention of the legislature that it should be modified or controlled by any of the provisions of the Civil Code, but was intended to be a complete limitation within itself, except so far as it is modified by other provisions of the tax law. For still further reasons for holding that this limitation is not controlled or modified by the provisions of the Civil Code, see the foregoing statements of the claims of the parties.

We think the tax deed in controversy in this case is valid, and that the five-year statute of limitations embodied in section 141 of the tax law has completely run in its favor, and bars all action brought to defeat or avoid the same.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

(36 Kan. 614)

CARLYLE v. SMITH.

(*Supreme Court of Kansas. June 11, 1887.*)

ERROR—JUSTICE OF PEACE—FINAL ORDER.

Where a motion is made before a justice of the peace to vacate and discharge proceedings in garnishment after final judgment, and said motion is overruled, said ruling by the justice is a final order, and may be taken to the district court on error.

(*Syllabus by Clogston, C.*)

Error from Wyandotte county.

Wm. S. Carroll and Bacon & Haysberger, for plaintiff in error. Hale & Miller, for defendant in error.

CLOGSTON, C. C. H. Carlyle commenced this action in justice's court in Wyandotte county to recover \$43.50, for professional services rendered as a physician, and caused garnishee summons to issue to the Atchison, Topeka & Santa Fe Railroad Company, who were indebted to the defendant; who answered acknowledging said indebtedness, and paid into court \$34.50. February 15, 1884, trial and judgment for the plaintiff for \$23.50, and costs. Afterwards defendant gave plaintiff notice, and filed his motion to discharge the garnishee, and release the money paid into court; for the reason that the money due him was for his personal earnings as a laborer, earned within three months next preceding the issuing of said garnishee process, and that the same was necessary for the support of his family. February 27th, motion heard on the evidence of both parties, and the justice overruled said motion,

to which ruling the defendant excepted, and filed his bill of exceptions, which was duly allowed by the court, and afterwards filed his petition in error in the district court of Wyandotte county to reverse the order of the justice of the peace. At the September, 1884, term of the district court, said petition in error was duly heard by the court, and the order of the justice of the peace reversed, the garnishee discharged, and the money so paid into court ordered paid to the defendant, Smith. Exceptions were taken by the plaintiff to the order and judgment, and plaintiff now brings the proceedings here for review.

But one question is presented: Did the district court have authority to review the order of the justice overruling defendant's motion? Plaintiff contends that the order made by the justice was not a final order, and therefore cannot be reviewed; and in support of these views cites *Miller v. Noyes*, 31 Kan. 13, 7 Pac. Rep. 602; but after a careful review of that case we think the plaintiff is mistaken. In that case the application was made to discharge the garnishment proceedings before the final judgment, and for this reason the court doubtless held that the order was not final. Many things might happen after that, before final judgment. The garnishee might refuse to obey the order, as he well might do, and wait until after judgment, and until he was sued on his answer; or, at the final hearing, no judgment might be rendered against the defendant, and thereby all proceedings would have ended. But in this case the motion was made after final judgment; after the money had been actually paid into court. Nothing more was left for defendant to do; either to submit and have his earnings applied to the discharge of this judgment, or move to set aside the order and release the money paid by the garnishee.

The legislature had provided that his personal earnings, when necessary for the support of his family, should be reserved to him and them free from any claim. Here they were being appropriated, and as a last resort he applied to the court for relief, and to deny him this relief is to destroy and set aside the exemption provisions for that class of persons who require its provisions the most. The public policy of our laws, and the decisions of our courts, have favored a liberal construction, not only of the exemption laws, but of the provisions for carrying the same into effect. But we think the statutes have in direct terms defined what a final order is. Section 543 of the Compiled Laws of 1885 is as follows:

"Sec. 543. An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified, or reversed, as provided in this article."

"Upon a summary application in an action after judgment" surely covers this class of orders, although made upon motion. Justice BREWER said, in *Commissioners Wilson Co. v. McIntosh*: "The only reason given is, as heretofore stated, that the one litigation was carried on by motion, and the other by action. But why should not a decision upon a motion be as conclusive as that upon a trial? The reasons given are that motions are often made in the hurry of a trial, and decided with comparatively little examination and consideration; that the decision cannot be taken up for review; and that they are tried upon affidavits, rather than oral testimony. None of these reasons exist in the case at bar. The motion was not made until after judgment. It could not have been regarded as in any sense interlocutory, or one whose subject-matter could thereafter be more carefully examined, but must have been considered as a final determination as to the rights of the sheriff. It could have been taken up for review to this court." 30 Kan. 234, 1 Pac. Rep. 572. And see cases therein cited.

A motion in this case was made, after judgment, to retax costs,—notice and hearing as in the case at bar; and this court held that a decision on such a motion was a final order, subject to be reviewed. We are clearly of the opinion

that the order complained of was a final order, subject to be reviewed by the district court.

It is therefore recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

STATE *ex rel.* BRADFORD, etc., v. HARWI, County Clerk Graham Co.

(Supreme Court of Kansas. June 11, 1887.)

COUNTY-SEAT—ADDITION TO TOWN-SITE—POWER OF COMMISSIONERS.

Where the county-seat of a county has been permanently located by a vote of the electors of the county, at a place not incorporated, but mentioned and described in a town plat duly executed, acknowledged, and filed, which plat embraced 56 10-11 acres of land, the board of county commissioners of the county has no authority, in the absence of any vote therefor, to arbitrarily remove the county-seat, or the county offices, or the books, records, etc., belonging to the county, to an addition, subsequently laid out and platted, adjoining the original town-site, where the county-seat was located, although such addition is subsequently incorporated with the original town-site, as a city of the third class.

(Syllabus by the Court.)

Original proceedings in *mandamus*.

S. B. Bradford, Atty. Gen., *D. C. Nellis*, *E. A. Austin*, *David Rathbone*, for the State. *J. B. Johnson*, for defendant.

HORTON, C. J. This action is brought in this court to compel the county clerk of Graham county to remove his office, records, etc., from Grave's addition to the town of Millbrook, to the original town-site of Millbrook. On April 1, 1880, the governor issued his proclamation, declaring the county of Graham organized, and designating Millbrook as the temporary county-seat. On July 12, 1881, a special election was ordered to be held in Graham county, to determine the permanent location of the county-seat of the county. The vote cast at said election was canvassed on July 16, 1881. No place having received a majority of all the votes cast, a second election was ordered to be held, the balloting to be confined to Gettysburg and Millbrook. The second election for the permanent location of the county-seat was held on July 26, 1881. The vote was canvassed July 30, 1881, and Millbrook, having received a majority of all the votes cast, was duly declared the permanent county-seat of Graham county.

At the time of the designation of the temporary county-seat of Graham county, and also at the time of the location of the permanent county-seat of that county, Millbrook was unincorporated, but was mentioned and described as Millbrook in a town plat, executed and acknowledged by N. C. Terrell, on the second day of May, 1879; the land so platted being the north 56 10-11 acres of the west half of the north-east quarter of section twenty-seven, of township eight south, of range twenty-three west, in Graham county. No election for the removal or the relocation of the county-seat of Graham county has been had or ordered since July 26, 1881.

Millbrook became and continued to be the temporary county-seat of Graham county until July 30, 1881, and thereafter became and continued to be the permanent county-seat of that county. On April 8, 1885, Benjamin B. F. Graves and wife acknowledged and recorded a plat of a certain tract of land adjoining the original town-site of Millbrook, and designated such tract of land as "Grave's addition to the town of Millbrook." On April 18, 1885, the county commissioners of the county entered into a contract with Benjamin B. F. Graves and C. Tillotson for the removal of the several county officers from the original town-site of Millbrook to lot 17, in block 30, in Grave's ad-

dition to the town of Millbrook. Said lot 17 is distant from the original town site of Millbrook from one-half to three-quarters of a mile. On July 7, 1885, the board of county commissioners of Graham county directed, by a written order, all the county officers to remove their respective offices, records, books, etc., from the town-site of Millbrook to Grave's addition. On July 14, 1885, the defendant, H. J. Harwi, county clerk, in pursuance of said order, removed his office, records, etc., to a one-story frame building, on said lot 17, in Graves' addition, which had been donated to the county for a court-house. On October 8, 1886, Millbrook was incorporated as a city of the third class, and embraced within the corporate limits is Grave's addition. The original town-site of Millbrook is therefore now only a portion of the present city of Millbrook. The court-house belonging to the county of Graham, and situated in Grave's addition, is valued at \$2,500, and is occupied by all the officers of the county, with the records of their offices. All of the buildings, with the exception of three or four, have been moved from the old town-site to the addition, and in the addition there are from 50 to 100 houses.

It is claimed, upon the part of the defendant, that as it is impossible to obtain water upon the original town-site of Millbrook, and as there is plenty of water in Grave's addition, and as all the principal part of the business has left the old town, and gone to the addition, that the removal of the county-seat to the addition was conducive to the public interests, and therefore that the county commissioners had the legal right to make the order of removal, and that it is the duty of the county officials to obey the same. The question is, whether the county commissioners of Graham county have any authority to change the county-seat from the original town-site of Millbrook, where it was located by the voters, to the addition platted April 8, 1885.

Section 119, c. 24, Comp. Laws, 1879, reads: "At the time of counting the votes at any election at which a vote shall be taken for the permanent location of the county-seat, it shall be the duty of the judges or inspectors of the election, in each precinct, to canvass the votes cast for such location, and make a certified return thereupon to the board of county commissioners, wherein they shall state the whole number of votes cast, the name of each place voted for, and the number of votes given for each; which return shall be attested by the clerks, and shall be returned at the time of making other returns to the board of county commissioners, who shall, from such returns made to them, determine the whole number of votes given for each place in the county, which shall be entered upon the records in the office of the county clerk; and, when some one place in the county shall have received the majority of all the votes cast in the county at one election, it shall be the duty of the county clerk, under his hand and seal, to certify the result to the secretary of state."

Chapter 26, Comp. Laws, 1879, provides: "Sec. 6. The board of county commissioners shall meet on the Saturday following said election, and proceed to canvass the vote; and the place having received the majority of all the votes cast, shall be proclaimed by them the county-seat of the county." "Sec. 8. In case of a second election, the board of county commissioners shall meet on the Saturday following, canvass the vote, and proclaim the result as hereinbefore provided. * * * Sec. 9. The county officers who are required by law to keep their offices at the county-seat shall, within twenty days after said proclamation, remove all books, records, papers, and furniture belonging to the county to the place therein named; and, if any officer shall fail to remove within the time prescribed by this section, he or his sureties shall pay to the county the sum of five dollars for each and every day of such failure, to be sued for and collected by the board of county commissioners."

From these provisions of the statute it is evident that the place having received the majority of all the votes cast is to be the county-seat of a county. In this case the place selected as the county-seat of Graham county was the

original town-site of Millbrook, located on 56 10-11 acres of land as platted, acknowledged, and recorded by N. C. Terrell.

The wisdom of the choice for the county-seat made by the voters of Graham county may be questioned, but their power to make it is beyond dispute. As the original town-site of Millbrook was selected as the permanent county-seat of Graham county, we do not think the county commissioners of that county, or any of its officials, have the power to change or remove the county-seat to any lot or tract of land not within the original town-site. Did such power exist, the exercise of it by the county commissioners would be discretionary, and its action final; and, if it existed, the offices of the county officials might be removed upon some addition one, two, three, or more miles from where the county-seat was permanently located by the voters. *State v. Smith*, 48 Mo. 60. If the electors of Graham county prefer Graves addition to the original town-site of Millbrook as the place for the permanent county-seat of that county, they have the right, if they pursue the provisions of the statute, to select that place; but this power is denied the county commissioners or the officials of the county, unless a vote is taken therefor. An addition to a county-seat is not, strictly speaking, a part of the original town-site. *State v. Smith, supra*.

In this state, as well as in Missouri, donations may be made to a county, as inducements to obtain the location of a county-seat at a particular place. *Setter v. Alvey*, 15 Kan. 157; *Yoxall v. Commissioners*, 20 Kan. 581; *State v. Elting*, 29 Kan. 397.

The peremptory writ of *mandamus* will be ordered as prayed for.
(All the justices concurring.)

ROBERTSON and another v. BELL.

(*Supreme Court of Kansas. June 11, 1887.*)

FENCES—DECISION OF VIEWERS—FRAUD—EQUITY.

Where R. and B. own adjoining lands, and agree upon the amount and the particular portion of the partition fence which each shall keep up and maintain, and R., in pursuance of such agreement, expends time, labor, and money in keeping up and maintaining, for a considerable time, his portion of the partition fence, it is then a fraud upon R. for B. to procure an award of the fence-viewers assigning to R. another and an additional portion of the fence to keep up and maintain; and as R. has no appeal from the award of the fence-viewers, and no petition in error, and no remedy more direct than an action in the nature of a suit in equity to set aside the award of the fence-viewers, *held*, that R. may maintain such action.

(*Syllabus by the Court.*)

Error from Brown county.

The plaintiffs' petition reads as follows:

"The plaintiffs, complaining of the defendant, allege that they are, and for the last five years and more have been, husband and wife; that about five years ago the plaintiff John H. Robertson became the owner of the west half of the south-east quarter of section eight, town four, range seventeen, in Brown county, Kansas, and has ever since been such owner, except that on or about the twenty-second day of December, 1882, he deeded to his wife, the other plaintiff in this action, Mrs. A. M. Robertson, the north half of said west half of said south-east quarter, being forty acres, and that the plaintiff John H. Robertson has been in the possession and had the control of all of said described land from the time he became the owner thereof until this present time, and is now in such possession and has such control; that about six years ago, and during the years 1876, 1877, and 1878, and other years, one J. F. English was in the possession of said land, and held a bond for a deed of the same from the Central Branch Union Pacific Railroad Company, which was a corporation organized under the laws of the territory and state of Kansas, and was the owner of said land; that for the last ten years and more the defend-

ant, J. M. Bell, has been the owner of the south-west quarter of section eight, town four, range seventeen, in Brown county, Kansas; that about the year 1878 the said J. M. Bell set out hedge plants on the south half of the line between the said west half of the south-east quarter and the said south-west quarter of said section eight, for the purpose of growing the same into a hedge to make a partition fence between said two tracts of land; that after he had done so, and in the same year, he called on said J. F. English, and stated to him that he had set out hedge on the south half of said line, and requested him, the said English, to set out hedge on the north half of said line between said two tracts of land; that in compliance with such request he, the said English, did immediately set out hedge on and along the north half of said line the whole distance thereof; that, from that time on, the said Bell cultivated and had the entire management of that said hedge that he had set out as aforesaid, except as hereinafter stated, and from that time on, the said English and the grantees of the said Central Branch Union Pacific Railroad Company and these plaintiffs have had the management, cultivation, and control of all that hedge set out by the said English, being the hedge on the north half of said line between said tracts; that the said Bell has never cultivated the said hedge set out by said English on the north half of said line, or any part thereof, or built or repaired any fence thereon, nor has he cultivated any hedge on the north half of said line whatever; that in about the year 1879 the said west half of said south-east quarter was forfeited to the said Central Branch Union Pacific Railroad Company, and that in about October of the year 1879 the said John H. Robertson became the owner thereof, as hereinbefore set forth; that he went into possession thereof on or about the tenth day of March, 1880; that in the month of March or April, 1880, after the said John H. Robertson had been in possession of said west half of the said south-east quarter about one month, the said defendant came to said last-mentioned land, and told him, the said John H. Robertson, that he, the said Bell, had made a contract with said English, while said English was in possession of said land under his bond for a deed, that he, the said Bell, should furnish the hedge plants to set out between said two tracts of land, for the purpose of making a partition fence between said two tracts, and that English had agreed to set out and work and cultivate the same, and then that each should own one-half of said fence, and stated that it had been some neglected the year before, but that he wanted him, the said John H. Robertson, to go on and replant said hedge where plants were missing, and cultivate it that year, and that would complete said contract on the part of said English, and that they would divide the line of fence equally between them; that this plaintiff, relying on the said representations of said Bell, and believing them to be true, agreed so to do, and under such agreement did replant such hedge where plants were missing, along the whole line thereof between said tracts of land, and did cultivate said hedge fence along the whole line thereof, and did comply with said agreement on his part in all things; that thereupon, on the next day after this said Bell made said statement, being about April 10, 1880, the said defendant and the said John H. Robertson, plaintiff herein, met on the line of said hedge, and divided the same by mutual agreement, and it was then and there agreed that the south half of said fence, 80 rods, should be the fence of the said Bell, and the north half, 80 rods, should be the fence of the said John H. Robertson, plaintiff herein, being the same division that had been made before between the said Bell and the said English, and evidenced by a stake and stone midway north and south on said line.

"And, further, these plaintiffs allege that on or about the third day of June, 1884, the said J. M. Bell, notwithstanding the facts above set forth, procured an award of the fence-viewers of Mission township, Brown county, Kansas, being the same township in which all of said land lies, assigning and awarding to him, the said J. M. Bell, forty rods of the hedge partition fence between

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the south-east one-fourth of the south-west one-fourth of section eight, town four, range seventeen, and the south-west one-fourth of the south-east one-fourth of section eight aforesaid, and to J. H. Robertson, the south forty rods of said partition fence, namely, so much of said forty rods as is composed of hedge, and the remainder of the said forty rods said John H. Robertson is to erect and maintain a lawful fence composed of such material as he may elect, the same to be kept up and maintained in good repair by the respective owners; also an award that said John H. Robertson is to pay to J. M. Bell the sum of sixty cents per rod for the hedge fence comprised in the above-described south forty rods of said partition fence, to be paid within thirty days from the third day of June, 1884, a copy of which said award is hereto attached, marked 'A' and made a part of this petition, which said award was certified, signed, and executed by P. R. Harmon, M. G. Ham, and Amos P. Carl, who were then the fence-viewers of said Mission township; that said assignment and award was delivered to the said Bell by the said fence-viewers, and a duplicate thereof delivered to the said plaintiff John H. Robertson on or about the sixth day of June, 1884, as their assignment to each said Bell and the said plaintiff Robertson, in writing, of their equal shares or parts of said partition fence to be by them kept up and maintained in good repair, and as their award of the amount that this plaintiff John H. Robertson should pay to the said J. M. Bell for having erected more than his share of said fence.

"And, further, these plaintiffs allege that on the fourteenth day of July, 1884, the said fence-viewers met again on the line of said fence, and proceeded to further consider said matter, without having given any notice to either of these plaintiffs, and that neither of them knew of said last-named meeting until it was over; and that at said last-named meeting the said fence-viewers, without any notice to either of these plaintiffs, and without any knowledge on the part of these plaintiffs, or either of them, proceeded to make an award, assignment, declaration, or statement, and signed and certified the same as an amendment to or a part of their first said award or assignment, and attached the same to their first said award or assignment, then in the hands of the defendant, and delivered the same to the said defendant, J. M. Bell, as an assignment and award, a copy of which is hereto attached, marked 'B' and made a part of this petition; and that thereafter, and on the eighteenth day of July, 1884, the said defendant, J. M. Bell, caused the same to be, and the same was, recorded in the office of the register of deeds of Brown county, Kansas, in the 'Fence Record,' on pages 20 and 21, and the same does constitute an illegal incumbrance and cloud on title of the said land of him, the said John M. Robertson.

"And, further, these plaintiffs allege that, at the first meeting of said fence-viewers, the said John H. Robertson appeared and claimed the matters and things hereinbefore set out, and offered evidence of a division of said fence as above set forth, and evidence of the agreement between himself and the said Bell, and of all the matters and things hereinbefore set forth, and that the said fence-viewers refused to receive said evidence, or any evidence on any of the matters set up in this petition, or to make any finding thereon; whereupon these plaintiffs pray that the said two awards may be set aside and held for naught, and may be declared illegal and void, and that the record thereof may be canceled and vacated, and that the plaintiffs have a judgment decreeing and declaring that the defendant shall have and maintain the south half of said fence, and that the plaintiffs shall have and maintain the north half of said fence, between the said west half of the said south-east quarter of said section 8 and the said south-west quarter of section 8; and that these plaintiffs recover their costs in this action; and such other, further, and different relief as to the court may seem just."

The exhibits A and B are as stated in the petition.

To this petition the defendant demurred upon the following grounds, to-wit: "(1) That there is another action pending in this court between the same parties for the same cause; (2) that there is a manifest defect of parties plaintiff, in this: that Mrs. A. M. Robertson is not shown to have any interest in the subject of the action whatever, and is therefore improperly joined; (3) that said petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs, and against the defendant." The court below sustained this demurrer, and rendered judgment in favor of the defendant, and against the plaintiffs, for costs; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

W. D. Webb, for plaintiffs in error. *C. W. Johnson*, for defendant in error.

VALENTINE, J. We think the court below erred in sustaining the defendant's demurrer to the plaintiffs' petition. It does not appear upon the face of the petition, or elsewhere, that there was another action pending between the same parties for the same cause, nor does it appear that there was any defect of parties plaintiff, nor that the petition did not state facts sufficient to constitute a cause of action. The action is virtually a suit in equity to set aside an award of fence-viewers for a want of power in them, for irregularity in their proceedings, and for fraud on the part of the defendant. It appears from the petition, among other things, that the line of partition fence to be maintained by the parties was 160 rods in length, north and south; that the plaintiffs owned the land on the east side of this line, and the defendant owned the land on the west side thereof; that, by previous arrangements between the parties, the plaintiffs were to maintain the north 80 rods of the fence, and the defendant the south 80 rods thereof; that the plaintiffs had already expended a considerable amount of time, labor, and money in keeping up and maintaining their portion of the fence; that, while this arrangement between the parties was still existing and in force, the defendant procured the fence-viewers to make an award requiring the plaintiff John H. Robertson to also keep up and maintain the south 40 rods of the south 80 rods of fence, which 80 rods the defendant was by the previous arrangement to keep up and maintain; leaving the defendant to keep up and maintain only the north 40 rods of the south 80 rods of said fence. Now, after the foregoing arrangement between the parties had been made, we think this attempt on the part of the defendant to require the plaintiff John H. Robertson to keep up and maintain an additional portion of the fence, making in the aggregate 120 rods out of the 160 rods of fence, by procuring the aforesaid award of the fence-viewers, was fraudulent and wrong, and the award of the fence-viewers for this reason should be set aside. Of course, we know nothing of the real facts of the case, except as they are stated in the plaintiffs' petition; and as they are there stated we think the plaintiffs are entitled to the relief which they now pray for, or, at least, the plaintiff John H. Robertson is entitled to such relief, and Mrs. Robertson is a proper party to the action. The statute of frauds has no application to this case. This statute was not enacted to encourage fraud, or to enable parties to commit fraud, but was enacted to prevent fraud. Unless the plaintiffs can have the remedy which they now seek, they have no remedy; and to say that they have no remedy is to cast reproach upon the administration of justice. They have no appeal, and no petition in error, and no remedy more direct than the one which they have resorted to in this case. Indeed, they have no complete remedy unless they are permitted to maintain an action such as the present action is. Hence we think they should be permitted to maintain this action.

The order and judgment of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

THOMPSON v. POST.

(Supreme Court of Kansas. June 11, 1887.)

ERROR—TO JUSTICE OF PEACE—PRACTICE.

A judgment rendered in an action tried before a justice of the peace with a jury, cannot be reversed under section 110, chapter 81, Comp. Laws 1879, for errors occurring on the trial, upon proceedings in error to the district court, where the record does not contain the evidence introduced upon the trial, or on the hearing of the motion for a new trial.

(Syllabus by Simpson, C.)

Error from McPherson country.

E. M. Clark, for plaintiff in error. *Lucien Earle*, for defendant in error.

SIMPSON, C. This action was tried before a jury in a justice's court. Verdict and judgment rendered for plaintiff in error. Motion for a new trial was overruled, and exceptions taken. Subsequently, the cause was taken to the district court upon proceedings in error, and reversed. In this court a reversal is sought of the judgment of the district court. The case is controlled by section 110, c. 81, Comp. Laws 1879, which reads: "It shall be lawful for the justice before whom a cause has been tried, on motion of the party aggrieved, and being satisfied that the verdict was obtained by fraud, partiality, or undue means, or that the verdict is not sustained by sufficient evidence, or is contrary to law, at any time within five days after the day of trial, to grant a new trial, and he shall set a time for the new trial, of which the opposite party shall have at least three days' notice." In 1885, this section was amended, and now reads: "The justice before whom a cause has been tried, on motion of the party aggrieved, at any time within five days after the decision or verdict, shall vacate the decision or verdict, and grant a new trial, for the same reasons, and upon the same terms and conditions, as provided in the Code of Civil Procedure in like causes, and he shall set a time for a new trial, of which the opposite party shall have at least three days' notice." Section 110, c. 81, Comp. Laws 1885. This last section, however, does not apply, as the cause was tried while said section 110, c. 81, Comp. Laws 1879, was in force.

As neither the evidence on the trial, nor on the hearing of the motion for a new trial, was contained in the record, and as there was nothing before the district court showing that the verdict was obtained by fraud, partiality, or undue means, or that the verdict was not sustained by sufficient evidence, or that it was contrary to law, within the authority of *Theilen v. Hann*, 27 Kan. 778, the judgment of the district court must be reversed.

It is therefore recommended that this cause be remanded, with instructions to the district court to affirm the judgment rendered before the justice of the peace.

BY THE COURT. It is so ordered; all the justices concurring.

LAWDER v. HENDERSON.

(Supreme Court of Kansas. June 11, 1887.)

1. WITNESS—CROSS-EXAMINATION.

On cross-examination of a witness he cannot be questioned upon a matter not examined on in chief, except where such questions tend to show interest, bias, or prejudice, or to explain, modify, or qualify former statements.

2. INSTRUCTIONS—CONSTRUCTION—ALL AND PART.

Instructions given to the jury by the court must be taken and considered together; and no separate sentence alone can be held bad, although, taken alone, it would be erroneous; but where, taken with the remainder of the instructions, it is so modified and explained as not to be misleading, held not error.

3. SAME—REPETITION.

Where an instruction is properly given by the court to the jury, and afterwards, in the course of the instructions, it is repeated several times, *held* not error, unless it appears that said instruction is made so prominent as to seem to have misled the jury.

(*Syllabus by Clogston, C.*)

Error from Wabaunsee county.

John Lawder commenced this action to recover damages for the killing of two shepherd dogs, which he alleged were killed by the defendant; he alleged that in June, 1883, defendant, with some 20 or 30 other citizens of Wabaunsee county, came to his house and wanted permission to kill his dogs, and that he refused to give permission to have them killed; and that defendant and said other persons killed his dogs against his protest, and without his permission; and that his dogs were of the value of \$300. The defendant, in answer, alleged that a mad dog had been in the neighborhood, and had bitten one person and a good many dogs, and some cattle and other animals; and the dogs that had been so bitten had become mad; and that, for the purpose of protection, the people met at the school-house and agreed to kill all the dogs in the neighborhood; that he, together with the said neighbors, proceeded to the premises of the plaintiff, and after consulting with plaintiff, plaintiff gave his consent that his dogs might be killed; and thereupon they were killed. Trial in the district court by jury. Verdict and judgment for the defendant. Plaintiff brings the case to this court.

A. H. Case, for plaintiff in error. Geo. G. Cornell, for defendant in error.

CLOGSTON, C. Appellant presents for our consideration two questions: *First*, that the court erred in sustaining objections to plaintiff's cross-examination of the defendant; and, *second*, in the instructions given by the court to the jury. The plaintiff, to establish the fact that he did not consent to the killing of his dogs, proved by one Taylor that, on the same day plaintiff's dogs were killed, the defendant, with other persons, came to his place to kill his dogs, and that the defendant read a list of the names of the owners whose dogs they had killed, and among which was the plaintiff's name; that the defendant stated that all of the owners had consented to the killing of their dogs save the plaintiff and one other. The defendant, to disprove this statement, testified on his own behalf as follows: "I am the defendant. I was at the meeting at the school-house. I was present on the twenty-fifth day of June, 1883, in Mission Creek township, near Taylor's house. Heard Taylor's evidence, in this case, about our being there, and what was done and said, and that I read a list of the owners of the dogs whose dogs had been killed. There was no such list read by me. We talked with him about his dogs; told him we wanted to kill all the dogs in the neighborhood, and that was what we were out for. He said he had one dead one and one live one; that some one had just killed one of his." And on cross-examination the plaintiff asked the defendant the following questions: "Were you at John Lawder's that twenty-fifth day of June, 1883? Did you kill any dog of the plaintiff's on that twenty-fifth day of June, 1883? Were you at John Lawder's place in Mission Creek township on that day? If so, state for what purpose you were there. Please state what was done and said by you at John Lawder's on that twenty-fifth day of June, 1883, in the presence of John Lawder. If you gave any instructions to any one to kill any of John Lawder's dogs on or before the twenty-fifth day of June, 1883, state to whom you gave the order, and what was the direction or directions. State whether or not John Lawder, in your presence or hearing, consented to the killing of either of his dogs, before they were killed." To all of these questions the defendant objected as incompetent, immaterial, and not cross-examination, and the objections were sustained by the court.

We see no error in this. The defendant only testified to what took place at Taylor's. He stated what conversation he had with Taylor, and denied the statements that Taylor made about his reading a list, and that the plaintiff consented to the killing of his dogs. He made no statement of any transaction or conversation that took place at the plaintiff's. Therefore the cross-examination was not confined to the facts and circumstances given by defendant in his evidence in chief. If he desired to go further, he would have to make the witness his own witness, and not seek to establish on cross-examination what would only be proper on examination in chief.

The plaintiff complains of this part of an instruction of the court to the jury: "That, as a general rule, dogs have no value." This, if given alone, unexplained or unqualified, would be error; but the court told the jury also that, under some circumstances, dogs may be of great value, and gave as an illustration the case at bar; that if the plaintiff's dogs were trained to do the work of herding, and took the place of a man, so to speak, that they would be of great service and value. These instructions taken together, and they must be so taken, we think were proper, and were not calculated to mislead the jury. Plaintiff claimed damages, and showed that his dogs had a special value by reason of their being trained shepherd dogs, and, as such trained dogs, were of great value to him in herding.

The plaintiff complains of the instruction of the court to the jury as follows: "That if the jury find from the evidence that the plaintiff consented to the killing of his dogs, then they must return a verdict for the defendant." The plaintiff insists, while this instruction, under the evidence, would be proper, yet that the court gave that instruction more prominence by repeating it at least four times in his instructions to the jury; and while we can see no good reason why the trial court should so often have called the jury's attention to this particular question, yet, after careful examination of the evidence, we cannot see how the jury could have been misled. The instructions properly stated the law applicable to the facts shown by the evidence, and the verdict was clearly supported by a preponderance of the evidence; therefore no substantial error was committed requiring a reversal. We therefore recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

CARSON, Sheriff, v. GOLDEN.

(Supreme Court of Kansas. June 11, 1887.)

1. REPLEVIN—AGAINST SHERIFF—EVIDENCE.

In an action of replevin for goods, wares, and merchandise taken from the plaintiff by the defendant, as sheriff, on certain orders of attachment, and held by the sheriff about two months before the trial of the replevin action, a ruling of the trial court admitting evidence from a competent witness tending to show that there would be a depreciation in the market value of that kind of goods if kept over for another season is not materially erroneous.

2. EVIDENCE—VALUE—SHERIFF'S APPRAISEMENT.

Where a sheriff attaches goods, and appoints appraisers to appraise them, the appraised value of the goods is *prima facie* evidence of their real value as against the sheriff.

3. FRAUDULENT CONVEYANCES—INSOLVENCY—INSTRUCTION.

In an action where the question arises as to whether G. sold goods for the purpose of hindering, delaying, or defrauding his creditors or not, an instruction by the trial court to the jury that, before they could find for the defendant, they must find that G. was insolvent, and that he made the sale with the intent to hinder, delay, or defraud his creditors, is erroneous; but where the case was tried upon the theory that G. was insolvent, and where it was an admitted fact in the case that he was insolvent, *held*, that such instruction is not materially erroneous.

(Syllabus by the Court.)

Error from Smith county.

Webb & McNall, May & McBride, and Corn & Meyers, for plaintiff in error.
Uhl & Pickler, for defendant in error.

VALENTINE, J. On March 7, 1885, L. A. Golden purchased from J. B. Griswold a stock of goods, wares, and merchandise, situated in Cedarville, Smith county, Kansas, for which he paid \$3,000 in cash. On March 10, 1885, F. M. Carson, the sheriff of Smith county, levied certain attachments upon these goods, as the property of Griswold, and took them into his possession. On March 20, 1885, Golden replevied the goods from Carson, but Carson still retains them in his possession. On May 1 to 5, 1885, a trial was had in this replevin action before the court and a jury, and the jury found generally in favor of the plaintiff and against the defendant, and found that the goods were worth \$2,356.02, and found the damages for the unlawful detention thereof to be \$250. On May 6, 1885, the defendant moved for a new trial, which motion was overruled, and on the same day judgment was rendered in favor of the plaintiff, and against the defendant, in the alternative for the possession of the property, or for the value thereof, to-wit, \$2,356.02, in case a return could not be had, and for the damages assessed by the jury, to-wit, \$250, and for costs of suit, taxed at \$115.60; and the defendant, as plaintiff in error, brings the case to this court for review.

The plaintiff in error claims that several errors were committed by the court below, which we shall consider in their order.

1. The plaintiff in error (defendant below) claims that the court below erred in admitting the evidence of T. W. Rea to prove the amount of damages sustained by the plaintiff below, on the ground that the damages sought to be proved by the testimony of this witness are too remote and uncertain to form the basis of any recovery. The testimony objected to is testimony tending to show that a depreciation in the market value of goods like those in controversy would ensue if carried over from one season to another, and that the depreciation would be from 25 to 40 per cent. The witness testified that he had had two years' experience, and had knowledge concerning these matters; and he also testified in detail with regard to the depreciation of the separate kinds of goods; as, for instance, laces, ribbons, gloves, shirts, drawers, flannels, cheviots, hats, caps, winter goods, etc. The witness did not pretend to testify that any of the goods would be kept over for another season, or whether they would or not. They were levied upon by the sheriff on March 10, 1885, while this trial was had on May 1 to 5, 1885, and it might be that none of the goods would be kept over. But still they might, or at least some of them might; for the unlawful detention of all of them from March 10, 1885, to May 5, 1885, or longer, might cause some of them to be kept over for another season. Besides, this evidence was not introduced for the purpose of fixing conclusively any particular amount of damages, but was introduced merely for the purpose that the jury might take it into consideration in determining what might be the proper amount of the damages. While the question is a close one as to whether this testimony should have been admitted or not, still we are inclined to think that the court below did not commit any material error in admitting it.

2. The plaintiff in error (defendant below) further claims that the whole of the evidence taken together is not sufficient to sustain the verdict of the jury either as to damages, or as to the value of the goods. We think there was ample evidence as to both. The plaintiff's being deprived of the use of the goods for two months or more would be some evidence of damage; and the removal from one place to another would also be evidence of damage; and their being boxed up and kept in boxes, as it was shown they were in this case, would also be evidence of damage; and also the evidence of Rea would be some evidence of damage. As to the value of the goods, the plaintiff below paid \$3,000 for them, and believed they were worth fully that amount.

Griswold claimed that they were worth more than that amount. The appraisers appointed by the sheriff to appraise them when the sheriff levied the attachments upon them appraised them at the amount which the jury finally found them to be worth, to-wit, \$2,356.02. This amount the appraisers believed was the original cost price, but probably the value of the goods at Cedarville was more than the cost price. We think that the appraised value was at least *prima facie* evidence of the value of the goods as against the sheriff; and, if he claimed that the goods were not worth that amount, it devolved upon him to show it. There was no evidence tending to show that the goods were worth less than the jury found them to be worth.

3. It is also claimed that the court below erred in instructing the jury that, before they could find for the defendant, they must find that Griswold was insolvent, and that he made the sale with the intent to hinder, delay, or defraud his creditors. Of course, this instruction is erroneous; for it is not necessary that Griswold should have been insolvent if he made the sale with the intent to hinder, delay, or defraud his creditors; but as the whole case was tried upon the theory that Griswold was insolvent, and as it seems to be an admitted fact in the case that he was insolvent, the instruction was not materially erroneous. The jury must necessarily have found that Griswold was insolvent, and then the only question left for them to find was whether the sale was made with the intent to hinder, delay, or defraud his creditors or not.

4. It is also claimed that the court below erred in instructing the jury that, if Griswold and Golden acted in good faith, the plaintiff should recover. Now, the court did not so instruct, or at most did not so instruct in terms; but, as all the other essential facts for a recovery had unquestionably been proved, we think that such an instruction would not have been erroneous.

The judgment of the court below will be affirmed.

(All the justices concurring.)

KINGMAN v. HOLMQUIST.

(Supreme Court of Kansas. June 11, 1887.)

SALE—VESTING OF TITLE—SELECTION.

Where a certain number of articles are sold from an ascertained lot which are identical in kind and value, a selection is unnecessary, and a separation is not essential to transfer title to the vendee. In such a case, the price being paid in full, the title will pass if it appears that the parties so intended.

(Syllabus by the Court.)

Error from Saline county.

Charles Holmquist brought an action to recover from Charles A. Kingman and Freeman Kingman the sum of \$50 as damages for the conversion of 25,000 hedge plants. He alleged that he purchased the plants from Charles A. Kingman in July, 1882, who was to deliver them at Salina, Kansas, on or before March, 1883, and that on or about the latter date he delivered the plants at the place of business of Freeman Kingman, at Salina, Kansas, together with a lot of other hedge plants, and notified Freeman Kingman that the plants so delivered were the property of Holmquist. It is further alleged that when Holmquist called for the plants, about the time of delivery, Freeman Kingman refused to deliver them to him, and, on the contrary, converted the same to his own use, well knowing that they were the property of the plaintiff. The cause was tried in the district court with a jury, and verdict and judgment were given in favor of Holmquist, and against Freeman Kingman, for \$31.25.

The jury made the following special findings: "(1) Was it agreed between C. A. Kingman and Freeman Kingman, for Kingman & Co., that said Kingman & Co. should receive, in the spring of 1883, enough hedge plants to satisfy the account of said C. A. Kingman to Kingman & Co.? *Answer.* Yes.

(2) Were the plants delivered to Freeman Kingman or Kingman & Co. sufficient to satisfy said account of C. A. Kingman? A. No. (3) What number of plants were delivered to Freeman Kingman, or to Kingman & Co.? A. 82,000. (4) Were said plants delivered in one lot, without any division or separation into different lots, except as they were tied in bundles of 250 plants each? A. Yes. (5) What number if any, of said plants were, by the persons delivering them, intended for the plaintiff? A. 25,000. (6) Was that number in any way marked or separated from the whole lot of plants delivered at the time, so as to show which particular plants were intended for plaintiff? A. No. (7) Did not defendant refuse to receive and receipt for the plants delivered, except upon the account of Kingman & Co. against C. A. Kingman? A. Defendant received the plants, and then refused to receipt for them except upon the account of Kingman & Co. (8) When the agreement was made between the plaintiff and C. A. Kingman for 25,000 hedge plants, were they in the ground, indiscriminately mingled with a much larger number of plants? A. Yes. (9) Were the plants delivered appropriated by Freeman Kingman, or by Kingman & Co., which? A. Kingman & Co. (10) Was Freeman Kingman a member of the firm of Kingman & Co. when the plants were appropriated? A. Yes."

Freeman Kingman thereupon made his motion for a judgment upon the special findings, and also for a new trial, both of which motions were overruled and exceptions taken.

Garver & Bond, for plaintiff in error. *John Foster*, for defendant in error.

JOHNSTON, J. The only contention of the plaintiff in error is that the 25,000 plants purchased by Holmquist were not separated from the whole number delivered, in such a way as to transfer the title to him, and enable him to maintain an action for conversion. The hedge plants were tied up in bundles of 250 plants each, which, so far as the record shows, were the same in quality and value. Holmquist purchased and paid for the plants, and the vendor agreed to deliver them at Kingman's place of business at Salina. He did deliver them there in accordance with his agreement, and at the same time and place he delivered 57,000 for Kingman in part payment of an indebtedness which he owed to Kingman. The whole 82,000 were delivered together to Kingman, and at that time he was informed that 100 bundles, or 25,000, were for Holmquist, and that the remaining 228 bundles, containing 57,000, were for himself. Kingman appropriated all of the plants to his own use, and hence this action.

We think the sale of Holmquist was complete, although the 25,000 plants sold were not separated from the whole number delivered, and that the action for conversion can be maintained. It will be observed that the controversy is not with the vendor. He had received full payment, had tied the plants up in bundles, and had delivered them at the place agreed upon. By this action he intended to transfer the title to Holmquist, and he has ever since regarded and treated it as a complete sale. Nothing remains to be done by him to ascertain the quantity, quality, or price of the plants sold. It is argued that, because the bundles intended for Holmquist were not set apart or designated by some mark, the title did not pass. But separation could not make more certain the quantity, quality, or price of the plants purchased by Holmquist. They were a part of a specific and ascertained quantity. There were 328 bundles of plants which were uniform in the number contained in each, as well as in the quality and value. It was therefore immaterial from what part of the whole the 100 bundles of Holmquist were taken. No possible advantage could have been gained by either party if the privilege of selection had been conferred upon him, and it is idle to dispute about the identity of articles that are equal in kind and value. Each had a right to a certain number of the whole, and either had a right to take possession of the number

that belonged to him; and, indeed, the circumstances under which Kingman received the plants are such that he might properly be regarded as the bailee of Holmquist. He held for Holmquist a specified number of bundles, which were a portion of a quantity that was ascertained and certain, and with which the seller had nothing further to do. While the English and some of the American courts hold that in all cases the goods sold must be separated and specifically identified before the title will pass, the weight of authority in this country is that, where the property sold is a part of an ascertained mass of uniform quality and value, separation is not essential, and the title to the part sold will pass to the vendee, if such appears to be the intention of the parties. This principle has been recognized by this court in a recent decision, and the authorities sustaining that view were there approved. *Piazzek v. White*, 23 Kan. 621.

The supreme court of Connecticut, in an action involving the title to 380 bags of meal which had been purchased from a larger number of similar bags, considered this question, and while holding that where the articles sold from a larger number differed in quality, quantity, or value, a separation was essential to transfer the title, stated that, "where the subject-matter of a sale is part of an ascertained mass of uniform quality and value, no selection is required; and in this class of cases it is affirmed by authorities of the highest character that severance is not, as a matter of law, necessary in order to vest the legal title in the vendee to the part sold. The title may and will pass if such is the clear intention of the contracting parties, and if there is no other reason than want of separation to prevent the transfer of the title." *Chapman v. Shepard*, 39 Conn. 413; *Kimberly v. Patchin*, 19 N. Y. 330; *Pleasants v. Pendleton*, 6 Rand. 473; *Hurff v. Hires*, 40 N. J. Law, 581; *Carpenter v. Graham*, 42 Mich. 191, 3 N. W. Rep. 974; *Waldron v. Chase*, 37 Me. 414; *Horr v. Barker*, 8 Cal. 603, and 11 Cal. 393; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Young v. Miles*, 20 Wis. 646; *Clark v. Griffith*, 24 N. Y. 595; *Lobdell v. Stowell*, 51 N. Y. 70; *Groat v. Gile*, Id. 431; *Gardner v. Dutch*, 9 Mass. 426.

A further citation of cases, or an extended examination of the conflicting decisions upon this question is unnecessary here. A very elaborate and careful review of the authorities is made by Mr. Benjamin in his treatise on Sales, in which he reaches the conclusion that, when the property sold is part of a mass made up of units of unequal quality, such as cattle out of a herd, their selection being material, the decisions all hold that the title will not pass until a selection has been made, but that the weight of recent American authority sustains the proposition that when property is sold, to be taken out of a specific mass of uniform quality, the title will pass at once upon the making of the contract, if that appears to be the intention of the parties. 1 Benj. Sales, §§ 469-487. The present case falls within this authority, which we deem to be controlling, and hence there must be an affirmance of the judgment of the district court.

(All the justices concurring.)

PETTIGREW v. MILLS and another.

(Supreme Court of Kansas. June 11, 1887.)

LANDLORD AND TENANT—ESTOPPEL.

The general rule, that a tenant cannot dispute the title of his landlord as long as the tenant holds possession derived originally from the landlord, affirmed; there being no facts in the case that bring the defendant in error C. K. Mills within any of the exceptions to the rule.

(Syllabus by Simpson, C.)

Error from Allen county.

Action brought before a justice of the peace by the plaintiff in error against C. K. Mills, one of the defendants in error, to recover \$50 rent of 80 acres of land, and \$100 for waste committed by Mills while a tenant of plaintiff during the rent year 1884. The defendant C. K. Mills moved the court to bring in as a co-defendant James Mills, his son. This motion was allowed, over the objection of the plaintiff. James Mills then filed an answer, averring that he was the legal and equitable owner of the land occupied by C. K. Mills, and moved the court to certify the case to the district court as one involving the title to real estate. This was done, and the case duly certified to the district court. The land is the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section No. 17, township 24, range 20, situated in Allen county. It originally belonged to the Leavenworth, Lawrence & Galveston Railroad Company, sold by them to Henry Tidman, and by Tidman and wife conveyed to plaintiff in error by general warranty deed on the fifteenth of December, A. D. 1880. The defendant in error claims title by quitclaim conveyance from William J. Richards and wife of date eleventh February, 1885. Richards claims title by virtue of a judgment in his favor against the Leavenworth, Lawrence & Galveston Railroad Company rendered in the Allen county district court on the fifth of July, 1876, a sale on execution, and a purchase at such sale. In the amended petition in the case of W. G. Richards against the Leavenworth, Lawrence & Galveston Railroad Company, filed August 10, 1875, there is an allegation in these words: "(4) That since the occurrence of said act, as hereinbefore mentioned, the defendant B. S. Henning has been appointed, by the proper and legal authorities, receiver, under the laws of the United States, of said company, and has now the control and management of the property." Henning, as receiver, is made a party to the amended petition, but the records fail to show any service of summons on him.

Other facts are recited in the opinion.

H. A. Ewing and *P. H. Harris*, for plaintiff in error. *Knight & Foust*, for defendants in error.

SIMPSON, C. We shall only consider one of the numerous questions raised on this record. The one urged with great vigor and persistency by counsel for plaintiff in error, as to the effect of the appointment of a receiver for the Leavenworth, Lawrence & Galveston Railroad Company, is not presented in such a manner that it can be carefully considered. The only reference to it in the record is in the fourth paragraph of the amended petition in the case of W. L. Richards against the Leavenworth, Lawrence & Galveston Railroad Company, and B. S. Henning, receiver, and this does not allege by what court, in what action, or for what purpose he was appointed,—whether he qualified, and took charge of all or any of the property of the company. Whether the land in controversy was ever in his custody, or what disposition was made of it, is not developed. Under this state of the record, we will not undertake to pass upon the questions of the validity of the title of Richards, derived by a judicial sale on his judgment against the railroad company. The general rule is that a tenant cannot dispute the title of his landlord as long as such tenant holds possession derived originally from the landlord. *Brenner v. Bigelow*, 8 Kan. 496.

The record shows that the defendant C. K. Mills rented the land in controversy from the plaintiff in error, for the rent years of 1882, 1883, and 1884, at an annual rental of \$50 per year; that the rent for the years 1882 and 1883 was paid. On the tenth day of November, 1884, the plaintiff in error commenced this action before a justice of the peace to recover the sum of \$50 for rent for the year 1884, and the sum of \$100 value of a building removed from the land by the defendant.

By the terms of the lease the annual rent was to be paid in time for the payment of taxes on the land. The defendant C. K. Mills made a motion in the

justice's court that James Mills be brought in as a co-defendant to the action, for the reason that he claimed to own the land, and to be entitled to the rent for the year 1884. This motion was sustained, over the objection of the plaintiff in error, and the justice certified the case to the district court because it appeared that the title to the land was involved in the controversy. In the district court an amended petition was filed, and the defendants jointly filed an answer in which it is alleged that the land was purchased by James Mills on the eleventh day of February, 1884, from Richards and wife, the then owners, and was rented by James Mills to C. K. Mills for the rent year commencing on the first day of March, 1884, and ending on the first day of March, 1885, for \$50 per year; that James Mills sold the building described in the plaintiff's amended petition to C. K. Mills, and delivered the same to him. The case was tried at the March term, 1885, of the Allen county district court, a jury being waived. There was a general finding and a judgment for the defendant.

James Mills is the son of C. K. Mills, the other defendant, and, at the time of the alleged purchase by him of the land, was living and rented a farm in the state of Missouri. The preliminary negotiations of the purchase by Mills from Richards was conducted by C. K. Mills, the father. The mother of James Mills loaned him what money was paid at the date of the purchase, and his father and mother executed their promissory note for the balance due. Even the date of this purchase is doubtful under the evidence. The deed from Richards and wife to James Mills is dated February, 1885, but it is claimed that this deed was executed in lieu of one made and delivered some time previous, in which there was a misdescription of the land. C. K. Mills testified that he had paid his son \$50 for the rent of the land for the rent year of 1884; but when and where he paid he could not tell. He did not know that the plaintiff in error was his landlord, although that relation existed for at least three years. He did not proclaim to the agent of the plaintiff in error, who served a notice to quit on him in the fall of 1884, that he was renting from his son James. A man who desired to rent the land from plaintiff in error in January, 1884, if he could get possession of it, had a conversation with C. K. Mills about possession, in which Mills declared that he had received no notice to leave, and that he would retain it for another year. He never seems to have disputed the title of his landlord until after this action was commenced. There is not a particle of testimony in the record tending to make any showing that brings C. K. Mills within the exceptions to the rule that a tenant cannot dispute the title of his landlord.

We recommend that the judgment of the district court of Allen county be reversed, and the same remanded, with instructions to grant a new trial.

BY THE COURT. It is so ordered; all the justices concurring.

KANSAS CITY, FT. S. & G. R. CO. v. KELLEY, by his Next Friend.

(Supreme Court of Kansas. June 11, 1887.)

1. NEGLIGENCE—RAILROADS—TRESPASSER ON TRAIN.

Where a boy 15 years old gets upon a freight train wrongfully, and as a trespasser, for the purpose of riding without paying his fare, and is commanded by the brakeman to jump off the train while in dangerous motion, in the night-time, and in obedience to that command, and in fear of being thrown off, jumps off the train, and is run over and injured, the company is liable.

2. SAME—ACTS OF BRAKEMAN.

It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the railroad company is liable.

(Syllabus by Clogston, C.)

Error from Johnson county.

William Kelley brought this action by his next friend, Giles Milhoan, against the Kansas City, Fort Scott & Gulf Railroad Company, to recover damages for injuries received by being forcibly ejected from a freight train by the employes of the railroad company in charge of the train of the defendant. Trial in the district court of Johnson county by jury. Verdict and judgment for the plaintiff for \$4,000, and defendant brings the case here on error.

Wallace Pratt and Blair & Perry, for plaintiff in error. *A. Smith Devaney*, for defendant in error.

CLOGSTON, C. It appears from the evidence that on the night of the sixteenth of June, 1884, while the north-bound freight train on the defendant's railroad stopped for water south of the city of Olathe about one mile, William Kelley got on the freight train, between two freight cars, for the purpose of going to Kansas City; that he had no ticket, and no money to pay his fare; that he had been working in Galena, Cherokee county, Kansas, and had been sick, and was beating his way home to Kansas City on the railroad. When the train started, and before it reached the station at Olathe, a brakeman passing over the train discovered the boy on the draw-head between the cars, and he was asked by the brakeman where he was going, and if he had any money to pay his fare; and the boy told him he was going to Kansas City, and was without any money, and could not pay fare. The brakeman then directed him to get off the train. He said he would if they would slow up or stop the train. He was then informed by the brakeman that the train was going slow enough for him to get off, and that he must jump off the train. The boy then climbed onto the ladder on the side of the car. The brakeman stepped from the car he was on to the end of the car where the boy was, and told him to get off or he would throw him off. In obedience to this demand, he jumped off the train, and in falling his leg was caught under the wheels of the car, and his foot and ankle crushed. He was picked up by a man and carried to a hotel, and it was found necessary to amputate his leg between the knee and ankle.

The evidence does not disclose what the duties of a brakeman are on the defendant's road. We presume, in the absence of a rule defining his duties, that under the general scope of his employment as a servant of the company on the train, concerned in its management, and aware of the fact that a person who got upon the train with the intent to ride thereon, without paying fare, was a trespasser, and the implied authority in such case, is an inference from the nature of the business, and its actual, daily exercise according to the common observation and experience. Added to this, the testimony of the brakeman, who answered, when asked how it happened, that he stood by and let Long, another brakeman, do all the talking with this young man: "I was to keep them off of my end of the train, and he was to keep them off of his."

Assuming that the brakeman had authority to put trespassers off the train in a lawful manner, yet defendant insists that if the act was done as the plaintiff claims, and the boy was forced off the train while it was running at a speed of eight miles per hour, on a dark night, it cannot be said that the brakeman was acting, in so doing, under the scope of his employment so as to make the company liable. In this the defendant is mistaken. Assuming the case made by the plaintiff, the act complained of was reckless, wanton, and illegal; and, if done within the scope of his employment and authority, he was acting for the defendant, and not for himself. The removal of trespassers from the train was within the implied authority, and became the duty of the servants in charge of the train; and the fact that, in so exercising that right or duty, they acted negligently and wantonly, and caused the boy to jump off the train while running at a speed unsafe for him to get off, and he

is injured, will not exonerate the defendant. *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117; *Higgins v. Waterlot Turnpike Co.*, 46 N. Y. 23; *Northwestern R. Co. v. Hack*, 66 Ill. 238; *Kline v. Central Pac. R. Co.*, 37 Cal. 400.

The defendant had the right to put him off from its cars, and in doing so could use such force as was necessary to eject him, but in so doing must exercise the right with ordinary care and prudence on its part, and, if the train was moving at such a rate of speed as to render it unsafe, and the night was dark, they must stop or slow up the train; and the mere fact that the boy was on the train as a trespasser was not such negligence as to relieve the defendant from this obligation, and gave its servants no license to negligently and wantonly eject him in a manner liable to do him great bodily harm. *Morgan v. Commissioners Miami Co.*, 27 Kan. 89. And it could make no difference whether he was ejected by actual force or by threats, if he jumped from the train in obedience to a command of the brakeman. He being a boy 15 years old, he would not be expected to use that degree of judgment and discretion that would be expected and required of an adult. He believed, and he had a right to believe, that force would be used to eject him; and when he saw the brakeman coming towards him, threatening to throw him off, he cannot, under the circumstances, be charged with negligence for not having waited longer. *Kline v. Central Pac. R. Co.*, 37 Cal. 404; *Moulton v. Aldrich*, 28 Kan. 312.

Again, he was assured that it was safe to get off the train, and that it was not necessary to slow up. Relying upon either, the defendant cannot be heard to say that his injury was caused by his own negligence. What he was guilty of was in getting on the train without being prepared to comply with the regulations of the company in relation to the carrying of passengers, and trying to beat his way on the train; but, at the time of the injury, defendant well knew of this negligence, and was informed of the facts which showed him to have been a trespasser on the train without right, save such right as the defendant owed even to trespassers. And we believe the true rule and doctrine to be that a railroad company is bound to exercise their dangerous business with due care to avoid injury to others, even to the protection of a trespasser who is not guilty of contributory negligence. *Beems v. Chicago, R. I. & P. R. Co.*, 58 Iowa, 155, 12 N. W. Rep. 222; *Keffe v. Milwaukee & St. P. Ry. Co.*, 21 Minn. 207; *Kansas City Ry. Co. v. Fitzsimmons*, 22 Kan. 686.

The defendant complains of the instructions given by the court to the jury. Some of these objections we deem of not sufficient importance to receive comment. Others are covered by the general discussion of the questions in this opinion. The defendant particularly complains of a part of the sixth instruction, which is as follows: "And I charge you that the plaintiff's right to recover is not affected by his having contributed to the injury, unless he was at fault in so doing." The general rule is that one cannot recover for an injury if he is guilty of negligence directly contributing to the injury. Yet, under the facts in this case, if the plaintiff was guilty of negligence, it was in boarding the defendant's train without first procuring a ticket, or having money to pay his fare; in other words, in attempting to beat the company, and be transported for nothing. Technically speaking, the jumping off the train by the plaintiff was negligence; and this instruction, in speaking of the plaintiff's negligence, was considering this class of negligence. In fact, the only claim of negligence relates to these two acts of the plaintiff. We admit that these acts establish negligence taken and considered by themselves alone, unexplained by circumstances and motives, where those acts result in the injury. In the first instance, the negligent act of the plaintiff was discovered by the defendant before the injury; and, after this discovery, by the slightest care on the part of the defendant the injury could have been prevented. Then, can it be said or claimed that, by reason of this negligent act, the plaintiff

was injured? As to the latter, it was caused by the acts of defendant's servants while in the discharge of their master's business. If the plaintiff had voluntarily jumped from the train when discovered, while the train was in dangerous motion, or doing so without sufficient provocation or ground for alarm, or in anticipation of danger where none existed, or the failure to exercise reasonable care and caution, situated as he then was, and the like, would not justify or excuse him. So the mere negligent act alone, when shown, will not always determine the right of recovery. The act may exist, and yet be the result of no fault of him who commits it. We see no error in this instruction. *Nelson v. Atlantic & P. R. Co.*, 68 Mo. 598; *City of Wyandotte v. White*, 13 Kan. 192.

The defendant again presents a single sentence from the ninth instruction, and claims it to be error: "Plaintiff was only required to exercise ordinary care to avoid injury." The ninth instruction, taken altogether, we think was properly given. It was as follows: "(9) Plaintiff was only required to exercise ordinary care to avoid injury; but this requisite could only be complied with by the exercise of that degree of caution which persons of his age and intelligence and of ordinary prudence would use under the same conditions of danger, and with like knowledge of the situation." This instruction, viewed in the light of the facts, properly states the law applicable to the facts. The plaintiff was on a train, and a trespasser. He was entitled to no protection from an injury resulting from his own acts or conduct, and could claim no protection from injuries received while so trespassing on the defendant's train, resulting from the ordinary and usual operation and management of the defendant's train; but to meet and protect himself against the wrongful acts of the defendant, he was not required to exercise more than ordinary care, considering his age, his situation and condition and surrounding dangers. When he became a trespasser upon the train, he had no right to believe that, by reason of that fact, he was to be negligently or wantonly expelled, or ejected in a manner that would result in serious injury to himself. *Townley v. Chicago, M. & St. P. Ry. Co.*, 53 Wis. 626, 11 N. W. Rep. 55.

In conclusion, defendant insists that the special findings of the jury show passion towards the defendant. We have carefully examined the special findings, and find no evidence of this charge; but, on the contrary, find all of the special findings supported by some evidence. True, upon some questions the evidence was conflicting; but because the jury believe one set of witnesses, and disbelieve others, is not of itself evidence of passion or prejudice. *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 145; *Whitaker v. Mitchell*, 58 Cal. 362.

We find no error in the record, and therefore recommend that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

STEPHENS and others v. BOARD OF COUNTY COM'RS LEAVEN
and others.

(*Supreme Court of Kansas. June 11, 1887.*)

HIGHWAYS—NOTICE—APPEARANCE.

The owner of certain land through which it was proposed, in 1882, to lay out and open a public highway, was not personally served with any notice of the time and place of the meeting of the viewers to view the road, nor was any notice thereof given to any of his agents residing in the county, but subsequently the owner appeared before the board of county commissioners, and asked that its action in ordering the laying out and opening of the road be considered, which was refused. Thereupon he asked pay for the damages caused to his land by the location and

opening of the road. *Held*, that his appearance before the board of county commissioners was a general one, and that the defect in the proceedings on account of the want of notice upon him was cured thereby.

(*Syllabus by the Court.*)

Error from Leavenworth county.

J. W. Green, for plaintiffs in error. *S. E. Wheat* and *J. H. Atwood*, for defendants in error.

HORTON, C. J. This action was originally brought by Nelson T. Stephens to vacate an order made by the board of county commissioners of Leavenworth county laying out a road through certain land owned by him in that county, and also to prevent the road from being opened. The petition alleged, among other things, "that the land is well fenced," and that "said Nelson T. Stephens is the owner in fee-simple and in possession thereof, and has, by himself, his tenants, and agents, been in the possession and actual occupancy of the same during all of the time of the happening of the grievances complained of." The petition also alleged that no notice was given him or his agents of the time and place of meeting of the viewers as prescribed by section 4, c. 89, Comp. Laws 1885. After the commencement of this action, Nelson T. Stephens died, and on January 26, 1885, such proceedings were had in the district court that the cause was revived in the names of the heirs of said Stephens. Upon the trial, the plaintiffs offered to introduce evidence tending to support the allegations of the petition. The defendants objected, upon the ground that the petition did not state facts sufficient to constitute a cause of action. This objection was sustained by the court, and judgment rendered for the defendants. Plaintiffs excepted, and bring the case here.

In support of a reversal of the judgment of the district court *State v. Farry*, 23 Kan. 731, and *Commissioners Chase Co. v. Cartter*, 30 Kan. 581, 1 Pac. Rep. 814, are cited. These cases decided that, before a public road can be laid out, the land-owner or his agent, if residing in the county, must be notified of the time and place of the meeting of the road-viewers, unless notice thereof is waived. Passing over the question whether it appears from the allegations of the petition that Nelson T. Stephens, or any of his agents, resided in the county at the time the road proceedings were instituted and carried on, we think it decisive of this case that the petition shows Stephens waived the notice prescribed in section 4 of said chapter 89. *Ogden v. Stokes*, 25 Kan. 517; *County Com'rs v. Heed*, 33 Kan. 34, 5 Pac. Rep. 453.

The petition alleges that Stephens "asked the said board of county commissioners to reconsider their said act in ordering the laying out of and opening said road, which they refused to do, and he asked them to pay him the damages which would be caused by said act, but so far they have utterly failed and neglected to do so, or give the same consideration." The allegations of a pleading are to be taken most strongly against the pleader, and, under this construction, the petition clearly shows that Stephens made a general appearance before the board of county commissioners for the purpose stated in the petition, and that such appearance was in no way special or limited. By his action the defect in the proceedings on account of the want of notice upon him was fully cured.

The judgment, therefore, of the district court must be affirmed.

(All the justices concurring.)

72 Cal. 448

GREENWADE v. DE CAMP. (No. 11,835.)

(Supreme Court of California. June 3, 1887.)

PUBLIC LANDS—RIGHT TO PURCHASE—SUCCESSIVE APPLICATIONS.

Section 3417, Pol. Code Cal., relating to contests for the privilege of purchasing state land, provides that, after an order of reference to a court, by the surveyor general, unless the contestant bring his action within 60 days, "his rights in the premises and under his application cease." Plaintiff, having once failed to bring his action under such reference, filed another application, obtained a second reference, and brought his action. *Held*, that he was not debarred from bringing such action by his first default, and that the second reference conferred jurisdiction on the court to try such action.

Department 1. Appeal from superior court, San Bernardino county.

Plaintiff filed with the surveyor general his application to purchase certain state lands, and his intention to contest the title of defendant, who was then holding said lands under a certificate of purchase, in the manner prescribed by sections 3414, 3415, Pol. Code Cal. A reference was made to the superior court of San Bernardino county, but plaintiff neglected to bring his action within the 60 days prescribed by section 3417, Id. Thereafter he made a second application, obtained another reference, and brought his action. The court held that, by his former default, he had forfeited his right to contest defendant's title, and that the second order of reference conferred no jurisdiction to try the case. Judgment for defendant. Plaintiff appeals.

Byron Waters, for appellant. *Paris & Goodcell*, for respondent.

TEMPLE, J. This is a contest for the privilege of purchasing state land. The defendant first made application for the right to purchase June 21, 1884. The plaintiff afterwards made application to purchase the same land, and initiated a contest with the defendant under sections 3414 and 3415, Pol. Code. The order of reference was made, but the plaintiff did not commence his action in the proper court within 60 days, and no action was ever brought to determine such contest. November 8, 1885, after the lapse of the 60 days, the plaintiff made another application to purchase the land, and procured another order in due form, referring the case to the superior court to try the contest. Section 3417, Pol. Code, is as follows: "Unless the party contestant commences his action within sixty days after the order of reference is made, his rights in the premises and under his application cease."

It is contended that, not having brought suit on the contest inaugurated on the first application within 60 days, the plaintiff was barred from contesting the validity of the defendant's certificate of purchase, and that the second order of reference did not confer jurisdiction upon the court. We see no ground whatever for such contention. Even if the effect of the failure to bring suit on the first reference would have the effect of depriving plaintiff of the right to make a second application to purchase, still the last order of reference gave the court jurisdiction to try the contest. The court might have determined the case for the defendant on the ground that plaintiff had failed to bring his suit within 60 days. But we do not think such failure to bring suit could have that effect. No doubt the effect was to work a forfeiture of all rights of plaintiff, both in the application and in the premises. But he then stood just like any other person. If there was any way in which he could afterwards acquire a right, there is nothing in this statute to prevent. If he had no right in the premises, he was in no worse position with reference to the land than any other person who had no right. His last application cannot in any way be helped out by the first, for his rights to the premises ceased when he was in default. This section goes no further.

Judgment reversed, and cause remanded.

We concur: MCKINSTRY, J.; PATERSON, J.

v.14p.no.4—12

72 Cal. 443

DEAN v. GRIMES. (No. 11,638.)

(Supreme Court of California. June 3, 1887.)

1. INSOLVENCY—NOTICE TO CREDITORS—COMPUTATION OF TIME.

Under an amendment to the California insolvent act of 1852, (St. 1863, p. 750,) the county court, on the filing of the insolvent's petition, is required to issue notice to the creditors calling them to meet on a day not less than 30 days thereafter. *Held*, that such a notice issued on December 7th, and returnable January 6th following, was sufficient.

2. SAME—VALIDITY OF DISCHARGE—COURT AND JURY.

Where, in an action on a promissory note, a discharge in insolvency, under the California insolvent act of 1852, was pleaded, and the court, after reading to the jury certain sections of that act, and of the amending act of 1876, relating, not only to fraud and misconduct on the part of the insolvent as avoiding the discharge, but also to the form of the proceedings, instructed them that any failure to comply with said sections would avoid the discharge, *held* error, as not only submitting the question of fraud or misconduct, but also of literal compliance with the formal requirements of the statute, which was a matter of record to be passed on by the court.

3. SAME—INSTRUCTIONS.

If such instructions mean that the jury should scrutinize the petition, schedule, and affidavit in the insolvency proceedings for any false statement of the insolvent, they are erroneous as omitting to charge on the fraud necessary to avoid the proceedings.

4. SAME—JURISDICTION OF COURT.

An instruction that, the statute being novel and extraordinary, and in derogation of common law, everything bearing on the question of jurisdiction must appear affirmatively, *held* error, as the jurisdiction of a county court is a question for the court; and, if the record shows want of jurisdiction, it should not have been admitted in evidence.

5. SAME—FRAUDULENT PREFERENCES.

Under section 8 of the California insolvent act of 1876, forbidding preferences, and declaring void all assignments of parts of the insolvent's estate within two months of the filing of his petition, an instruction that a failure to comply with said section would avoid the insolvent's discharge is erroneous, since the only penalty prescribed by the statute for attempting to prefer a creditor within the two months is a recovery of the property by the assignee. To constitute a fraud which will avoid the discharge, the transfer must have been made out of the usual course of business.

6. SAME—ACTS AVOIDING DISCHARGE.

In such case the sole question for the jury is whether the defendant, having had the benefit of the insolvent act, "had concealed any part of his property or estate, or given (knowingly) a false schedule, or committed any fraud under the provisions of the act" of 1852, and its amendments.

Department 1. Appeal from superior court, Merced county.

Schell & Bond and *R. H. Ward*, for appellant. *Wigginton, Creed & Hawes*, for respondent.

McKINSTRY, J. The action was brought on a promissory note, the defense being a discharge under the insolvency act of 1852. It is urged by plaintiff (respondent) that the county court never acquired jurisdiction of the estate of the defendant, alleged insolvent, because there was no sufficient publication of a notice for the appearance of his creditors. By an amendment of the insolvent act of 1852, the county judge, on the filing of the insolvent's petition, was required to order the clerk to issue notice calling the creditors to appear on a specified day, not less than 30 days from the first publication of the notice. St. 1863, p. 750. In *Grimes v. His Creditors*, the first publication was on December 7, 1878. The return-day was January 6, 1879. The order of the judge, and the publication thereunder, were sufficient to bind the creditors of the insolvent. *Wilson v. His Creditors*, 55 Cal. 476.

The court below, as portion of its charge, read to the jury sections 2, 3, 4, 7, 27, 28, 29, and 32 of the insolvent law of 1852, and section 8 of the act of March 31, 1876, (St. 1875-76, p. 582;) and then instructed the jury: "If you

believe from the evidence that the defendant, I. C. Grimes, violated *any of this law*, or failed in *any manner to fully comply* with all provisions and requirements of said law, your verdict must be for the plaintiff. These insolvency proceedings are novel and extraordinary,—created by statute in derogation of the common law,—and should be strictly enforced. The proceedings in insolvency are special, and no intendments can be made in favor of the jurisdiction. Everything bearing upon *that question* must appear affirmatively." The defendant duly excepted.

The instructions were erroneous and misleading. They did not alone submit to the jury the issue whether the defendant had committed any of the frauds, or been guilty of the misconduct mentioned in section 32 of the act of 1852, and in section 8 of the act of 1876, but they also left to the jury to decide, and apparently informed them that their verdict should turn on the decision, whether the defendant had literally complied with the requirements of sections 2, 3, and 4 of the act of 1852, which treat of the form and contents of the insolvent's petition, his schedule, and his oath. But the petition, schedule, and affidavit were introduced as evidence in the present action, and were proved by record. Whether they were defective "in any manner" was a question of law for the court, and ought not to have been submitted to the jury. If such was not the intention of the instructions, but one other meaning can reasonably be given them. They must have been intended to inform the jury it was their duty to inquire whether the petition or schedule or oath contained any statement which was false, and, if they found such false statement, to render a verdict for the plaintiff. But, if that interpretation can be given the instructions, they were clearly erroneous, since they eliminated from the conditions which would justify a verdict for plaintiff the element of fraud. *Tevis v. Hicks*, 41 Cal. 128; *Dean v. Baker*, 64 Cal. 232. Thus, for instance, the jury were told that the insolvency proceedings were "novel and extraordinary," in derogation of common law, and "special;" and, if the defendant had failed in any manner to comply with section *four*, their verdict must be for the plaintiff.

The clause of the instructions given, that everything bearing on the question of "jurisdiction" must appear affirmatively, is, like the rest, somewhat ambiguous. If by "jurisdiction" was meant the power of the county court to enter the judgment of discharge, no question as to its power could arise except such as were presented in the record of the proceedings in *Grimes v. His Creditors*. Every such question was one of law, which it was the duty of the court in this action to decide. If the record in *Grimes v. His Creditors* showed want of jurisdiction, the court below should not have admitted it in evidence. No other objection to the jurisdiction has been argued than the one considered at the beginning of this opinion. It was not for the jury to inquire whether the judgment discharging defendant, Grimes, from his debts was or was not valid, as they should deem the publication of notice to creditors was or was not sufficient. The question for the jury to determine was whether the defendant, having had the benefit of the insolvent act, "had concealed any part of his property or estate, or given (knowingly) a false schedule, or committed any fraud under the provisions of the act" of 1852 and its amendments. St. 1852, p. 75, § 32.

The court below told the jury that, if defendant violated or in any manner failed to comply with section 8 of the supplemental act of 1876, (St. 1875-76, p. 582,) the verdict must be for the plaintiff. This was error. The mere giving of a preference to one creditor, without intent to delay or defraud others, is not in itself, and independent of the statute, a fraud. Section 8 of the act of 1876 provides that the assignment of any part of an insolvent's estate, within two months prior to his filing his petition, is void, and that the assignee may recover the property attempted to be assigned. The penalty imposed upon an attempt to prefer a creditor within the two months is the re-

covery by the assignee in insolvency of the property which the insolvent has sought to transfer. If section 32 of the act of 1853 refers at all to section 8 of the act of 1876, still to constitute a fraud as against a creditor, which can be asserted after the discharge, it must at least be made to appear that the assignment was not made "in the usual and ordinary course of business of the debtor."

Judgment and order reversed, and cause remanded for a new trial.

We concur: PATERSON, J.; TEMPLE, J.

72 Cal. 535

HEGARD v. CALIFORNIA INS. CO. (No. 11,073.)

(Supreme Court of California. June 14, 1887.)

1. FIRE INSURANCE—POLICY—DEPRECIATION CLAUSE—EVIDENCE.

The material question under the "depreciation" clause in a policy of fire insurance is, what was the actual condition and value of the property insured at the time of the fire? And, where there is no evidence for the company upon that point, it is harmless error to refuse to admit testimony as to the probable depreciation prior to the issuance of the policy.

2. APPEAL—WHAT OPEN—PROCEEDINGS BELOW.

A motion, on appeal, to consider the judgment roll only, on the ground that the proceedings in the court below for a new trial were not had within the time allowed by law therefor, should be overruled, where no objection was made in the court below to the proposed bill of exceptions, or to the hearing of the motion for a new trial.

In bank. Appeal from superior court, Plumas county.

Action on a policy of fire insurance. On rehearing. See 11 Pac. Rep. 594.

E. W. McGraw, for appellant. *W. W. Kellogg* and *R. H. F. Variel*, for respondent.

PATERSON, J. It is urged by respondent that the proceedings in the court below for a new trial were not within the time allowed by law therefor, and that in consequence thereof we should consider only the judgment roll on this appeal. It is sufficient to say, in answer to this proposition, that no objection was made in the court below to the proposed bill of exceptions, or to the hearing of the motion for a new trial. The appellant prepared and served its proposed bill of exceptions. The respondent, without objection, proposed amendments thereto. The court, without objection, settled the bill, fixed a time for argument, heard and decided the motion for a new trial, without any suggestion from respondent that the proceedings had not been commenced in time or prosecuted with diligence. Under these circumstances, we think that the respondent's objections ought not to be heard in this court. The record is silent upon the question whether any extension of time was given by order or stipulation. *Gray v. Numan*, 63 Cal. 220. The plaintiff recovered a judgment of \$1,950, and from that judgment, and an order denying a motion for a new trial, the defendant appealed.

It is contended by appellant that the plaintiff ought not to recover because he overvalued the property, and because he falsely represented that he was the sole owner of the property insured. The policy contained stipulations that, in the event of false representations in regard to any of these matters, the policy should be void. Upon these issues the court found in favor of the plaintiff, and the findings are supported by the evidence.

In the policy upon which the plaintiff founded his right to recover, there is this provision as to the measure and mode of computing the damages: "In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire. * * * The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and,

in case of the depreciation of such property from use or otherwise, a suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value." Upon these provisions in the policy, and the rulings of the court on the evidence offered on this topic, the appellant places its chief reliance for a reversal of the judgment. The record is as follows:

"William Kinzie, witness for plaintiff, testified: 'Am a carpenter and mechanic. Know the cost of building in Quincy for many years past. Was well acquainted with Hegard's saloon that was burned. At the time of the fire it would have cost \$1,264 to replace that building. In October, 1883, materials were a little higher than at the time of the fire, and then it would have cost \$1,384. *Cross-examination.* What is a reasonable deduction from your cost of replacing the building for depreciation in the value of the original building, which was built in 1856 or 1857? [Objected to as not cross-examination; that the question was irrelevant and immaterial. Objection sustained, and defendant excepted.]'

"G. B. Somner, called for plaintiff, testified same as witness Kinzie.

"DEFENDANT'S TESTIMONY.

"G. B. Somner, recalled for defendant, testified: 'Of the \$1,264, cost of replacing that building, \$809 would be for the original building, and the rest for the additions. *Question.* What would be a reasonable deduction, from your estimate of the cost of replacing the building, for depreciations in the value of the original building, which was built in 1856 or 1857? [Objected to by plaintiff as immaterial, irrelevant, and incompetent.] *The Court to Counsel for Defendant.* Depreciation from what time? *Mr. McGraw.* From the time the building was built. *The Court.* That is not proper. I will allow you to prove depreciation since the policy was issued, but not before. [Objection sustained. Defendant excepted to the ruling.]'

This point of contention raised between counsel and the court as to the period of depreciation, it seems to us, is one of form and theory, and without merit or application. The age of the building is not an essential element of the criterion for damages which is prescribed by the contract. The material questions—the ultimate facts to be determined—are, what was the actual condition of the building immediately before the fire? To what extent was it worn or dilapidated by use or by the elements? How much worse was its condition than a new building of the same plan, form, and execution, and what is a reasonable deduction for the depreciation? The time when the building was erected is immaterial. The house may have been built at one time, painted at another, decorated still later, improved at intervals, and the exact time when it reached its best finish be forgotten. How, then, shall we apply the rule contended for by defendant? The facts in this case illustrate its inapplicability. Many and great changes had been wrought in the form and substance of the building. After a quarter of a century the original building was transferred to another lot. A part of the sills had been removed, and new ones put in their places, portions of the floor were treated in like manner, new lathing was substituted, the ceiling was plastered, the walls were "patched," and papered, the wainscoting repaired, and a brick chimney added. In January, 1882, a new wing was attached, and in August, 1883, an addition was erected, which appears to have been fully half as large as the original building. To enable a witness to apply intelligently the rule contended for in this case he must have watched for nearly 30 years the changes which had occurred in the building by use thereof, and by action of the elements. But, as stated before, the period of time through which the building had passed is immaterial; the material question being what was its actual condition and value at the time of the fire? The word "depreciation"

seems to have been used by the parties to the contract rather in the sense of deterioration than in its strict signification.

No other effort was made by defendant to show the condition or value of the building than as shown in the above copy of the record. We think, therefore, that the failure of the defendant to show the actual detriment, if any, for which a deduction should be allowed, was due to its adherence to an immaterial matter. The fact that the court erroneously proposed another and more limited period of "depreciation" was not, under the circumstances, such an error as could have operated to the prejudice of the defendant.

The witnesses Kinzie and Somner were experts, knew the building, and could have stated, no doubt, how much less the old building was worth than the new one, the value of which they had fixed in the sum of \$1,264. The evidence is sufficient to justify the findings of the court as to the value of the building. Mr. Dorsch, agent for defendant, testified that he examined the whole property insured, including the building, and thought the values were fair. It is conceded by respondent that the judgment is excessive to the amount of \$185, the value of certain articles which the court below considered under the description of "bar-room fixtures."

The cause is remanded, with directions to the superior court to modify the judgment by substituting the figures "\$1,765," for the figures "\$1,950." In all other respects the judgment and order are affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; McFARLAND, J.

(72 Cal. 528)

THOMPSON and others v. SPRAY. (No. 11,791.)

(*Supreme Court of California*, June 14, 1887.)

1. PUBLIC LANDS—MINING CLAIMS—RIGHT TO LOCATE—MINORS.
Minors, who are citizens of the United States, may locate placer mining claims.
2. SAME—EVIDENCE OF CITIZENSHIP.
The uncontradicted testimony of a father that his children were born in California is sufficient proof that they are citizens of the United States for the purposes of the mining law. The provision in Rev. St. U. S. § 2321, for proof of citizenship by affidavit, is not exclusive of other modes of proof.
3. SAME.
Proof of birth within the United States is sufficient to establish the citizenship of one setting up a claim to mineral lands, in the absence of a showing of subjection to a foreign power.
4. SAME—NOTICE OF LOCATION.
The fact that the notice of location was recorded before it was posted, does not render the location invalid.
5. SAME—PRINCIPAL AND AGENT—RATIFICATION.
The bringing of a suit by the principal to quiet title to a placer mining claim located for him by his agent, without his knowledge, is a sufficient ratification of the agent's location.
6. QUIETING TITLE—COMPLAINT—NECESSARY ALLEGATIONS.
A complaint in a suit to quiet title to a placer mining claim is not defective for failing to allege that the plaintiff is a citizen of the United States.
7. SAME—EVIDENCE—AMENDED NOTICE.
In a suit, by a father and his five children, to quiet title to a placer mining claim, an "amended" notice of location is admissible in evidence although it omits the names of two of the children on the first notice, and inserts the names of two of the others in their place.

Commissioners' decision. Department 1.

Appeal from superior court, Amador county.

Suit to quiet title by appellants, Alex. Thompson, Matilda Thompson, Margaret Thompson, Bedelia Thompson, James Thompson, and Alex. Thompson, Jr., a minor, by his guardian *ad litem*.

The complaint is as follows: "Now come the above-named plaintiffs, by their attorneys, Eagon & Armstrong, and for cause of action allege that on the nineteenth day of June, 1883, by an order of superior court of said Amador county duly made on that day, and before the filing of this complaint, the said James Thompson was appointed guardian *ad litem* for A. Thompson, a minor; that plaintiffs are now, and for a long time hitherto have been, the owners of, in the possession of, and entitled to the possession of, that certain piece or parcel of land situated, lying, and being in the county of Amador, state of California, and bounded and particularly described as follows: The N. $\frac{1}{4}$ of the N. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and the N. $\frac{1}{4}$ of the S. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 17, and the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 16, township (5) five north, range ten east, M. D. M., containing 70 acres; that said defendant claims an estate and interest in the above-described tract of land adverse to the said plaintiffs; that the said claim of defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in the said land or premises, or any part thereof. Wherefore plaintiffs pray for judgment (1) that defendant may be required to set forth the virtue of his claim, and that all adverse claims of the defendant may be determined by a decree of this court; (2) that, by said decree, it be adjudged that the defendant has no estate or interest whatever in or to said land in this complaint described, and that the right, title, and interest of plaintiffs therein to said land is good and valid; (3) that the defendant be forever enjoined," etc.

J. A. Eagon and A. C. Brown, for appellants. *Rust & Caminetti*, for respondent.

HAYNE, C. The action is in relation to a placer mining claim in Amador county, and was brought by Alex. Thompson, Sr., and his five children mentioned below. At the trial a notice of location was introduced in evidence, dated January 20, 1882, and signed with the names Alex. Thompson, James Thompson, Alex. Thompson, Jr., and Matilda Thompson. The plaintiffs then offered what they styled an "amended" notice, which bore the same date, and contained a fuller description of the property, and was signed with the names Alex. Thompson, Matilda Thompson, Margaret Thompson, and Bedelia Thompson. It will be observed that the second notice omits two of the names on the first, and inserts two new names in their place. The defendant objected to the introduction of the second notice, on the ground that it was not an "amended" notice inasmuch as the names were not the same, and that no abandonment of the first notice had been shown. The court sustained the objection, and excluded the evidence.

We think this was error. There does not appear to be any statute of this state providing for amending notices of location as is the case in Colorado. But we see no reason why, if locators have any apprehension as to the sufficiency of their notice, they may not put up another one. Whether the second notice is to be treated as an original notice, or whether it relates back to the posting of the first one, is a question as to its effect which it is not material to consider. In the present case the rights of James Thompson and Alex. Thompson, Jr., whose names were on the first notice, but not on the second, could not be affected by the posting of the second notice. *Morton v. Solambo Co.*, 26 Cal. 527; *Gore v. McBrayer*, 18 Cal. 588. Margaret and Bedelia Thompson had nothing to do with the first notice. Their rights rested on the second, which, as to them, was an original notice; and they were certainly entitled to have it introduced in evidence. With respect to the two who were on both notices, we think that they also were entitled to have the second introduced in evidence. The second would not operate as an abandonment of the first. *Weill v. Lucerne Co.*, 11 Nev. 212, 213. But it was not necessary to show such abandonment to render the second notice admissible.

The question as to the rights of the plaintiffs, as between themselves, does not arise in this action.

Upon the close of the plaintiffs' evidence several motions for nonsuit were made and granted. The first motion was as to Margaret and Bedelia Thompson. Their notice of location having been excluded, the motion was granted; but, as above shown, the exclusion of the notice was erroneous. The defendant then moved for a nonsuit as to James, Matilda, and Alex. Thompson, Jr. This motion was denied as to Matilda, and granted as to the others. It was upon four grounds, viz.: That they were not citizens of the United States; that they were minors at the time of the location; that the use of their names was unauthorized; and that the notice was recorded before it was posted.

Were the plaintiffs citizens of the United States at the time the location was made? We think the evidence shows that they were. The father testified as follows: "I and each of my co-locators were, at the time of location of said mining claim, citizens of the United States. My children were born in the state of California." The testimony that all the locators were "citizens" would perhaps have been excluded, as being a conclusion of the witness, if it had been objected to. But, it having been allowed to go in without objection, we think it was of itself sufficient to prevent a nonsuit upon this ground. With reference to the children, the matter was put beyond cavil by the statement that they were born in California. The provision of the statute is that "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." Rev. St. § 1992. Here citizenship from birth is the rule. Subjection to a foreign power is the exception. A case will not be presumed to fall within the exception. Hence proof of birth within the United States is sufficient. In the absence of a showing of subjection to a foreign power. See *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 325, 326. The testimony of the father was good evidence of the place of birth. The provision for proof of citizenship by affidavit, if it applies, (Rev. St. U. S. § 2321,) is not exclusive of other modes of proof.

Does the fact that these plaintiffs were minors at the time of the location invalidate the notice as to them? We have not been referred to any decision which holds that it does. The provision of the statute is that mineral deposits in public lands are open to "citizens of the United States, and those who have declared their intention," etc. Section 2319. No requirement that the citizen shall be of any particular age is expressed; and, unless we are prepared to affirm that minors are not citizens, we do not see how we can say that they are not entitled to the benefit of the act. This conclusion is strengthened by the circumstance that in some instances the statute expressly requires that the citizen shall be of age. Thus, in reference to coal lands, the provision is that "every person above the age of twenty-one years who is a citizen of the United States," etc. Section 2347. So with reference to homesteads the provision is that "every person * * * over the age of twenty-one years, and a citizen," etc. Section 2259. The expression of a requirement as to age in some instances, and the omission of it in others, is significant. Nor is there any reason in the nature of things why a minor may not make a valid location. After the preliminary steps are taken, all that is required is that a certain amount of work shall be done. If the minor can do it, or can get any one to do it for him, the condition imposed by the statute is fulfilled. If he cannot, his claim lapses, and the mine is open to location by others. It may be added that, so far as we know, it is the practice, in many mining communities, for minors to locate claims.

Did the father's want of authority from his children invalidate the notice as to them? He testified as follows: "I had no power of attorney to sign the notice for my children, nor to authorize Mr. Price to sign their names. None

of them gave me or him authority to sign their names. * * * I acted for them, but without their knowledge, until after their names were signed, notice recorded and posted." Unless there is an implication from the foregoing that he acted with their knowledge after their names were signed, etc., it does not appear that there was any ratification by all the children, except the bringing of the suit.

It cannot be doubted that the location of a mining claim may be made by agent, (*Gore v. McBrayer*, 18 Cal. 587;) and wherever there is a local custom to that effect, it is not necessary that the person in whose name a location is made should be aware that it has been made, (*Morton v. Solambo Co.*, 26 Cal. 534.) In the absence of evidence of such a custom, we think that there must be either authority in the first instance or a ratification. Whether a ratification will be presumed, in accordance with what is said in *Gore v. McBrayer*, above cited, and whether, if presumed or proven, it will relate back to the posting, so as to cut off intervening rights, (compare *Hibberd v. Smith*, 67 Cal. 547, 4 Pac. Rep. 478, 8 Pac. Rep. 46,) need not be decided; for the bringing of the suit, which must be taken to have been by authority, is a sufficient ratification; and, as far as the record goes, we cannot know that there were any intervening rights,—the assertions in the answer being denied by force of the statute, and the defendant not having introduced any evidence.

Does the fact that the notice was recorded before it was posted render it invalid? We think not. No record is necessary in the absence of a custom requiring it. *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 323; *Southern Cross Co. v. Europa Co.*, 15 Nev. 384; *Jupiter Co. v. Bodie Co.*, 7 Sawy. 114, 11 Fed. Rep. 666. No such custom was proved in this case; and it is clear that the doing of an unnecessary act cannot vitiate the notice. But, if such a custom were shown, we do not think the mere order in which the acts are done of sufficient importance to render them of no effect. See, generally, *North Noonday Co. v. Orient Co.*, 6 Sawy. 313, 1 Fed. Rep. 522.

This motion, therefore, was improperly granted. After it had been granted, the defendant moved for a nonsuit as to the two remaining plaintiffs, viz., Matilda and Alex. Thompson, Sr., partly upon grounds already considered, and partly upon the ground that the dismissal of the action as to the other plaintiffs left these two claiming more than they were entitled by law to hold. But in such case the location is good for as much as the party is entitled to hold, and void for the excess only. *Richmond Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055.

It results that the nonsuit as to Matilda and Alex. Thompson, Sr., was improperly granted.

The respondent, however, seeks to uphold the judgment on the ground that the action is under section 2826 of the United States Revised Statutes, and that, so treating it, the complaint is defective in that it does not aver that the plaintiffs are citizens. But there is nothing in the complaint to lead any one to suppose that it was brought under the provision mentioned. It is sufficient as a complaint to quiet title to a mining claim. See *Pralus v. Jefferson Co.*, 84 Cal. 559; *Pralus v. Pacific Co.*, 35 Cal. 34. The plaintiff's motive in bringing the action, or the use which he may be able to make of the judgment, should he obtain one, cannot affect the question of the sufficiency of the complaint.

In the case of *Lee Doon v. Tesh*, 68 Cal. 44, 6 Pac. Rep. 97, and 8 Pac. Rep. 621, the complaint itself showed that it was brought under section 2826, and the question whether it could not have been upheld as a complaint in an ordinary action to quiet title was not made or considered. The court did not hold that, in all actions in relation to mining claims, the complaint must aver the citizenship of the plaintiffs. It guarded its decision from any such inference by saying: "We must not be understood as holding that in all actions in relation to mining claims, it is necessary for plaintiffs to aver citizenship." And we think

that in ordinary actions in relation to mining claims the general allegation that the plaintiff is "the owner," etc., covers all the essential elements of ownership.

We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

(72 Cal. 451)

BEAL v. STEVENS and others. (No. 11,819.)

(*Supreme Court of California. June 4, 1887.*)

1. MORTGAGE—ASSIGNMENT—RELEASE—BONA FIDE PURCHASE.

A mortgage, as recorded, secured five notes. When the first note was paid, the mortgagee, who had assigned the mortgage, by the direction of the assignee entered the following satisfaction on the margin, signing and acknowledging it himself: "Full payment and satisfaction of the within note and mortgage hereby acknowledged." The assignment of the mortgage was not put on record. *Held*, that the satisfaction was not notice to subsequent *bona fide* purchasers for value and mortgages that the remaining four notes were unpaid.

2. SAME—SERIES OF NOTES—DEFAULT IN ONE—SATISFACTION—PERSONAL DECREE.

The right given in the mortgage to the mortgagee to declare all the five notes secured to be due upon default in any, is not taken away by a satisfaction put on record by direction of the mortgagee, upon payment of the first note; and, although not entitled to a decree against the property, the mortgagee may yet have, if he elects to use his option, a personal decree against the mortgagor upon the last three notes, on his failure to pay the second.

3. WITNESS—PARTY—FEES.

A party not subpoenaed by his adversary, who appears and testifies in his own behalf is not entitled to fees and mileage.

Department 1. Appeal from superior court, San Bernardino county.

Hargrave & Gray, for appellant. *Harris & Allen, Curtis & Otis*, and *H. C. Rolfe*, for respondents.

MCKINSTRY, J. The action is to foreclose a mortgage on certain real estate, given January 18, 1883, by defendants Stevens and Seymour, to secure their five promissory notes of even date with the mortgage, payable to J. S. Loveland or order, one, two, three, four, and five years from date, with interest specified. The defendants Curtis, Soule, and Stacy are charged in the complaint with having or claiming some interest in the premises, which, if any, is subject to the Loveland mortgage. With respect to every matter, except a certain question of costs, as to which there is a bill of exceptions in the record, the cause has come to this court on the judgment roll, including the findings of fact and law. The court below found that, on the day of their date, the notes were indorsed for value, and delivered to the plaintiff, and the pleadings admit that the plaintiff has ever since been the owner and holder of the five notes, except the first, which matured in January, 1884, and was paid. There is also a finding that no part of the four last notes has been paid except one year's interest on each of them. On the day of its date the mortgage was duly recorded. The defendants Stevens and Seymour failed to pay the second of the promissory notes when it became due, or any part thereof, or any part of the interest, making default therein. The mortgage sought to be foreclosed contained a stipulation by which it was covenanted that, in case default should be had in the payment of the principal of any note, or any installment of interest, as the same should become due, then the whole sum of all the notes unpaid, principal and interest, should become at once due and

payable, at the option of the mortgagee or his assigns, and that suit could be immediately brought for the foreclosure of said mortgage, etc. On default occurring in the payment of the second note, the plaintiff exercised her option to treat as due the whole amount of the unpaid notes, and commenced this action to foreclose for the whole, on the third day of December, 1885.

The court found that on the nineteenth day of February, 1884, the "plaintiff caused J. S. Loveland, the mortgagee, to discharge the mortgage; and the said Loveland thereupon, with his own consent and the consent of the plaintiff and the defendants Stevens and Seymour, discharged the said mortgage by an entry in the margin of the record thereof, signed by the said mortgagee, J. S. Loveland, acknowledging the satisfaction of said mortgage, in the presence of the recorder, who certified said acknowledgment; which entry of satisfaction and certificate of acknowledgment are in the words and figures following, to-wit: 'Full payment and satisfaction of the within note and mortgage hereby acknowledged. J. S. LOVELAND. Signed and acknowledged before me this nineteenth day of February, 1884. W. F. HOLCOMB, County Recorder, by E. A. NISBET, Deputy.' "

On the nineteenth of February, 1884, and after said mortgage was discharged, the defendant Curtis loaned to the defendants Stevens and Seymour \$1,200, and took a note therefor, with interest, payable one year after date, to secure the payment whereof Stevens and Seymour executed and delivered to Curtis their mortgage on all the real property described in the complaint, which mortgage was duly recorded on the day of its date. And on the thirtieth of July, 1884, the defendants, Soule and Stacy, purchased the property of Stevens and Seymour in good faith, and for a valuable consideration; and on the day last mentioned Stevens and Seymour executed and delivered to Soule and Stacy a deed of conveyance of the property aforesaid, which deed was duly recorded on the same day. The court found that neither the defendant Curtis, nor the defendants Soule and Stacy, or either of them, when they parted with their money, respectively, had any notice or knowledge that any of the notes set forth in the complaint had been indorsed to plaintiff, or that plaintiff had any interest in the same, or any part thereof, or in said mortgage.

The court declared, as conclusions of law, that plaintiff was entitled to a personal judgment against defendants, Stevens and Seymour, in the amount of the second of the promissory notes only; but that the third, fourth, and fifth of the notes described in the complaint had not matured when the action was commenced, because the mortgage mentioned in the complaint was, on the nineteenth of February, 1884, completely canceled as to all its conditions and covenants. Further, that the plaintiff recover nothing as against the defendants Curtis, Soule, and Stacy, and that they recover their costs, and that the real property described in the complaint is free from the Loveland mortgage.

The court erred in refusing the plaintiff a personal judgment against the defendants Stevens and Seymour for the last three notes set forth in the complaint. The contract between the plaintiff's assignor and those defendants is contained in the notes and mortgage. All those instruments are to be read together, and, in case of the default mentioned in the contract, the plaintiff, at her option, was entitled to treat all the notes as due. The court, as a court of equity, having acquired jurisdiction by reason of the issues with respect to the existence or non-existence of a mortgage lien, the equity which authorized and required a personal judgment for the amount of the second note authorized and required a personal judgment for all the unpaid notes, since the court finds that no part of the last three notes had been paid. The satisfaction in the margin of the record of the mortgage, if it operated a discharge of the mortgage lien, did not extinguish the mortgage in so far as, with the notes, it constituted the contract of loan. The plaintiff was not estopped from assert-

ing her right to have the last three notes paid, according to the terms of her contract, by a marginal entry the scope and purpose of which was to release the lien. Even if the acknowledgment of payment of "the note" is evidence of a receipt of the sum due on all the notes, such evidence was entirely overcome, to the satisfaction of the court below, as appears from the finding that no part of the last three notes had been paid, except one year's interest.

The question remains to be decided, what was the effect of the marginal entry upon the rights of the subsequent mortgagee and subsequent purchasers? In effect, the second defense of the fourth amended answer of the defendants Stevens and Seymour is that on February 12, 1884, they agreed to pay, and Loveland, the payee named in the notes, agreed to accept, in extinguishment of their obligation to pay the principal and accrued interest of all the notes, the sum of \$303; that in pursuance thereof, and on the nineteenth of the same February, they paid him \$303; and that thereupon Loveland did in writing release them from all liability and obligation on said mortgage, "and satisfied the same by an entry in the margin of the record of said mortgage." Further the defense alleges, "on information and belief, that at the time of the agreement mentioned Loveland had the notes and mortgage in his possession. Further, that the plaintiff knew of all the transactions of Loveland with the said defendants, and was fully aware of said agreement, and consented and agreed thereto, and was fully aware of the release of these defendants, and of the satisfaction of said mortgage, and consented thereto at the time of the * * * satisfaction of said mortgage."

It is urged by counsel for the plaintiff that the finding of the court below that the plaintiff "caused J. S. Loveland, the mortgagee, to discharge the mortgage," and that Loveland, "with the consent of the plaintiff," discharged the same, is without the issues, because no one of the defendants avers in his answer that plaintiff caused Loveland to discharge the mortgage. But, as we have seen, defendants Stevens and Seymour aver that the discharge was with the consent of the plaintiff, and the court found that the discharge was with her consent, given at the time. It is not necessary to decide whether the plaintiff's demurrer to the above-stated second count of the fourth amended answer was well taken, inasmuch as, so far as such defense or count was a plea in the nature of accord and satisfaction, the court below found upon it adversely to the defendants Stevens and Seymour, in the finding that no part of the four last notes had been paid except one year's interest on each.

It is contended by appellants that an assignment of negotiable notes before maturity carries with them the security, and a satisfaction of a mortgage entered on the record by the original creditor, after he has sold and delivered the notes, is a mere nullity; that the party buying mortgaged premises must at his peril ascertain who then owns the notes accompanying the mortgage, and whether the same have been actually paid. Even if it should be conceded (in the absence of an assignment of the mortgage and its registration) that a subsequent purchaser is bound to know, notwithstanding a discharge of record executed by the mortgagee, that he has transferred the notes the mortgage was given to secure, and the mortgage itself as an incident to the notes,—and we do not concede it or decide the question,—yet if the indorsee or transferee of the notes consented to and approved of the discharge of the mortgage by the mortgagee, how stand the equities of the respective parties?

In the case at bar the plaintiff comes into equity to assert the continuance of the lien, as against the mortgagors, a subsequent mortgagee, and subsequent purchasers. Clearly she ought not to be permitted to do this in the face of her established consent to its discharge.

Section 2938 of the Civil Code provides: "A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the

acknowledgment in form substantially as follows: 'Signed and acknowledged before me this _____ day of _____, in the year _____. A. B., Recorder.' "

It is not required by the statute that the entry in the margin of the record shall state anything with respect to the indebtedness to secure which the mortgage was given. It is manifest that an acknowledgment of satisfaction of the *mortgage*, signed by plaintiff, would have been sufficient, and that the words "full payment" and "note" are surplusage. The entry, signed by Loveland with plaintiff's consent, must be construed in like manner. When the mortgage was discharged the lien ceased, and unless the marginal satisfaction was induced by fraud, or was a mistake, with the knowledge of defendants Curtis, Soule, or Stacy, they were not bound to inquire what, if any, was the consideration for the discharge of the lien. A mortgagee may voluntarily discharge his mortgage, relying upon the general credit and responsibility of the mortgagor, or he may do so in consideration of receiving other security, or for any other reason satisfactory to himself. If the marginal discharge expressly recited that it was executed in consideration of the payment of the first of the five promissory notes, the lien would have ended.

It is insisted that defendants Curtis, Soule, and Stacy were not "in good faith," because the marginal entry informed them that only one note had been paid. But, in the first place, the matter with respect to payment of "the note" was not properly of record as part of the marginal entry; therefore no constructive notice. In the second place, the discharge was complete if made in consideration of the payment of one note. If it be said the insertion of the words, "full payment of the note is acknowledged," was evidence to put the subsequent parties on inquiry that Loveland (acting with the consent and approval of plaintiff) was induced by the fraud of the defendants Stevens and Seymour to sign the marginal entry, or that it was done under a mistake, the matter unnecessarily inserted in the marginal entry was, at most, evidence tending to prove notice of fraud or mistake, if any existed, and no such fraud or mistake was pleaded, proved, or found. The court below denied the plaintiff's motion to retax by striking from defendants' cost-bill two items, one being a charge for mileage as to witness of E. E. Stacy, party to the suit, taxed at \$16, and the other his fees for two days' attendance as a witness, \$4. Stacy was not subpoenaed as a witness.

The parties to a suit are competent witnesses. Code Civil Proc. § 1879. The statute in force in San Bernardino county gives to witnesses fees for attendance and mileage. Hitt. Code, 2720. In the present case the court below could have allowed or refused to allow costs to the defendants other than the mortgagors named in the complaint, or could have apportioned costs between them and the plaintiff. Code Civil Proc. §§ 1022, 1024, 1025. The object of section 1879 of the Code of Civil Procedure, so far as it relates to parties to an action, is to change the common-law rule, and to render such parties competent to testify. Fairly construed, the statute which allows fees and mileage to witnesses relates, in ordinary cases, only to witnesses who may be compelled by subpoena to attend the trial, or to give their deposition, and, in case of a party, to one who has been subpoenaed by the opposite party. It may be that a witness not a party, who is subject to subpoena, may ordinarily be allowed, not only his attendance, but mileage, although not actually subpoenaed. But it appears from the bill of exceptions that Stacy, who was a party, was not subpoenaed. If he testified on his own behalf, it must be presumed he supposed his attendance was necessary for that purpose, even if, in support of the action of the court below, we assume that he was called to the stand by the plaintiff or a co-defendant. We think it is not intended by the statute that he should be allowed compensation for his voluntary attendance on the trial, or mileage. His presence must be referred to his natural interest as a party to the litigation. We are informed it has been the practice of the superior courts almost uniformly to refuse to allow such charges.

Judgment reversed, with direction to the court below to enter a judgment in accordance with the views expressed in the foregoing opinion.

We concur: TEMPLE, J.; PATERSON, J.

73 Cal. 408

COBURN v. GOODALL and others. (No. 9,592.)

(Supreme Court of California. June 10, 1887.)

1. COVENANTS—IN LEASE—RUNNING WITH THE LAND.

A covenant in a lease to surrender, at the expiration of the term, with such improvements as shall have been erected, runs with the land, and binds the assignees of the lessee, although they are not mentioned in the lease.

2. LEASE—ASSIGNMENT—JOINT LIABILITY OF ASSIGNEES.

Assignees of the whole of the demised premises, though in unequal proportions, are jointly and severally liable for the entire damages sustained by the lessor by reason of a breach by them of a covenant in the lease to surrender possession at the expiration of the term.

3. ESTOPPEL BY JUDGMENT—EJECTMENT—OUSTER.

In ejectment when the claim for mesne profits has been withdrawn, there are but two material questions left, viz., right of entry by the plaintiff, and wrongful possession of the defendant on the day the action was brought. The judgment in the suit is therefore not an estoppel as to the time of ouster.¹

4. SAME—ELECTION OF REMEDIES—COVENANT.

A landlord is not estopped to proceed against the assignees of his lessee for a breach of covenant to deliver possession, on the ground that he has elected to treat them as trespassers, by reason of the fact that he has successfully maintained ejectment against them, when in the ejectment suit he expressly withdrew all claim for damages.

5. EVIDENCE—WRIT AND RETURN.

In a suit by the lessor for damages for a breach of covenant to surrender, against the assignees of the lessee, a return of "executed" by the sheriff on a writ of restitution issued in another suit to which the assignees were not parties, is only *prima facie* evidence that the lessor was so put in possession.

6. INTEREST—RIGHT TO—UNLIQUIDATED DEMAND.

When the plaintiff's claim is an uncertain and unliquidated demand, and the amount due cannot be ascertained from the face of the contract in suit, but has to be settled by process of law, he is not entitled to interest, *eo nomine*, under Civil Code Cal. § 3287, providing that "every person who is entitled to recover damages, certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to recover interest thereon from that day," etc.

7. SAME—CONTRACT.

Interest can be had under Civil Code Cal. § 3288, only for the breach of an obligation *not arising from contract*. Where, therefore, the court finds that the plaintiff's case is for a breach of an obligation arising from contract, he is not entitled to interest under that section.

8. DAMAGES—EVIDENCE.

The court is entitled to be put in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the *quantum* of damages is to be deduced.

9. APPEAL—QUESTION OF FACT.

It is not for the appellate court to say that the court below ought to have believed certain witnesses rather than the one on whose testimony the findings is based.

Department 1. Appeal from superior court, San Francisco.

Action by Coburn, respondent, against Goodall and others, appellants, to recover damages for failure to deliver certain premises on the sea-shore, to which a wharf and chute were attached, leased by him (Coburn) to one Brennan, and by him assigned to the appellants.

¹As to when a judgment is not an estoppel, see *Haley v. Haley*, (Cal.) 14 Pac. Rep. 92; *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54; *Dicken v. Hays*, Id. 58; *Riverside Co. v. Townsend*, (Ill.) 9 N. E. Rep. 65, and note; *Weiss v. Guerinian*, (Ind.) Id. 399; *Richardson v. Richards*, (Minn.) 30 N. W. Rep. 457; *Elgin Nat. Watch Co. v. Meyer*, 29 Fed. Rep. 225.

Fox & Kellogg and *McAllister & Bergin*, for appellants.

The conclusion of law and the judgment are in conflict with each other; the one does not support the other, and neither is supported by the findings of fact.

The findings of fact are: (1) That the defendants entered under lease. (2) That the following named persons are the defendants who so entered, and that they held in the following proportions, to-wit: The defendant Sudden one undivided fourth; the defendant Fake one undivided fourth; the defendant Goodall one undivided eighth; the defendant Nelson one undivided eighth; the defendant Wensinger one undivided eighth; and the defendant O'Farrell one undivided eighth. (3) That these defendants so named continued in possession (of the five acres here demanded) until the commencement of this suit. (4) That said defendants oppressively withheld the possession (although there is no such allegation in the complaint.) (5) That the value of the use and occupation is \$10,000, and that that is the measure of plaintiff's damage, by reason of all the acts of all these defendants. There is nothing in all the findings to show that any of the defendants have succeeded to any of the interests or liabilities of any of their co-defendants, or that for any cause any of the defendants have ceased to be liable; and yet the conclusion of law is that plaintiff is entitled to judgment against four of the defendants only,—Goodall, Nelson, Wensinger, and Sudden, representing five-eighths of the interest found, and five-eighths of the wrong,—for the full amount of all the rents and profits and damages found, \$10,000, and that that amount shall bear interest from November 24, 1875; and the judgment is entered against the said four defendants, not for \$10,000, or for that sum, with interest from November 24, 1875, as ordered, nor for any sum which is equal to the said \$10,000, with interest added for the time mentioned, but for \$16,520, a sum which is more than \$1,700 in excess of the damage found, with the interest added.

It thus appears (1) that the judgment is erroneous, even if it ran against all the defendants, because it is in conflict with and is not supported by the findings; (2) that it is erroneous because it does not run against the defendants found liable; (3) that it is erroneous because the conclusion of law is not supported by the findings of fact; (4) that it is erroneous because it is not in conformity with the conclusion of law.

If the defendants against whom the findings ran are jointly, or jointly and severally, liable, then the defendants against whom the judgment runs are injured by the judgment, for that it cuts them off from the right to enforce contribution. On the other hand, if five defendants against whom the findings run are only severally liable, and each for his proportion as found, as the findings imply, then the judgment is against law, in that it makes the judgment defendants liable for a large sum of money, for which the court found that others, and not these, were liable. So that, looking at this judgment in any aspect that we may, it is erroneous and against law. It therefore becomes unnecessary to consider the question whether the liability of the defendants named in the findings is joint, joint and several, or several only.

Plaintiff is estopped by the judgment in the former suit of *Coburn v. Ames, Templeton, Goodall, and Nelson*.

This action was commenced November 24, 1875. The case of *Coburn v. Ames, Templeton, Goodall, and Nelson*, commenced January 16, 1875, was an action of ejectment to recover possession of about six acres of land, and \$5,000 damages for the detention of the same. Judgment was rendered against said defendants, June 15, 1876, for the possession of the demanded premises, *but without damages*. That judgment was affirmed by this court in October, 1877, and *remittitur* filed January 14, 1878. The evidence of plaintiff himself in this case shows that, before the commencement of this suit, he was in possession of all of the 40-acre tract mentioned in the com-

plaint in this action, except the 6 acres described in said former complaint. And the plaintiff himself introduced the judgment roll in said former case in evidence, and argued that it was conclusive of the fact of detention by these defendants of the 6 acres, part of the said 40 acres; and all the evidence in this case, as to the damage sustained, is directed to this 6-acre tract, and the findings themselves say that the adverse holding was of 5 acres. This judgment roll was offered by plaintiff generally, and admitted without objection. It is evidence for all the purposes to which it is applicable in the case. It was claimed by the plaintiff to be conclusive, as between these parties, as to the legal condition or relation of the parties to that six acres of land; and it was so conclusive, at least as between the plaintiff and the defendants Goodall and Nelson, under section 1908, sub. 1, and section 1962, sub. 6, of the Code of Civil Procedure. Under the same sections, it was equally conclusive on the question of the damages sustained by the plaintiff, and of his right to recover damages for the detention of said lands.

A judgment is conclusive, and operates as an estoppel, as between the parties and their privies, not only as to the matters expressly determined, but also as to all matters which might have been given in evidence under the issues. *Le Guen v. Gouverneur*, 1 Johns. Cas. 486; *Gray v. Dougherty*, 25 Cal. 272; *Garwood v. Garwood*, 29 Cal. 521; *Pheian v. Gardner*, 43 Cal. 306; *Estate of Pico*, 56 Cal. 413; *Parnell v. Hahn*, 61 Cal. 131; *M'Creery v. Fuller*, 63 Cal. 30.

This question of damages was directly within the issues of that former case, being alleged in the complaint, and denied in all the answers. Under the authorities cited, it is no answer to say that it was not adjudicated; it might have been. Complaint in ejectment; damages alleged, and issue thereon; judgment for possession, but no judgment for damages. That judgment will be a bar to any further action to recover the same damages. *Belcher Con. G. M. Co. v. Deferrari*, 62 Cal. 163.

The evidence is insufficient to support finding 9, and the same is against both fact and law.

This finding is directly responsive to an issue tendered by all the answers, and is directly in conflict with *all* the evidence on the point. The lease under which defendants entered expired October 1, 1872. The evidence shows that on the nineteenth of June, 1872, an action was commenced in the Twelfth district court, San Mateo county, by the Pacific Lumber & Mill Company and J. P. Ames, against this plaintiff and his co-tenant, and their lessees, these defendants, to acquire the said five acres of land by condemnation, under the statute as it then stood. On the twenty-seventh day of September, 1872, in that cause, an order was made and given, signed by his honor, Judge MCKINSTRY, then judge of said court, authorizing the plaintiffs in that cause, to take possession of the said five acres, and hold and use it for the public uses named in said order, and staying all proceeding against the plaintiffs therein on account thereof. This order was fully authorized by the terms of the statute as it then stood. Code Civil Proc. 1872, § 1254.

On granting this order, the undertaking required by said section was duly given and approved by the court. Under this order, which ran as well against the plaintiff as against the defendants herein, these defendants were ousted, before the expiration of the term of their lease, and at the expiration of said term, as to these five acres, it was impossible for them to put plaintiff in possession; and these defendants were never afterwards restored to that possession. On the contrary, the tract was surrendered by the parties who held under the order, not to these defendants, but to *this plaintiff*, in October, 1873. Whatever scramble for possession occurred after that was between this plaintiff and other parties, not with these defendants, for they never in any manner interfered with it. In further proof of this, it appears from the record in this case that afterwards, in another action brought by Ames and Templeton

(the latter of whom had succeeded to the interest of the Pacific Lumber & Mill Company) against this plaintiff and his co-tenant, Clarke, and to which these defendants were not parties, those plaintiffs were put in possession of the land, first under an order dated May 26, 1873, which order was vacated June 9, 1873, and another order of possession made March 14, 1874, the court having first, however, by its writ of restitution, executed by the sheriff of the county, put this plaintiff into full possession of the property on the twenty-fourth of January, 1874. Thus these defendants were put out in September, 1872, and the court itself authorized another to take possession. In October, 1873, the plaintiff was put in possession by the parties then holding it. Not satisfied with that, he applied to the court, and its officer put him in possession in January, 1874. And still the court finds in this case that these defendants remained in possession and kept the plaintiff out until the commencement of this suit, November, 1875.

Garber, Thornton & Bishop and Craig & Meredith, for respondents.

PATERSON, J. It was decided in *Coburn v. Ames*, 52 Cal. 395, that the wharf and chute were not on the demised premises, were not affixed or appurtenant thereto, and therefore were not "improvements," within the meaning of that term as used in the lease. The court held that the plaintiff had no such right to the possession of the land below the line of high water as to enable him to maintain ejectment, and the judgment of the lower court was modified accordingly. Pending the appeal in that case a receiver was appointed in the trial court to take possession of the property, collect tolls, and manage the wharf and chute. After judgment was modified in accordance with the order of this court, the receiver, under directions from the court in which he was appointed, paid over all the money in his hands to the plaintiff. The defendants, among whom were Goodall and Nelson, defendants herein, again appealed to this court, and it was held that, as the plaintiff was not entitled to the possession of the wharf and chute, he was not entitled to all of the profits derived from the use of them pending the litigation. The cause was accordingly again remanded for the adjustment of the accounts. *Coburn v. Ames*, 57 Cal. 204.

This action was commenced on November 25, 1875. The lease which is made the basis of this suit contained a covenant that Brennan, the lessee, at the expiration of said lease would surrender to Coburn and Clark (the lessors or their assigns) with such improvements as shall have been erected or made thereon, but there was nothing in the covenant providing in terms that the lease should be binding upon the assigns of the lessees. The defendants are all assignees of undivided parts, amounting to five-eighths of the whole interest in the lease, viz., Sudden, one-quarter; Goodall, one-eighth; Nelson, one-eighth; and Wensinger, one-eighth.

The action as to defendant Fake, who owned one-quarter, was dismissed. The other defendant, O'Farrell, who owned one-eighth, died pending the action, and his representative has never been substituted. Judgment was rendered against the defendants Sudden, Goodall, Nelson, and Wensinger for \$10,000, with interest thereon from commencement of suit, \$6,520; total, \$16,520; and costs of suit.

It is claimed that these four defendants, if liable at all under the covenant to surrender, (which is denied,) are liable only in respect of their privity of estate, and that such liability is several and proportionate to the interest acquired by each of them. To this proposition we cannot assent. There are some authorities to that effect, but the weight of opinion, we believe, is contrary thereto; and with better reason it is held that, while assignees of a leasehold are tenants in common, they are jointly and severally liable on covenants to repair and to deliver up at the end of the term. These covenants which are connected with the estate run with the land, and vest in point of benefit

and liability in the assignee, while the personal privity of contract between the lessor and lessee remains unaffected by the transfer. 1 Washb. Real Prop. 435, 329; 2 Platt, Leases, 351; Tayl. Landl. & Ten. (7th Ed.) § 530, note; *Hayes v. Morrison*, 38 N. H. 95; *Fitch v. Johnson*, 104 Ill. 117.

The authorities cited which relate to questions concerning the apportionment of rent, are not applicable, as payment of rent is an exception to the rule. Freem. Co-Tenancy, § 346.

The demurrer was properly overruled, if our view of the liability of tenants in common, assignees of the whole of the demised premises, though in unequal proportions, is correct, *i. e.*, that they are jointly and severally liable on all covenants and obligations of the assignors, except, perhaps, the payment of rent. The possession of one of the tenants is the possession of all. There is no unity of interest, title, or time as in joint tenancy, but as to unity of possession they are identical. So far as enjoyment of possession goes, they are all equal, whatever may be the difference in shares held by each. If they are not jointly and severally liable, one tenant in common owning a small undivided interest might prevent the delivery of the property in its entirety which the lessor is entitled to under his contract with or without an express covenant therefor. We see no hardship in this rule, for the assignees in possession, upon authority and in reason, stand in the shoes of the lessee; and so long as they occupy such relation to the lessor and his property they are bound by the terms of the contract with the lessee, and the obligations implied therefrom by law. While one of the tenants in common remains, the unity of possession is undivided, and as to those at least who continue in possession by themselves or by agents the unity of obligation flows from unity of possession. There is nothing in the judgment which will prevent the four defendants against whom it was entered from enforcing contribution from Fake and the representatives of O'Farrell, if the right to contribute exist.

The evidence is sufficient, we think, to sustain the finding that the defendants continued in possession of the five-acre tract from the expiration of the lease to the time this action was commenced. This tract or parcel, as described by the court in its findings, is "commonly known as 'Pigeon Point' shipping point, and used for the purpose of handling and shipping freight, and lying above and bounded on one side by ordinary high-water mark." As between these defendants and this plaintiff, the grant of the wharf franchise by the board of supervisors to Templeton and Moore, in 1870, is immaterial. It was the duty of the defendants to deliver to plaintiff the possession of the five-acre tract. We think there was evidence sufficient to warrant the court below in finding that Ames did not deprive the defendants of possession. There was evidence tending to show that defendants were using the name of Ames as a disguise for their own possession. Furthermore, there seems to be no longer any doubt that orders like that of the district judge, made in the case referred to September 27, 1872, putting plaintiffs in the possession of the land during the pendency of the action for condemnation, are void. *Sanborn v. Belden*, 51 Cal. 266; *San Mateo Water-Works v. Sharpstein*, 50 Cal. 284. With respect to the possession which it is claimed Coburn secured by virtue of the writs of restitution served in the case of *Templeton and Ames v. Coburn and Clark*, it is sufficient to say that the evidence is conflicting as to the fact of possession. The return of the officer upon the writ was only *prima facie* evidence of the fact stated. Pol. Code, § 4178. Plaintiff testified that he had no actual possession; that the moment the sheriff left "they just jumped right in, and took possession again."

It is claimed by appellant that the ejectment suit of Loren Coburn, as plaintiff, against Josiah P. Ames, Ellen Templeton, administratrix of the estate of Horace Templeton, Charles Goodall, Christopher Nelson, and George C. Perkins, defendants, commenced on the sixteenth day of January, 1875, and the findings and judgment therein, establishes an election by Coburn to treat

Goodall and Nelson as trespassers, dissolves all their relations with him as assignees of said lease, and adjudicates facts which are inconsistent with the claim of plaintiff in this action. In that case all claim for damages the findings therein show was expressly withdrawn by plaintiff. If this had not been done, there is no question that the judgment would be conclusive on the question of damages, as it was made an issue in the case. "An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated, and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense." *Freem. Judgm.* § 249. When, however, the record on its face shows that the issue was withdrawn from the consideration of the court, the presumption that it was adjudicated no longer applies. The right to recover possession, and the right to recover mesne profits, were not necessarily united in the action in ejectment. The right to join causes of action for both is a mere privilege granted by statute. That the record in that case is not an estoppel as to the time of ouster is equally clear, (*Yount v. Howell*, 14 Cal. 465;); for if the question of mesne profits may be considered out of the case by virtue of the finding of a withdrawal thereof, then there were but two other questions which could have been material in that action of ejectment, viz., right of entry by plaintiff, and wrongful possession of defendant on the day suit was commenced.

Appellant, claims, further, that the bringing of the suit in ejectment was an election of a remedy inconsistent with this action, and concludes him from maintaining the latter. The rule stated in the syllabus, taken from *Jones v. Carter*, 15 Mees. & W. 718, is doubtless correct: "The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture, operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due, or covenants broken, after the service of the declaration." That was an action of covenant in a mining lease in which breaches were alleged, the first for non-payment of rent, and others for violation of covenants requiring defendants during the continuance of the demise to keep six men searching for mineral for certain periods in each year, for keeping legible accounts of ore extracted, etc., but the principal question related to rent. The case before us, however, is not for rent, or for damages caused by a breach of covenant subsequent to the commencement of the ejectment suit. The plaintiff's right to recover both possession and damages arose immediately upon the failure of the defendants to deliver at the expiration of the lease, and in both actions the defendants are treated as wrongfully in possession and charged with a continuous wrongful withholding from the time the covenant was broken down to the commencement of the action.

There was evidence to support the finding of the court that Wensinger and Sudden continued in possession of the tract from the expiration of the lease to the commencement of the action. It is not for the appellate court to say that the court below ought to have believed certain witnesses rather than the one on whose testimony the finding is based. There are circumstances tending to corroborate plaintiff's testimony and claim that Scotty held possession for and as agent of Wensinger and Sudden. Coburn failed to obtain possession under the written surrender executed by Sudden to him, and, of course, if such failure was due in any degree to the act or neglect of Sudden, it was inoperative. *Kower v. Gluck*, 33 Cal. 406.

It is claimed that the court erred in allowing, against the objection of defendants, evidence as to profits derived from the wharf and chute; that such was improper *data* for the assessment of damages; and it will be presumed that injury resulted from the admission of such evidence. The court evidently did not hold that the defendants were bound to deliver the wharf, not

was the amount of profits derived from the wharf and chute taken as the measure of damage; otherwise a much larger sum would have been fixed by the court as the damage suffered by plaintiff. In determining the amount of damage sustained by plaintiff, we think that the question of profits derived from the wharf was a proper subject of inquiry, providing it was not taken as the measure of damage. If it be true that the defendants were wrongdoers in refusing to deliver possession to plaintiff, the question is, how much was Coburn damaged by the failure of the defendants to do what it was their duty to do? If it be assumed that those profits would necessarily have been less, if they had delivered to him the portion above high-water, retaining the part below themselves, it was easy to arrive at and deduct the difference. All he had to do was to complete it, and the cost of completion was capable of demonstration. He was not allowed to recover, as such, the profits of the whole property. But in this, as in similar cases, it was proper and necessary to put the court in possession of all pertinent facts and circumstances from the consideration of all of which the ultimate fact of the *quantum* of damage was to be deduced. The court below allowed damages for the detention only of that part of the demised premises which it found was actually and exclusively detained, used, and possessed by the defendants from the expiration of the lease, October 1, 1872, to the commencement of this action, November 24, 1875; and whether we take into consideration the results flowing from the acts of defendants under the doctrine of encroachment contended for by plaintiff or not, \$10,000, the principal amount of damages allowed is reasonable and just.

We think, however, that the court erred in allowing interest on the \$10,000. Section 3287; Civil Code, reads as follows: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." But the damages were unliquidated and uncertain, and could only be made certain by proof and adjudication. Where the plaintiff's claim was an uncertain and unliquidated demand, and the amount due could not be ascertained from the face of the contract, but was to be settled by process of law, this court has held that interest *eo nomine* cannot be allowed. *Brady v. Wilcoxon*, 44 Cal. 245. Nor could interest be allowed under section 3288, Civil Code; for interest under this section can only be allowed for the breach of an obligation *not arising from contract*, and in case of oppression, fraud, or malice. If plaintiff shows any case at all, it is for breach of an obligation which *does arise from contract*, and the court so finds.

It is therefore ordered that the judgment be and it is hereby modified by striking therefrom the sum of \$6,520, and, as so modified, the judgment shall stand.

We concur: TEMPLE, J.; MCKINSTRY, J.

(73 Cal. 459)

PEOPLE v. KRAKER. (No. 20,285.)

(Supreme Court of California. June 4, 1887.)

CORROBORATION OF ACCOMPLICE—RECEIVING STOLEN GOODS.

In a prosecution for receiving stolen goods, it is error to allow the jury to convict on the uncorroborated testimony of the thief, without leaving to them to find whether such witness was not in fact an accomplice of defendant, so as to require his testimony to be corroborated.

In bank. Appeal from superior court, San Francisco.

Chas. B. Darwin, for appellant. Geo. A. Johnson, Atty. Gen., for respondent.

PATERSON, J. Defendant was convicted of the crime of receiving stolen goods knowing them to have been stolen. At the trial, one H. G. Matthewson, who was charged in the information with the stealing of the goods, was a witness against the defendant, evidently the principal witness. At the conclusion of the testimony and argument the defendant asked the court to instruct the jury substantially in the language of section 1111 of the Penal Code, which reads as follows: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof."

The court refused to give the instruction asked, and, in the charge to the jury referring to the claim of defendant's counsel that Matthewson was an accomplice, said: "I charge you, in plain terms, that if you believe the testimony of Horace G. Matthewson, and from that testimony you are satisfied to a moral certainty that the defendant did receive the property mentioned in the information from him, and that, at the time of the receipt thereof by the defendant, he knew and was informed that it was stolen property, and he so received it for his own gain, or to prevent the owner from again possessing it, then you are authorized to convict the defendant on the testimony of said Matthewson." Subsequently, on motion for new trial, the learned judge had some doubt as to the correctness of his instruction, but, deeming it best to have the question settled, denied the motion, giving the defendant the benefit of a certificate of good cause.

We think the instruction given by the court was erroneous. The proposition has never been directly passed upon in this state, but in *People v. Levi-son*, 19 Cal. 99, the court, in commenting upon certain rulings, said: "It also leaves the inference that the *unsupported testimony of the thief* is sufficient to establish the defendant's guilt." An accomplice includes all persons who have been concerned in the commission of an offense, and the grade of guilt of the witness is not important. Abb. Law Dict.; *Cross v. People*, 47 Ill. 152.

In England, where there is no statutory provision against a conviction on the uncorroborated testimony of an accomplice, the judges always instruct the jury that the uncorroborated testimony of the *thief*, in cases of this kind, is not sufficient. *Reg. v. Robinson*, 4 Fost. & F. 48; *Reg. v. Pratt*, Id. 315.

In that portion of the charge quoted above the court took from the jury the question whether, as a matter of fact, Matthewson was an accomplice, considering, it seems, only the abstract proposition of law as to whether the mere fact that the witness was the thief made him an accomplice of the one who received the goods. But the question as to whether the witness was an accomplice in the commission of the offense is a question of fact for the jury. *State v. Schlagel*, 19 Iowa, 169.

In Texas, under a statute like section 1111, *supra*, the court held that, if the witness was *an accomplice in any material fact*, the jury should have been instructed as to the value of his evidence without corroboration. *Miller v. State*, 4 Tex. App. 251. And in Massachusetts it is held that "the court should instruct the jury as to what constitutes an accomplice, and leave it for them to determine whether the witness was in fact an accomplice." *Com. v. Elliot*, 110 Mass. 106; *Com. v. Ford*, 111 Mass. 394.

Judgment and order reversed, and cause remanded for new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; MCFARLAND, J.; TEMPLE, J.; SHARPSTEIN, J.

72 Cal. 477

FITZELL v. LEAKY. (No. 11,424.)*(Supreme Court of California. June 7, 1887.)***1. HOMESTEAD—EXEMPTION—APPURTENANCES—DITCH.**

Plaintiff made an agreement to give a right of way over his homestead for a ditch, and to pay one-fourth of the expense of constructing it, in return for one-fourth of the whole ditch, and of the water flowing through. Such part of the water was to be used in irrigating said homestead, which would be valueless without the use of water; the remainder to be used by the other party to the agreement, to irrigate his lands, through which the ditch ran. *Held*, that plaintiff's interest in the ditch and water is part of his land,—the right of the other party being merely an easement to have the water flow down to his land; and said interest, being part of plaintiff's homestead, is exempt from sale to the full extent to which homesteads are exempt.

2. SAME—DECLARATION OF—PENDING SUIT.

A declaration of homestead, regular in form, filed by the defendant in an action after the findings of the court have adjudged a debt to be due from him to the plaintiff therein, but before judgment entered, is not in fraud of creditors, but is valid, for such is the very purpose of the homestead law. Civil Code Cal. §§ 1240, 1241.

3. VENDOR'S LIEN—GENERAL JUDGMENT—WAIVER.

A vendor's lien on real property can be enforced only in a suit brought for that purpose, and is waived by taking a general judgment, which, if docketed, is a lien upon all the debtor's real property.

In bank. Appeal from superior court, Lassen county.

C. G. Kelley, for appellant. *E. V. Spencer*, for respondent.

McKINSTRY, J. The action is to enjoin the defendant from selling, as sheriff, one-fourth of a water ditch, and of the water flowing through it, claimed by plaintiff as appurtenant to and part of his homestead. The court below decreed an injunction. At the trial the defendant introduced in evidence the judgment roll in an action wherein one G. F. Kelly was plaintiff, and the plaintiff herein was defendant. That action was brought by the plaintiff to quiet his title to a tract of four and one-half acres of land, described by metes and bounds, so as to include the land occupied by a ditch, in part the ditch above mentioned, and in part the continuation of the same through and within the general limits of the lands owned by one George Riddle. The tract, the title to which was sought to be quieted, was further described: "The westerly one-half of the same being the same lands heretofore purchased by the plaintiff [Kelly] from one George Riddle, by deed of date June 28, 1880, and the easterly one-half, or remainder, being the same lands purchased by said plaintiff of H. G. Fitzell [plaintiff herein, and defendant in said action,] by deed of date June 28, 1880, and was all purchased for the purpose of constructing a ditch thereon for irrigating purposes."

The defendant in that action (plaintiff in this) answered, and such proceedings were had thereafter that on July 28, 1883, a judgment was entered, whereby it was adjudged and decreed that the plaintiff therein was the owner of an undivided three-fourths interest, and the defendant therein of an undivided one-fourth interest, in the right of way and irrigating ditch situate and being on the lands described in the complaint therein, and barring each of the parties from asserting any claim to the interest adjudged to the other; and, further, that the plaintiff therein have and recover from the defendant therein the sum of \$275.

In its findings in the action aforesaid, the court found that the plaintiff therein was not the owner of the lands described in the complaint, nor of any interest in the same, except as specified; that on the twenty-eighth June, 1880, the plaintiff therein procured a right of way from the defendant therein across the latter's land for the purpose of constructing an irrigating ditch, and on the same day granted to the defendant therein one-fourth interest in said easement or right of way, upon condition that said defendant would bear his proportionate part of the cost and expenses of constructing the irrigating

ditch; that thereafter the said plaintiff and defendant jointly constructed the ditch upon and across the strips of land described in the complaint, and have since jointly maintained the same; that plaintiff is the owner of three-fourths interest in such right of way, ditch, and water-right, and the defendant of one-fourth; that since the twenty-eighth June, 1880, the plaintiff in said action had claimed to be the sole proprietor, etc.; that the defendant therein did not, on the twenty-eighth June, 1880, convey the described land by deed to the plaintiff therein, but only granted a right of way; that the plaintiff therein had paid out \$275 more than three-fourths of the cost of construction of the ditch; and that the defendant therein had paid \$275 less than one-fourth of the cost of such construction. For this sum, as we have seen, a money judgment was entered in favor of the plaintiff in such action.

The present plaintiff's declaration of homestead was regular in form, and was filed after the findings of the court in the action above described, but (considerable delay intervening between the findings and judgment) before the judgment was entered. It is by virtue of an execution issued upon the money judgment in favor of Kelly that the present defendant, as sheriff, has advertised and threatens to sell the plaintiff's interest in the ditch and water therein flowing.

Can the plaintiff's interest in the ditch and water be said to be a portion of the homestead created upon a tract of land through which the ditch flows? The plaintiff here agreed to give the right of way through his land, and to pay one-fourth of the expenses of constructing the ditch, in return for one-fourth of the whole ditch, and of the water flowing through it. Looking below the form, this was the real nature of the contract.

And in the findings in the present action the court below found that the interest of this plaintiff in said water-ditch was acquired for the purpose of irrigating the land of plaintiff embraced in his homestead declaration; that the ditch crosses said lands before coming to the lands of said Kelly; and that plaintiff takes one-fourth of the water out of said ditch upon the homestead lands for the purpose of irrigating the same, which is necessary for the production of the staple crops of the country, and that said land would be actually valueless without the use of the water. The case, as a whole, clearly shows that the object of the plaintiff and defendant in jointly constructing the ditch was to secure water for the purpose of irrigating their respective tracts of land. Under these circumstances, we think the flow of the water through plaintiff's land, to the extent of his interest therein, was part of his land inseparably connected with it until he should part with it voluntarily, or until it should be sold under a judgment which could be enforced against the homestead.

This is not the case of a partnership formed for the purpose of appropriating water, and vending it to third persons. There is nothing in the nature of the transaction which made the ditch, as a mere *conduit*, or the water flowing in it as such, assets of a copartnership, or which created a lien upon them in favor of one of the partners advancing more than his proportion of the capital. The plaintiff and Kelly diverted a stream from its natural course to give value to their lands by irrigating them. As to third persons, creditors of either, they should be treated, with reference to the flowing water, like riparian proprietors upon the same natural stream; both being bound, *inter sese*, by their contract for the distribution. If the water had been brought to his land by the plaintiff alone, it would have become annexed to the land; and it would be difficult to apply a different rule, because, by convention between him and a lower proprietor, he is entitled to one-fourth, or any definite proportion, of it. The owners of adjacent tracts of land led the water to their tracts, and their rights are substantially the same as if the channel were a natural channel. The statute, and decisions under it, which seem to require that, in case of the declaration of a homestead upon property held in common

with another, the declarant must have the exclusive possession of the land, do not affect the rights of the parties hereto. The statute none the less operates to exempt from forced sale the land embraced in the homestead, and all its incidents, in a case where a lower proprietor may own an easement to have the water flow down to his land.

The adjacent proprietors were not tenants in common in the water in any other sense than as all the riparian proprietors are entitled to the common use of a stream. Each had exclusive possession of his own land, and of the water flowing over it as a part of his land. As to Riddle, occupant above, they might perhaps assert he had no right to use the water, because he had granted the right of way for a ditch carrying it all; but, as to the creditors of plaintiff or Kelly, the flow of the water over the tract of each was, in legal contemplation, part of his land. Kelly was entitled to have the water flow from plaintiff's land to his own, subject to reasonable use by the plaintiff, but this did not make him tenant in common in any part of the land embraced in the homestead. The owner of an easement upon land has no right of entry, nor has he any right to possess the land as such. *San Francisco v. Calderwood*, 31 Cal. 585. One who owns an easement upon the land of another has a right to enter on the land to keep the easement in repair; but, aside from this and analogous purposes, he has no right of entry. *Pico v. Colimas*, 32 Cal. 578.

By virtue of the contract between plaintiff and Kelly, the former was authorized to use one-fourth of the water, and could not deprive the latter of any part of three-fourths of it. But, whatever his contract with the lower proprietor as to the use of a specific share, the water flowing over the plaintiff's homestead was a portion of his homestead. It is possible that, independent of their relation as owners of the dominant and servient estates, Kelly had such an interest in the ditch, as a mere artificial *conduit*, as would authorize him to enter upon the homestead to repair the ditch; or that, in case plaintiff should advance moneys to keep the ditch in condition to conduct the water to Kelly, he would have a right of contribution, to be enforced by the equitable action for money paid, laid out, and expended for Kelly's benefit. But, if such rights exist, they grow out of the contract under which the water was originally brought to the lands, or are referable to the easement. Their existence does not depend upon, nor is it connected with, any right of possession in Kelly to plaintiff's land, or in the water as part of the land. The existence of such rights would not separate the water from the land, nor carve out of it a distinct property or estate, to be treated as entirely disconnected from the land.

As a judgment creditor of the plaintiff, having no specific lien which antedates the declaration of homestead, Kelly occupies precisely the same position as if he were not the owner of the land below, and had no interest in the flow of the stream. It follows that, whatever the share of the water which plaintiff may be entitled to use as against Kelly, the water flowing over his land is part of the land. Being an appurtenant to and legally incorporated with his homestead, it is exempt from forced sale to the full extent that homesteads are exempt.

On this appeal the defendant and appellant urges that the homestead was declared by plaintiff in fraud of his creditors, and especially in fraud of Kelly, the judgment creditor. It was declared, as we have seen, before the Kelly judgment was entered. The homestead is exempt from forced sale except as provided in the Civil Code. Civil Code, § 1240. The very purpose of the homestead law is to give to one—except as against an indebtedness already merged in a judgment, and as against a judgment of peculiar character subsequently entered—the right to preserve and protect a homestead from forced sale. It has never been held that a homestead was invalid because the declarant was in debt, or declared the homestead to protect it from existing debts.

It is not invalid because made during the progress of litigation which subsequently results in an ordinary money judgment against the homesteader, or because made at any time before the entry and docketing of such a judgment. The law authorizes a debtor to erect a barrier around the *home*, over which the sheriff, although armed with final process under such a judgment, cannot pass. With the policy of the law, or the abstract morality of a particular transaction, we have nothing to do. The doctrine bearing upon conveyances made to hinder, delay, or defraud creditors has no application to the creation of a homestead. If any doubt remained as to the intention of the legislature, it ought to be set at rest by the language of sections 1240 and 1241 of the Civil Code, which, after declaring generally that the homestead is exempt, enumerates as an exception that it is subject to sale in satisfaction of judgments obtained before the declaration of homestead was filed, "and which constituted liens upon the premises." A judgment obtained after a declaration of homestead, unless secured by a mortgage, or mechanic's, laborer's, or vendor's lien, cannot be enforced against the homestead, even although an attachment was levied upon the premises before the filing of the declaration. *McCracken v. Harris*, 54 Cal. 81; *Sullivan v. Hendrickson*, Id. 258.

The homestead is subject to sale in satisfaction of judgments obtained on debts secured by mechanics', laborers', or vendors' liens. Civil Code, § 1241. There is no pretense here of any mechanic's or laborer's lien.

It is contended, however, that Kelly's judgment was "on" a debt secured by a vendor's lien. We pass the question as to whether a vendor's lien ever existed in favor of Kelly. The lien which the vendor of real property retains, after an actual conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the land, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks v. Hess*, 15 Cal. 186. It is in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced. If Kelly ever had the right to have a vendor's lien adjudicated and declared by a court of equity, he has never commenced proceedings to that end, but has waived his lien by taking a general judgment, which, if docketed, was a lien on all the real property of the plaintiff. His right, as against the real property granted, (supposing any such grant,) was a mere equity, which, to become of any force or effect, was to be established by the decree of a court of equity. *Baum v. Grigsby*, 21 Cal. 178. The judgment on a debt secured by vendor's lien, mentioned in section 1241 of the Civil Code, is a judgment in a suit brought to have a vendor's lien and its amount declared and enforced upon the real property sold and conveyed by the vendor claiming the lien. Such a judgment relates back to the date when the conveyance was made, or when the court of equity decrees the equity of the vendor attached; and, if the homestead declaration was filed after that date, declarant cannot avail himself of his homestead protection against the lien of his vendor. But the existence of the vendor's lien in favor of Kelly was never asserted in the action wherein the judgment for \$275 was rendered in his favor, and we think that the defendant in the present action, who relies upon an execution issued on the general judgment for damages, ought not to be permitted to disregard that judgment, and to try herein the question whether, if Kelly had so elected, he might have obtained a decree establishing a vendor's lien.

The appellant having claimed in argument that the title to one-fourth of the ditch and water passed from Kelly to the plaintiff herein, and therefore a vendor's lien for a portion of the purchase price unpaid, proceeds to assert that the title never passed; that the sale from Kelly to the plaintiff was not absolute, but conditional upon full payment. Again, putting aside the question whether the plaintiff bought any property of Kelly, it is enough to say that if he did the sale was absolute, since it clearly appears Kelly relied upon plaintiff's personal promise to pay one-fourth of the cost of constructing the

ditch, and took a judgment against plaintiff for the part of the one-fourth of the cost which he failed to pay.

Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.

72 Cal. 490

PEOPLE v. BRADY. (No. 20,288.)

(Supreme Court of California. June 9, 1887.)

1. MURDER—VERDICT—QUESTION OF FACT.

In a trial under an information for murder, when the evidence is contradictory, and there is some testimony which, if credited by the jury, demands from them a verdict of guilty of murder in the first degree, a verdict to that effect will not be disturbed, because the jury are the sole judges of the degree of credit to be given to the testimony.

2. CRIMINAL PRACTICE—DISCHARGE OF JUROR—SUBSTITUTION OF ANOTHER.

When, during a trial for murder, and before any evidence was taken, one of the jurors became sick, and was discharged, and the court refused to comply with the request of the defendant to discharge the other jurors, and impanel a new jury, but granting to each party the right to challenge any of said other jurors, swore in another in place of the one discharged, and there appeared to be no good reason for discharging all the jurors, *held*, that the course pursued by the court was eminently proper, under Pen. Code Cal. § 1123, which provides that, if a juror becomes sick during a trial, so as to be unable to perform his duties, "the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled."

3. EVIDENCE—DYING DECLARATION.

On the day after the deceased was cut, when a physician had stated in his hearing that his wound was mortal, and that he was going to die, and he had announced repeatedly that he had no hope of recovery, he made a statement before a justice of the peace, in the presence of several persons, which was taken down by a reporter in short-hand, written out, read and assented to by the deceased, who signed and swore to it, and died soon after. *Held*, that the statement was admissible in evidence on a trial for murder as a dying declaration, it not appearing that there were any questions put or answers given after the statement had commenced which did not appear in it as presented, or that anything was said by the deceased previous to the formal dying declaration which conflicted with it.¹

In bank. Appeal from superior court, Colusa county.

William Frazier, for appellant. G. A. Johnson, Atty. Gen., for respondent.

SEARLS, C. J. The defendant was charged by information with the crime of murder, alleged to have been committed in the county of Colusa, on the twenty-first day of June, 1885, by the killing of one W. A. Bristow. He entered a plea of not guilty, and upon a trial had was found guilty of murder in the first degree, and the punishment fixed at imprisonment for life in the state prison.

The first point made by the appellant is that the verdict is contrary to and not warranted by the evidence; that, at most, it only made a case of manslaughter, and was lacking in the elements from which malice is presumed. The testimony was, as is usual in such cases, more or less contradictory, and it only need be said that there was testimony which, if credited by the jury, demanded from them the verdict rendered. As they were the sole judges of the degree of credit to be given to the testimony, the verdict cannot be disturbed for the cause indicated in the error assigned.

¹ Dying declarations are admissible in evidence in homicide cases, if made under a sense of impending death. *State v. Mathes*, (Mo.) 2 S. W. Rep. 800, and note; *State v. Partlow*, (Mo.) 4 S. W. Rep. 14; *Cook v. State*, (Tex.) 3 S. W. Rep. 749; *State v. Leeper*, (Iowa,) 30 N. W. Rep. 503, and note; *Puryear v. Com.*, (Va.) 1 S. E. Rep. 512; *State v. Johnson*, (S. C.) 1 S. E. Rep. 510; *State v. Saunders*, (Or.) 12 Pac. Rep. 441; *Jordan v. State*, (Ala.) 1 South. Rep. 577; *Hill v. State*, (Miss.) Id. 494.

It is further urged that the court erred in refusing a new trial upon the ground of error committed in discharging a juror, and in refusing to discharge the remainder of the panel, and to commence *de novo* and impanel a jury. It appears from the record that after the jury was sworn to try the cause, and before any evidence was taken, Henry Gurnsey, one of the jurors, was taken sick; and, being unable to continue on the jury, was discharged by the court. Counsel for defendant excepted to this action of the court, and requested that the remaining eleven jurors be discharged, and that their names, in common with all others summoned, be placed in the jury-box, and that the jury be impaneled anew to try the cause. The court declined to pursue this course, and retained the 11 jurors, subject to the right of counsel to challenge said jurors. Defendant interposed no challenge. The prosecution challenged one of the 11 peremptorily, and thereupon the jury was filled and sworn in the usual manner.

Section 1123 of the Penal Code provides: "If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case a new juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled." The course pursued by the court was eminently proper under the Code. There appeared no good reason for discharging all of the jurors, as the court might have done, and, as the right of the defendant to challenge the jurors retained was expressly accorded to him, there was no error committed. *People v. Stewart*, 64 Cal. 60.

The only other error urged upon our attention relates to the admission of the dying declarations of the deceased, and to the refusal of the court to strike out such declarations. The testimony shows that the deceased was cut by defendant on the evening of the twenty-first day of June, 1885, so severely that his bowels protruded, and he held them with his hands while walking from the scene of the difficulty to his cabin. A physician was called, who, upon an examination of the wounds, of which there were several, pronounced the injuries mortal, and stated in the hearing of the patient that there was no hope for him. On the following day (June 22, 1885) deceased announced repeatedly that he had no hope of recovery, and that he was going to die, and expressed a desire to make a statement of the circumstances attending the conflict with defendant. His statement was then made to a justice of the peace, in the presence of several persons, taken down by a reporter in short-hand, written out at length, read and assented to by deceased, who signed and swore to it. He died the same night or the following morning.

Counsel for defendant based a motion to strike out the dying statement on the ground that the written statement, as introduced, did "not contain all of the statements made by the deceased at the time, and does not contain all the questions and all the answers put to and answered by the declarant with reference to this homicide at that time." The motion was denied because it failed to appear that any questions were put or answers given which did not appear in the statement as presented. The record shows: *First*, that before the statement was commenced there were several persons present who put questions to deceased touching the affray, which were answered by him; *second*, that, having expressed a desire to make a formal statement, it was taken down by question and answer literally, and every word of it written out and assented to as hereinbefore stated.

If there was any statement made by deceased which conflicted with his formal dying declaration, it might have been competent to prove it; but nothing of this kind was attempted or, so far as we can see, claimed. It was neither necessary nor proper to include in the dying statement all the deceased said from the time he received the mortal wound. The parties met him, and after an informal interview, directed, so far as appears, mainly to his condition and expectation of speedy death, proceeded in a formal manner to take

and read his dying statement. The court below was satisfied that this statement was made in such immediate and certain expectancy of speedy death, as entitled it to admission as a dying statement, and in this view we think there was no error.

The judgment and order appealed from are affirmed.

We concur: MOFARLAND, J.; MCKINSTRY, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.

72 Cal. 544

WISE and others v. WILLIAMS and others. (No. 9,829.)

(*Supreme Court of California. June 16, 1887.*)

1. PARTNERSHIP—PROOF OF RELATIONSHIP—ESTOPPEL.

Where a man and his wife, who had dealt with, as a partnership, and were indebted to, J. H. Wise and Thomas Denigan, composing the firm of Christy & Wise, have executed to said partnership a note and mortgage, neither they, nor their personal representatives, can be heard to dispute the firm relationship.

2. SAME—PLEADING.

In a suit by a partnership on a note and mortgage executed to the firm, the showing of the copartnership relation of the plaintiffs is not indispensable in the caption, if in the body of the complaint it be specifically averred that the plaintiffs are in fact copartners, and it appears, from the facts alleged, that the obligation relied upon is one that has been created in favor of such copartnership.

3. EXECUTORS AND ADMINISTRATORS—ACTION AGAINST—PLEADING.

In a suit against an administrator, it is sufficient to allege that defendant is sued as administrator, and it is not necessary to allege matters showing his appointment as such.

4. SAME—CLAIM AGAINST ESTATE—LIMITATION OF ACTIONS.

Under Code Civil Proc. Cal. § 1569, which provides that "no claim against any estate, which has been presented and allowed, is affected by the statute of limitations pending the proceedings for the settlement of the estate," the statute does not run against a note, the estate of the maker of which was not closed when the suit was brought, and the claim under which note had then been allowed.

5. SAME.

In a suit against the administrator of decedent the burden is upon the defendant to show that plaintiff's cause of action is barred by the statute of limitations. Hence, unless such fact clearly appears on the face of the complaint, from the date of defendant's appointment as executor, a demurrer thereto is bad, and the objection must be made by answer.

Department 1. Appeal from superior court, Merced county.

Edward P. Cole and *E. Jackman*, for appellants. *J. K. Law*, for respondents.

PATERSON, J. The demurrer of the defendants Hallinan, administrator of the estate of Sarah Connell, deceased, and J. B. Connell, a minor, by Hallinan, his guardian, was sustained, and, plaintiff having refused to amend, judgment was entered in favor of said defendants for costs of the action. The grounds of demurrer are that the complaint does not state facts sufficient to constitute a cause of action; that the cause of action is barred by the provisions of section 337 of the Code of Civil Procedure; and that there is a defect or misjoinder of parties plaintiff, in this: that said note and mortgage were executed to Christy & Wise, and John H. Wise and Thomas Denigan have brought this action as individuals, and have shown no assignment from Christy & Wise to them.

The amended complaint was filed August 22, 1883. The note and mortgage were made May 2, 1877, and became due May 2, 1878. The note was executed by John, and the mortgage by him and his wife, Sarah Connell. On October 24, 1877, John and his wife filed a declaration of homestead on the land mortgaged to plaintiffs. Thereafter John died, and on July 19, 1880, Sarah, his widow, qualified as administratrix. December 21, 1880, the claim of plaintiffs, which had been presented to the administratrix and the judge,

was allowed and filed. December 27, 1880, the court set aside to Sarah Connell the land in suit as a homestead. February 17, 1882, Sarah Connell died. February 20, 1883, Williams was appointed administrator of the estate of John Connell. Hallinan was appointed administrator of Sarah Connell's estate, but the date of his appointment is not stated. The other defendants are heirs of said John and Sarah Connell.

1. The complaint sets forth a copy of the note signed by John Connell, which is made payable to the order of Christy & Wise. It is then alleged "that, in order to secure the payment of said note, the said John Connell and his wife did execute and deliver to John H. Wise and Thomas Denigan, *composing the firm of Christy & Wise*, a mortgage on those pieces of land," etc., describing them. The complaint further avers that on the second day of May, 1877, said John H. W. and T. D. were copartners doing business under the firm name of C. & W., and that said J. C., being indebted to said firm, executed and delivered to them his said promissory note. Having thus dealt with plaintiffs *as a firm*, neither John nor Sarah could be heard to dispute the firm relationship, and their representatives stand in no better position to contest the same.

While a pleading should show, in cases of this kind, the copartnership relation of the plaintiffs in the caption of the complaint, such a showing is not an indispensable matter if in the body of the complaint it be specifically averred that the plaintiffs are in fact copartners, and it appears from the facts alleged that the obligation relied upon is one that has been created in favor of such copartnership. Thus it is said in Bliss on Code Pleading, (section 145:) "It is not absolutely necessary that the title describe the parties as partners, and give the partnership names, provided the fact appears in the body of the complaint." And in New York it is held that, if the names are intelligibly given in the body of the complaint, it is sufficient. *Hill v. Thacker*, 3 How. Pr. 407. See, also, *Shear v. Ward*, 20 Cal. 660; *Hallock v. Jaudin*, 34 Cal. 174.

The case of *McCord v. Seale*, 56 Cal. 262, was decided upon the evidence introduced showing a copartnership transaction; the plaintiffs insisting upon a liability to them as individuals. The intimation made therein to the effect that the allegation of a copartnership might be treated as surplusage is, as matter of pleading, mere *dictum*.

2. It was sufficient to allege that the defendant J. H. is the administrator of the estate of Sarah C., deceased. Where a plaintiff sues in a representative capacity, he must allege matters showing his appointment, but such is not the case as to defendants, who are sued as executors or administrators. "In actions against executors or administrators, it is not necessary to allege in the complaint facts showing how the defendants became invested with this representative character, but simply that they are such executors or administrators." 2 Wait, Pr. 374.

3. As to the statute of limitations. The Code (section 1475, Code Civil Proc.) requires all claims against a homestead to be presented to the administrator. *Camp v. Grider*, 62 Cal. 21. It does not appear that the estate of John Connell was closed when suit was brought; and the note and mortgage having been presented to his administratrix on the twentieth day of December, 1880, and allowed, the statute ceased to run. "No claim against any estate which has been presented and allowed is affected by the statute of limitations pending the proceedings for the settlement of the estate." Section 1569, Code Civil Proc.; *Estate of Schroeder*, 46 Cal. 317; *Dohs v. Dohs*, 60 Cal. 255; *Savings & Loan Soc. v. Hutchinson*, 68 Cal. 53, 8 Pac. Rep. 627.

4. It is claimed by respondent that as to Sarah Connell, unless the complaint contains some averment showing that the statute had not run against her, the action is barred. The burden, however, is upon defendant to show that plaintiff's cause of action is barred. Unless it clearly appears from the face of the

complaint that plaintiff's cause of action is barred, the issue must be raised by answer. It does not appear from the complaint when the administrator of Sarah Connell was appointed. Hence the question cannot be raised upon demurrer. *Harmon v. Page*, 62 Cal. 449; *Willis v. Farley*, 24 Cal. 491; *Savings & Loan Soc. v. Hutchinson*, 8 Pac. Rep. 638; *Cameron v. San Francisco*, 68 Cal. 390, 9 Pac. Rep. 430.

Judgment reversed, with directions to the court below to overrule the demurrer.

We concur: TEMPLE, J.; MCKINSTY, J.

73 Cal. 555

GASSEN v. BOWER. (No. 11,817.)

(Supreme Court of California. June 21, 1887.)

PLEADING—DEFECTS—CODE CIVIL PROC. CAL. § 475.

When the cross-complaint, in an action to quiet title to a certain parcel of land, prays for the correction of the certificate of acknowledgment of the deed of a married woman, which constitutes one link in the chain of title, but fails to state that said land was the separate property of said married woman, and the court decreed that the correction be made, *held*, that said omission is not such a defect in the pleading as to mislead appellant, and hence, under Code Civil Proc. Cal. § 475, which provides that no judgment shall be reversed by reason of any defect which does not "affect the substantial rights of the parties," is no ground for reversing the judgment.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

W. J. Hunsaker, for appellant. *John R. Jones* and *B. W. Hendrick*, for respondent.

HAYNE, C. Action to quit title. The defendant put in a cross-complaint praying for the correction of the certificate of acknowledgment of a deed of a married woman, which deed constituted one link in the chain of title. The court found that the property was the separate property of the married woman, and that the acknowledgment had in fact been made, but that, by a blunder of the officer, the certificate was defective, and decreed that it be corrected. It is not contended that the evidence was insufficient to support the finding, or that upon the facts found the judgment was improper. The single point made is that the cross-complaint did not aver that the property was the separate property of the married woman, and that, therefore, there was no cloud, and consequently that the court erred in overruling the plaintiff's demurrer for ambiguity. While we think the pleading was obnoxious to criticism, it does not seem to us that it is so radically defective as to fail to support the judgment; and the provision of the Code is that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect." Code Civil Proc. § 475. Where a pleading is demurred to for ambiguity, we think that, if the party was not misled to his prejudice, the ambiguity cannot be said to "affect the substantial rights of the parties." And we do not think that in this case the appellant was misled. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

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BAUGHMAN v. SUPERIOR COURT. (No. 12,140.)

(Supreme Court of California. June 22, 1887.)

APPEAL—EFFECT AS A STAY—REMOVAL OF RECEIVER.

Where the appointment of the receiver is a matter ancillary to the main proceedings in the action, the fact that the plaintiff, at whose instigation he was appointed, has appealed from an order of the court sustaining a demurrer to the complaint and entering judgment for the defendant, does not prevent the discharge of the receiver on motion.

In bank. On application for writ of prohibition.

Lindley & Spagnoli and *Reddick & Solnisky*, for petitioner. *Blanchard & Swisler* and *Eagon & Rust*, for respondent.

MCKINSTRY, J. Petitioner, as surviving partner of the firm of Ruoff & Baughman, prosecuted an action in the superior court against one R. B. Reed, and in the prayer of his complaint, among other demands, asked that a receiver be named to take charge, "pending the action," of certain grain, in which, in said complaint, he claimed an interest. Upon the complaint the superior judge appointed one A. J. Wilson receiver "to take charge of and hold, preserve, and keep" the grain, "and for that purpose to take such measures and employ such help as may be requisite." Wilson qualified as receiver, and took possession of the property. Afterwards the defendant in the action demurred to the complaint on the ground that it stated no cause. The demurrer was sustained, and, the plaintiff neglecting and refusing to amend, final judgment in favor of the defendant was entered in the superior court. Subsequently the defendant moved said court to set aside the order appointing the receiver, and that the receiver be discharged. The prayer of the complaint did not give such character to the appointment as that, in case of an appeal, the receiver could not be discharged until the final determination of the cause in this court. The defendant has an undoubted right to move for the discharge of a receiver *pendente lite*. High, Rec. 846.

The present application is that the superior court be prohibited from hearing or determining the motion of defendant in the action aforesaid for the discharge of the receiver. It is claimed the superior court has no jurisdiction to determine the motion, inasmuch as the plaintiff in the action had appealed from the final judgment. Section 564 of the Code of Civil Procedure provides that a receiver may be appointed "by the court in which an action is pending, or the judge thereof." The action above mentioned was not brought to procure a judgment appointing a receiver. The appointment by the court or judge is a matter ancillary to the main proceedings in an action, and is for the purpose of protecting property or a fund until the judgment in the superior court, and to secure its application as, in express terms or by implication, may be required by such judgment. Section 946 of the same Code provides that whenever an appeal is perfected it stays all further proceedings in the court below "upon the judgment or order appealed from, or upon the matters embraced therein," and the appeal releases property levied on, "but the court below may proceed upon any other matter embraced in the action," etc.

In *Ireland v. Nichols*, 40 How. Pr. 85, 9 Abb. (N. S.) 71, the supreme court of New York said: "In the present case the appointment of the receiver was a provisional remedy in the action, and ancillary to it. It was made by the court in the exercise of its discretionary powers, not as a matter of strict right, but purely as a matter of favor to the plaintiff, and is entirely independent of the judgment from which plaintiff appealed." Commenting upon section 339 of the New York Code,—which is like section 946 of our Code,—the court remarked that the proceedings stayed by the appeal "must be construed to be such proceedings as may be instituted by the respondent

for the purpose of enforcing the provisions of the judgment," especially as the same section reserves to the court below "the power to proceed upon any other matter included in the action," etc. And the court concludes: "According to the current authorities, the entry of the judgment in favor of the defendant has the effect of ending the functions of the receiver, but the receiver is not discharged thereby. The court, may, according to the exigencies of the case, upon good cause shown, either continue or discharge him by further order."

Where a bill upon which the appointment of a receiver is made is afterwards dismissed on demurrer, the duties of the receiver cease, as between the parties to the action. And so, where the defendant finally obtains judgment, the entry of judgment would seem to have the effect of terminating the receiver's functions, although plaintiff perfects his appeal to the appellate court. But the abatement of the action, or entry of final judgment, does not discharge the receiver *ipso facto*. Although, as between the parties, his functions terminate with the determination of the suit, he is still amenable to the court as its officer until he has complied with its direction as to the disposition of the funds he has received as receiver. And when the bill is dismissed on demurrer it is the plain duty of the court to direct the receiver to restore the fund or property to the person from whom it was taken. *High, Rec. 833; Field v. Jones, 11 Ga. 413; Beverley v. Brooke, 4 Gratt. 220; Ireland v. Nichols, supra*. It would seem that where the decree, in terms, provided that one of the parties should take certain property from the receiver, the late receiver did not hold the property after decree as receiver, but as trustee of the party, although there had been no formal order of discharge. *Very v. Watkins, 23 How. 475*. It has been said a receiver will be "discharged" by a decree in the cause in which he is appointed, unless he is expressly continued. *Daniel, Ch. Pr. 1601*. But the discharge spoken of evidently refers to the surcease of his functions as receiver proper, leaving on him the duty of properly accounting under the order of the court. But whether, when his office is not expressly continued by decree, he should afterwards be called receiver or not, he is subject to the orders of the court with respect to the winding up of his affairs as receiver,—as to accounting and application of funds. In these respects he continues liable until he is discharged of his responsibilities as trustee, and we see no impropriety in his being designated "receiver" up to the date of such discharge.

The adoption of the foregoing views will not deprive petitioner of any substantial right, since the statute authorizes the court, in a proper case, to appoint a receiver for the preservation of property during the pendency of an appeal. *Code Civil Proc. § 564*. It may be said that the superior court will, unless prohibited, not only discharge the receiver, but attempt to set aside the order by which he was originally appointed. It is at least doubtful whether the motion is to be construed as anything more than a motion to discharge. At all events, the motion would authorize the court to discharge the receiver, and the petitioner avers that on the twenty-ninth of April, 1887, and after the appeal from the judgment was perfected, "the superior court, at the application of the defendant, made and gave its order that said motion to discharge said receiver be heard, considered, and determined by said superior court on Friday, May 13, 1887." It is the hearing and determination of the motion, as a motion to discharge, which the petitioner claims will be beyond or in excess of the jurisdiction. It may be added that the petition does not distinctly show that objection was made to the proposed action of the superior court, on the ground that it would be beyond its jurisdiction. It has been repeatedly held here that prohibition will not go from this court unless the attention of the court whose proceedings are sought to be arrested has been called to the alleged excess of jurisdiction. *Southern P. R. Co. v. Superior Court, 59 Cal. 475*.

Writ denied, and proceedings dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.; SHARFSTEIN, J.; PATERSON, J.; TEMPLE, J.

In re Estate of POTEN, Deceased. (No. 11,827.)

(*Supreme Court of California. June 24, 1887.*)

APPEALABLE ORDER—MONEY IN COURT—MOTION TO PAY OVER.

An order refusing to direct the clerk of court to pay over to a special administrator a sum of money, allowed him as compensation for his services, *held* not appealable.

Department 1. Appeal from superior court, Yolo county.

G. P. Harding and *R. Clark*, for respondent.

One Jerry Desmond gave to R. Clark an order on the county clerk of Yolo county for \$320, which he claimed was due to him from Poten's estate. The claim had not yet been allowed; the administrator of Poten's estate having filed objections to it. Desmond and one Frees, the executor or administrator, made a settlement, whereby Frees withdrew his objections to the allowance of the claim. After such withdrawal, the clerk of the court paid the \$320 to Clark on the written order of Desmond. Some months afterwards an attorney appeared for Desmond in the superior court of Yolo county, *ex parte*, and asked that the clerk be compelled to turn over the money to Desmond. The superior court took proof in the matter on such application, and denied the motion on the ground that the clerk had properly turned the money over to Clark.

The order is not appealable. It does not come within any of the provisions of section 963, Code Civil Proc., or any of the sections of that chapter. Neither does it fall within the provisions of section 933, Code Civil Proc. There are no other provisions of the Code that we know of that allow appeals from the superior court to this court in cases of this kind.

P. M. Sullivan, for appellant.

By THE COURT. The order of the probate court complained of is clearly not an appealable order. The motion to dismiss the appeal must therefore be granted. So ordered.

TELLER v. BROWER and others.

(*Supreme Court of Oregon. January 19, 1887.*)

1. DEED—LOSS OF—PROOF OF DELIVERY.

A widower, who had for a long time cohabited with a woman, not his wife, married her, and subsequently died. Before said marriage he had, as it was alleged, conveyed to a daughter by his former wife certain land; the deed, however, being lost. In a suit brought by the daughter to quiet her title to said land, it appeared from the evidence that such a deed would have been the most natural and just means of providing for his more helpless children, and that he had settled on his wife certain other land, which was an ample substitution for dower. Said daughter's testimony of the execution and delivery of the deed was corroborated by other circumstantial evidence, and deceased's intentions were clearly proved; while the heterogeneous condition of the family rendered likely the loss or theft of such a deed. *Held*, that its delivery and execution were sufficiently proved.

2. SAME.

In such case the fact that the daughter, after her father's death, united with his other children in a petition for the appointment of her brother as administrator of the estate, said petition including, among the assets, the land in question, does not materially impeach her evidence in support of her claim to the land; it being shown that she signed it when sick, knowing nothing of its contents, and at the instance of her brother.

v.14P.NO.4—14

Appeal from circuit court, Polk county.

N. B. Knight and Holmes & Hayden, for appellant. *Tilmon Ford*, for respondents.

THAYER, J. The appellant commenced a suit against the respondents in said circuit court to quiet her title in certain real property situated in said county. The complaint is in the usual form adopted in such suits. The respondent claims that she is entitled to a right of dower in the property as the widow of one George W. Teller, deceased, who died seized of the said property. The appellant was the daughter of the said George W. Teller, and claims the entire property in fee by a deed of conveyance thereof prior to his marriage with the said respondent, which deed has been lost. A question was made in the case as to the time when the said respondent and the said George W. Teller intermarried; said respondent claiming that they were married twice, the first time on the twenty-seventh day of December, 1867, in Boone county, Iowa, and the second time on the twenty-third day of December, 1878, at said Polk county. The deed to the property is claimed to have been executed by the said George W. Teller to the appellant in January, 1878,—subsequent to the first pretended marriage, and prior to the last one; but the evidence does not sustain the allegation that a marriage took place between said parties on the twenty-seventh day of December, 1867. It shows conclusively, on the other hand, that they were at that time, and for a long time thereafter, incapable of contracting a lawful marriage. The respondent was, at the time of the alleged first marriage, the wife of one Amos Kentner, and she continued to be his lawful wife until the twenty-second day of October, 1868, at which last time a decree of divorce was granted in favor of the said Amos Kentner against the respondent by the district court of the Sixth judicial district, state of Minnesota. It is not improbable but that the parties may have gone through the formal ceremony of a marriage in Boone county, Iowa, at the time alleged; but it was only a mere sham and pretense, and the parties unquestionably so understood it at the time.

The main question in the case is as to whether the said deed was executed to the appellant as alleged by her. It appears from the evidence that the appellant and the respondents James B. Teller, Franklin Teller, Samantha J. Higgins, Michael A. Teller, and George W. Teller, were the children of George W. Teller, deceased, by a former wife. That after the death of their mother, and while they were quite young, the said Marion Brower left her husband, Amos Kentner, and went and lived with the said George W. Teller. This occurred about the time of the first pretended marriage between the parties, and they continued to live and cohabit thereafter as husband and wife. After residing a short time in the north-western states and territories, they came, in 1869, to Oregon, representing themselves to be husband and wife, but were never lawfully married until on the said twenty-third day of December, 1878. That the said George W. Teller acquired various property in Oregon, including the premises in question, another tract of 320 acres of land in Polk county, and also a tract of land in Tillamook county. That, about two years prior to the time it is alleged he made the deed in question to the appellant, he conveyed to the said respondent Marion Brower the 320-acre tract in Polk county, which, at the time, was as valuable if not more valuable than the premises claimed to have been conveyed to the appellant. He sold the Tillamook place subsequently, and the proceeds of the sale constituted a part of his assets at the time of his decease, which occurred November 29, 1881. The circuit court, in the decree from which the appeal is taken, seems to have placed its decision of the case more upon the grounds that the deed was not delivered to the appellant than upon the grounds that no such deed had been signed by the grantor as required by the statute. At least the decree recites that "the court, having fully considered the matters at issue in

said case, finds from the testimony, as conclusions of fact, that the alleged deed set out in the plaintiff's complaint was never delivered to the plaintiff by George W. Teller," which would seem to imply that it might have been signed, witnessed, and acknowledged.

The more difficult question with this court has been to determine whether such a deed was ever in fact signed. There would be no difficulty, as it appears to us, in finding that the deed was delivered if ever made. The circumstances surrounding the affair were of such a nature as to render it reasonable that George W. Teller, deceased, may have executed the deed as claimed. He had two daughters, one of whom was insane and an inmate of the asylum. His other children were all boys, and he would have been more likely, it seems to me, to have confided the property in question to the appellant than to any of his other children. By doing that, it would be likely to remain intact, and enable the appellant to bestow assistance upon the more helpless of the children; and she would probably be more impressed with such a duty than a son would be. There is no doubt in my mind but that a woman, as a general thing, has a finer sense of honor in such matters and a much deeper sympathy than a man has, and the decedent was doubtless conscious of that fact. The conveyance, if made as claimed, was evidently in the nature of a gift in prospect of death; and it would certainly have been injudicious to have attempted to divide up the premises among all the children, or to have left it subject to such division as the law would have made. The alleged disposition of the premises, under the circumstances, would be better than to have limited them to the appellant by devise. In the latter case they would have had to be administered upon, which would have tied up the property in the hands of an executor until the administration was closed; and would, in case the testator left a widow, have subjected it to dower. In this case, to have cut off any right of dower the respondent Marion Brower may have had in the property, or which the deceased supposed she had or might thereafter have, would have been eminently just upon his part. He had already settled upon her the 320 acres of land, which, no doubt, was a full equivalent of any right of dower of which she, by the execution of the deed, would be deprived. And it plainly appears that the deceased had an intention to bestow this property upon the appellant. The testimony of her brother James B. Teller, and that of Mrs. N. J. Hosford, is direct upon that point. The respondent Mrs. Brower made a statement to Mrs. Hanville, a witness in the case, showing that such had been the decedent's intention. He stated also to said James B. Teller and to Mrs. Hosford that he had deeded the premises to appellant. At least they so testified in the case. The direct testimony that such a deed was executed, is not so strong as might be desired; but, with the aid of the corroborating circumstances and statements referred to, I think it sufficient to justify the finding that it was executed. The testimony of Judge J. Quinn Thornton is to the effect that the deceased stated in his presence that he had executed a deed to the appellant of the Tillamook place; that the deed was not to be put on record, or not to be operative, until his death. This evidence is corroborative of the appellant's claim. It tends to show that the deceased had settled property upon the appellant; and, it appearing from the proofs that it could not have been the Tillamook property, the inference, in view of the direct testimony of Seth R. Hammer, Esq., that the deceased conveyed to the appellant by deed lands in Polk county which answered to the description of the premises in question; of John W. Minto, who witnessed an instrument of the nature of a deed of that character; and of the appellant herself, who swears positively that her father did execute and deliver to her a deed of the premises,—is very natural that the said statement referred to a deed of the premises in question, and that it was either misunderstood by the witness, or that deceased mentioned in his statement the wrong property.

It is claimed by the counsel for the said respondent Marion Brower, that

the deed alleged to have been so executed is not sufficiently described, nor its loss accounted for. The direct evidence of the execution of the deed is indefinite, but it is positive, and seems to be entirely consistent with the circumstances surrounding the case; and that it should have been lost is not at all remarkable. The circumstances under which the said respondent came into the family of the deceased, the anomalous relation they sustained for a number of years, the fact that he had children growing up to manhood and womanhood, were not favorable conditions to the maintenance of order and regularity. It necessarily produced a heterogeneity which seems to have terminated in his sudden demise. In a state of affairs which would be likely to succeed so irregular an alliance, the loss of a deed to real property affecting the interest of any of the parties would not be a strange consequence. Shifting it about from place to place, as the evidence tends to prove, would be quite natural; and its loss, from being mislaid or purloined, not at all unlikely.

Said counsel also pointed out what he claimed to be discrepancies in the testimony of the appellant as to the whereabouts of the instrument after its alleged execution and delivery; but in view of the circumstances surrounding the affair, and of the immateriality of her testimony upon that point, an impeachment of her general testimony cannot be claimed.

Another circumstance urged by said counsel with great force against the appellant's claim to the ownership of the said premises is that she united with three of her brothers in a petition to the county court for Polk county for the appointment of one of the petitioners, J. B. Teller, administrator of the estate of the deceased, and which petition states that the deceased, at the time of his death, was possessed of 250 acres of farm land in said county, referring undoubtedly to the land in question. The appellant in her examination fully explained the circumstances under which she signed the petition. She says that it was presented to her while she lay sick at the Chemeketa Hotel, in Salem; that she knew nothing of its contents except its general object; and signed it formally at the request of her brother presenting it, relying entirely upon him as to its correctness. The fact that she signed such a petition containing a statement of the character referred to would ordinarily militate strongly against her claim to the property, though it would not at all be conclusive of her right; but considering the purpose of the petition, and her explanation of the circumstances of her signing it, weakens very much its effect as impeaching evidence. And, besides, her case is not dependent upon her unsupported testimony. The court must view it in the light of its surroundings and corroborating proofs, and determine the material facts involved from the whole evidence. It follows, from the conclusions indicated as to the result of the proofs, that the decree appealed from must be reversed, and that the relief prayed in the appellant's complaint in the suit should be granted.

The decree, therefore, will be to that effect.

CHIVINGTON v. COLORADO SPRINGS CO.

(*Supreme Court of Colorado.* February 18, 1887.)

1. JUDGMENT—DEFAULT—PENDENCY OF MOTION.

Under section 149, Civil Code Colo., providing that if, in an action, no answer, demurrer, or motion has been filed within the time specified in the summons, or such further time as may have been granted, default shall be entered against the defendant, no default can be entered for failure to answer so long as a motion to quash the sheriff's return to the summons remains undetermined.

2. COSTS—UPON OVERRULING MOTION.

In an action of ejectment, plaintiff demurred to and moved to strike out parts of the answer. The demurrer and motion being overruled, plaintiff was ordered, before filing his replication, to pay \$10 to defendant, and a judgment for that sum was entered against him. *Held*, that this was warranted by section 57, of the Colo-

rado Code which provides that, upon the determination of any demurrer or motion to strike out the whole or any part of any pleading of fact in any cause originally brought in the district court, the unsuccessful party shall be adjudged to pay not less than five nor more than ten dollars into court for the use of the successful party. It being constitutional, the court will not consider the unreasonableness of the provision.

3. LIMITATION OF ACTIONS—PLEADING THE STATUTE—EJECTMENT.

Chapter 23 of the Colorado Civil Code, governing actions for the possession of real property and for damages, provides that the answer in such actions shall either specifically deny the allegations of the complaint, or disclaim any interest in or possession of the property, and also allows the defendant to state the character of the estate, or right of possession or occupancy, he claims in the premises. Under this chapter, in an action of ejectment the statute of limitations must be specially pleaded, or the defense will be considered waived.

4. EJECTMENT—TITLE NECESSARY TO MAINTAIN.

Plaintiff in an action of ejectment can recover solely upon the strength of his own title, and not through the weakness of defendant's. If he have none himself, he cannot maintain the action, even though defendant's paper title be fatally defective.

5. DEED—EXECUTION—EVIDENCE.

A deed properly certified to by a competent officer, the genuineness of whose certificate is unimpeached, cannot be overthrown by the uncorroborated testimony of the person whose name is signed as grantor, to the effect that he never executed or acknowledged the deed.

Appeal from district court, El Paso county.

Action of ejectment. Plaintiff, John M. Chivington, claimed title under government patents, to certain property situated in the town of Manitou, Colorado. Defendant pleaded a general denial, title in itself, and the statute of limitations. The court overruled plaintiff's motion to strike out those parts of the answer setting up the statute, also his demurrer, and required plaintiff, before filing a reply, to pay into court, for the use of defendant, \$10 in the nature of costs for the demurrer and motion. Defendant relied for title upon a deed purporting to have been executed by plaintiff, but the execution and acknowledgment of which were denied by plaintiff. Judgment for defendant, and plaintiff appeals.

L. B. France, for appellant. *J. M. Waldron* and *Benedict & Phelps*, for appellee.

HELM, J. The court committed no error in refusing a default for want of answer. Within the period allowed for pleading, defendant filed its motion to quash the sheriff's return to the summons; and, when the application for default was submitted, this motion was still pending. Section 149 of the Civil Code must be construed in connection with the provisions of that instrument that relate to the time for answering. Under this section, as amended in 1881, no default could be entered while the motion to quash remained undetermined.

We shall decline to reverse the judgment because the court required plaintiff, before filing his replication, to pay the \$10 previously awarded to defendant. The judgment for that sum was entered against plaintiff, under section 57 of the Code, upon the denial of his demurrer and motion. With the alleged unreasonableness of this statute we have nothing to do. It was framed upon the theory of compensation to the successful party for extra and unnecessary expense occasioned by the demurrer or motion overruled; and is, in this respect, analogous to laws providing for the recovery of costs. It may also have been intended to secure greater caution by parties and counsel, and to prevent the filing of sham and frivolous pleadings of the kind mentioned. We are not prepared to hold the statute unconstitutional, and it clearly warranted the ruling in question.

Nor did the court err in denying plaintiff's motion to strike from the answer as "immaterial, irrelevant, and redundant," certain defenses therein averred. Chapter 27 of the Revised Statutes, on the subject of ejectment,

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was repealed in 1877, and the general issue no longer performs the office therein assigned to it. Chapter 23 of the Code applies to this class of actions the general rules of pleading specified elsewhere in that instrument. Besides, it expressly allows defendant to set up affirmatively the character of the estate or right of possession or occupancy through which he claims. Section 2189 of the General Statutes, referring to the limitation of actions, prescribes a rule of pleading. It was originally framed with reference to the existing law, which inhibited in ejectment all pleas save the "general issue only." It did not then, nor does it now, preclude the defendant in ejectment from availing himself of this defense, but, as a rule of pleading, it is modified by the subsequent provisions of the Code above mentioned. Under the present practice the statute of limitations must be specially pleaded in this as well as other actions, or the defense will be considered waived.

For the purposes of this case it is a matter of no importance whether the defendant company and its immediate grantors were, at the time of the conveyance to them, capable of taking title to real estate in Colorado. There were intermediate deeds between them and plaintiff to other parties, whose capacity in this respect is not questioned. The action is in the nature of ejectment, and, except as modified by statute, the common-law principles pertaining to ejectment are applicable. Neither mines nor mining claims are in controversy, and the verdict must be for defendant unless plaintiff makes out a case. Moreover, the latter must recover, if at all, upon the strength of his own title or right to possess and occupy. If he has legally parted with both, he cannot maintain the action, even though defendant's paper title be fatally defective.

We proceed now to consider the main question presented, viz., did Chivington part with his title to the property by valid and binding conveyances? He asserts that the power of attorney from himself to Pollock, offered in evidence, is a forgery. But, when upon the witness stand, he contented himself with the declaration that he did not *sign* the paper, or authorize any one else to attach his name thereto. He did not fairly question the *bona fides* of his acknowledgment appended to the instrument, nor did he deny that he authorized the delivery thereof. It is strange, indeed, if in truth the acknowledgment is also forged, and if no delivery was authorized by him, that, when testifying, he failed to specifically mention these two important matters. It is also a circumstance of sufficient significance to be noticed that the notary public who made the certificate of acknowledgment, and who was present at the trial in the employ of plaintiff, was not called upon to offer any explanation touching the same. Testimony by him admitting that he made this certificate, but asserting that it was untrue, would be entitled to little consideration. *Wilson v. South Park Com'rs*, 70 Ill. 46. But his sworn declaration that the certificate itself was a forgery might be very important.

Whether plaintiff actually *signed*, or previously directed another to sign, his name to the instrument, may be a matter of no importance. Admitting, for the purposes of the argument, that his testimony in this regard is true, the power of attorney is still not necessarily void. If he duly acknowledged the instrument, and authorized its delivery, he thereby recognized and adopted the signature and seal, making them his own for the purposes of the conveyance. *Clough v. Clough*, 73 Me. 487; *Kerr v. Russell*, 69 Ill. 666.

We have not overlooked the fact that, while giving his testimony, plaintiff was asked when he first saw the power of attorney, and answered, "Yesterday." This question and answer were preliminary to the statement that his signature was forged. The good faith of the certificate of acknowledgment was not spoken of. But if we assume that their effect is indirectly to challenge this certificate, and hence admit that plaintiff did, in this equivocal way, dispute its validity, he is yet in no better attitude; for "the unsup-

ported testimony of a party to a deed that he did not execute it shall not prevail over the official certificate of the officer taking the acknowledgment." *Kerr v. Russell, supra; Lickmon v. Harding*, 65 Ill. 505. While the certificate of the officer may in some cases be impeached for fraud, duress, or gross concurrent mistake, the proof to sustain the charge "is required to be of the clearest and strongest and of the most convincing character, and by disinterested witnesses." *Kerr v. Russell, supra; Baird v. Jackson*, 98 Ill. 78. The reasons for these rules are obvious and satisfactory. They are essential to the security of titles. If the solemn deed of a party to real estate duly attested by a public officer, and recorded according to law, may be avoided by the grantor's individual oath, or by anything short of clear and convincing evidence, the efficacy of recording statutes is largely destroyed, and the title to such property is precarious, indeed. Public policy, as well as individual security, require that the ownership and peaceful possession of land should be subjected to no such hazard.

Let us illustrate the force of these conclusions by the case at bar. The instrument in question was regular in form. It was duly recorded. The certificate of acknowledgment complied with the law in all essential particulars, and there was absolutely nothing to advise parties dealing with the property of the alleged forgery. There is no claim or pretense that defendant is not an innocent purchaser for valuable consideration, without notice of any such defect. For 16 years plaintiff paid no taxes, and neither exercised, nor attempted to exercise, any of the rights of ownership over the property. Ever since its purchase in 1872, defendant, and parties holding title through defendant, have been in undisputed possession, and have discharged the burden of taxation. Without one word of objection from plaintiff, they have been permitted to expend large sums of money in the erection of buildings, and placing of other permanent improvements upon the premises; such improvements comprising a large part of the town of Manitou. Under these circumstances, and at the end of the 16 years, plaintiff returns to the state, and by his individual oath, substantially unaided, undertakes to destroy the force and effect of an official certificate, and to undermine the apparently perfect title to this valuable property. The acknowledging officer, who is present, and is friendly to plaintiff, is not called upon to say that the certificate is a forgery, while plaintiff himself avoids giving any direct evidence to this effect. The negative testimony of certain witnesses as to plaintiff's presence in Colorado on the first of February, 1867, when the acknowledgment purports to have been taken, is entitled to but little weight. He himself admits that, in November or December preceding, he was here, but asserts that he then left and went to Cheyenne. Had the *bona fides* of the certificate in question been submitted to a jury upon all the evidence, with a proper instruction, and by them resolved for plaintiff, it would have been the court's unquestioned duty to vacate the special finding. Plaintiff failed, both in the quantum and kind of proof, to establish his charge of forgery. See *Kerr v. Russell, supra*, and cases cited; *Harkins v. Forsyth*, 11 Leigh, 294.

We do not rest our decision, as to the power of attorney, upon the rule cited that, "in favor of innocent purchasers for valuable consideration, without notice, it [the certificate of acknowledgment] is conclusive as to all matters which it is the duty of the acknowledging officer to certify, if he has jurisdiction." Whart. Ev. § 1052, and cases. Had plaintiff clearly and convincingly established the fact that both his signature and acknowledgment were forgeries, this rule would have no application, even though defendant is a purchaser of the kind described. The deed to Palmer executed by Pollock under the power of attorney above mentioned, which conveys 80 acres, including the specific lots and parcels of land in the complaint referred to, is valid. Counsel for plaintiff asserts that the certificate of acknowledgment thereto attached is defective, but he makes no other or further reference to

the subject in argument. We are not advised of the particular defect upon which he relies. While this acknowledgment is somewhat informal, we think there is a substantial compliance with the statute of 1861 which was in force when the conveyance was executed. It is our opinion that the title of plaintiff and whatever possessory rights he held in the premises passed to Palmer through these instruments. If this conclusion be correct, it follows that plaintiff could not recover.

The assignments of error relating to the admission of evidence, and to the giving and refusing of instructions, need not be considered. Appellant could in no way be prejudiced by the expert testimony concerning his signature; the matter being, by virtue of the law, as we have already seen, wholly immaterial. Under our views above expressed, there was no necessity for submitting any question of fact to the jury, and the instruction to return a verdict for defendant was in order.

Plaintiff admits the due execution and delivery to Pollock, in 1867, of an absolute deed, referring to the identical 80-acre tract above mentioned. This title, such as it was, also passed by deed to Palmer, and through him to defendant. But plaintiff now undertakes to avoid the effect of this line of conveyances, on the ground that there was a patent ambiguity in the description, which renders inoperative the deeds to Pollock, and from Pollock as grantor to Palmer. Whether these deeds be valid, or, as plaintiff claims, void for uncertainty, is a matter we deem it unnecessary to discuss; for, if valid, the title to the premises therein described passed to Palmer; if void, a like result followed, as we have seen, through the power of attorney and deed from Pollock, as attorney in fact, to Palmer.

The foregoing conclusions being decisive of the case, we shall decline to lengthen this opinion by a discussion of the defense resting upon the statute of limitations.

The judgment is affirmed.

10 Colo. 153

GIBBS and another, Copartners, etc., v. WALL and another, Copartners, etc.

(Supreme Court of Colorado. June 15, 1887.)

1. EXCEPTIONS—HOW TAKEN—JUDGE'S SIGNATURE.

If the appellant writes, at the close of each instruction to which he excepts, the words "excepted to," there is a substantial compliance with Code Colo. p. 58, § 69, providing that "a party excepting to the giving of the instructions * * * shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken the words 'Excepted to,' which shall be signed by the judge." The omission of the judge to sign an instruction so excepted to cannot prejudice the rights of the appellant.

2. SAME—NUMBERING.

Nor is the omission of the appellee to number the instructions prayed by him, and excepted to by the appellant, a fatal defect.

3. APPEAL—ASSIGNMENT OF ERROR—FORM.

An assignment of error upon an instruction which sets out the instruction excepted to *in hæc verba* is sufficient.

4. INSTRUCTIONS—ISSUES.

Where the only issue made by the pleadings is as to the fact of a warranty as to the disposition of certain horses sold by the defendant to the plaintiff, and there is no plea or proof of accord and satisfaction or payment, there is no foundation for an instruction as to the verdict which the jury should render, if they should find that there had been a settlement between the parties and it is error to give such an instruction.

5. SAME.

Where an express warranty is alleged and proved, and there is no contention at the trial as to an implied warranty, an instruction as to the effect of an implied warranty, if proven, is inapplicable to the issue, and is calculated to mislead the jury.

6. APPEAL—REVIEW—RECORD.

An objection that the evidence did not support the verdict will not be inquired into on appeal, where the bill of exceptions shows affirmatively that all the evidence elicited in the case is not contained therein.

Appeal from district court, Saguache county.

Arthur & Vosburg, for appellants.

MACON, C. By the uncontradicted testimony in this case, it appears that on the seventeenth day of May, A. D. 1881, appellees sold appellants five horses for use in a livery stable, carried on by appellants at that time in the town of Saguache, in this state, and warranted them all to work well, either single or double, except one, as to which they declined to warrant him to work alone, but did warrant that he would work double. On trial of the horses, they were all found to be balky, and, while they would work well at times, they were liable to stop and refuse to go at any time. Two of these horses were driven by appellees for appellants before the purchase, and showed no bad traits, and seemed to be satisfactory to appellants; but the other three were not tried before the purchase, and were bought on the warranty aforesaid. One Buchanan acted as salesman in the transaction for appellees, and was called and examined as their witness on the trial, and admitted that one of the horses had to be led before he was driven out of Denver by appellants on their way to Saguache. The horses were sold and bought in the city of Denver.

It was also shown by uncontradicted testimony that of the two horses known as the "Chestnut team" one or both balked on the way to Littleton on the same day that appellants left Denver to go to Saguache. On the arrival of appellant Fish at Monument, he stopped and corralled the horses, and returned to Denver, called upon Buchanan, complained of the horses, and informed him of their balky disposition, and of the trouble he had had in driving them. Buchanan returned with Fish to Monument to examine the horses, and assist him to drive them from Monument to Colorado Springs, a distance of about 25 miles. Some of these horses balked with Buchanan at Colorado Springs, and Fish expressed to Buchanan a desire to return the horses to appellees, but was dissuaded therefrom by Buchanan's assurance that the horses would drive well by the time they reached Saguache, and that if they continued balky after their arrival at Saguache, that appellees would make it "all right," and at the same time gave Fish \$20 or \$30, as Buchanan says, to pay the expenses of delays occasioned Fish by the bad disposition of the horses, and also paid the stable bill at Colorado Springs. This sum of \$20 or \$30 and the stable bill were not given or received as a satisfaction for the breach of the warranty. Buchanan returned to Denver and Fish to Saguache with the horses, and put them in the livery stable of appellants. Their dispositions did not improve, and they continued from time to time to balk, though they were used in and about the livery stable, and let to customers. Some time after Fish's arrival at Saguache he returned to Denver, called on Buchanan, and stated to him that the horses continued unsatisfactory, and were not as they had been warranted to be; and called also upon appellee Wall, had some conversation with him on the subject, and was told by Wall to wait until appellee Witter returned to Denver, and they would endeavor to arrange the matter; whereupon Fish returned to Saguache, and no further negotiations took place between them on the subject.

Some time in the month of July, 1881, appellants brought suit against appellees upon the warranty, in the county court of Saguache county, setting up the terms of the warranty to be that said horses were kind, thoroughly and well broke, and would drive single and double, and that they were in all respects suitable and proper horses for plaintiffs' use in their livery stable; averring breach of the warranty, and laying their damages at \$500. Defendants below answered, admitting that plaintiffs were partners, and that defendants were also partners; admitting also the sale of the horses; but deny that any of the horses were warranted as to any quality, or that they made any repre-

sentations as to the horses; and aver that plaintiffs acted upon their own judgment in selecting the horses, after having carefully tried the same; further aver that plaintiffs took possession of the horses, and converted them to their use, and had never returned, or offered to return, the same, and still had possession thereof; averring the value of the horses to be \$750.

In the month of September of that year the case came on for trial in said court, and judgment was rendered against the plaintiffs below for costs, from which judgment the plaintiffs appealed to the district court of said Saguache county; and on the twenty-fourth day of December, 1881, the cause was tried in the district court, and a verdict found for defendants. Plaintiffs filed a motion for a new trial, which was overruled by the court, and judgment rendered on the verdict, to which plaintiffs excepted, and appeal to this court, and assign 10 errors occurring in the trial.

Before examining the assignments of error upon the instructions refused for plaintiffs, and given for defendants, it is necessary to consider the objection of defendants, made in argument, that no proper exceptions were taken and saved to the instructions now objected to, because the same were excepted to *en masse*. If this point is well taken, it would seem to bring this case within the rule pointed out and enforced in *Webber v. Emmerson*, 3 Colo. 251. It is true that in the bill of exceptions, following immediately after the instructions, this sentence occurs: "Whereupon the plaintiffs, by their counsel, excepted to the court giving the above and foregoing instructions on behalf of defendants." If this were all the bill of exceptions contained as to exceptions taken by the plaintiffs in error to the instructions in behalf of defendants, it might be necessary to hold that such exception was not sufficient; but it clearly appears in the bill of exceptions that each of the first four instructions given in behalf of defendants was specifically excepted to by plaintiffs. In the margin of each of these four instructions are found the words, "Excepted to by plaintiffs." Does this show an exception to each of these instructions? We think it does. It is true that section 69, p. 56, Code, in force at the time of this trial, provides that "a party excepting to the giving of the instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions, but it shall be sufficient to write at the close of each instruction to which exception is taken the words 'Excepted to,' which shall be signed by the judge." This provision was intended to guide and direct the judge, not that of the party litigant, except so far as such party was required to write upon the instructions his exception. The signature of such judge the party might well leave to the judge, upon the assumption that he would do that which by law he was required to do, and we cannot hold that the omission of the judge to comply with this direction of the statute ought to or can prejudice the rights of the party. If the party wrote at the close of each instruction to which he excepted the words "Excepted to," he did all he was required to or can do, and may well trust the judge to do his duty in the premises. The judge has in this instance signed the bill of exceptions, which shows unequivocally that, at the close of each of the aforesaid four instructions for defendants, the plaintiffs in error excepted thereto; and the insertion in the same bill of exceptions of the general words above quoted does not change the effect of the specific statements found therein. The maxim, *utile per inutile non vitiatur*, has a perfect application in this particular. The specific exception to each of the first four instructions given for defendants is well shown in the record, and the omission of the judge to sign such exceptions cannot preclude an examination of the errors assigned thereon by this court.

As to instructions 2 and 3, prayed by the plaintiffs and refused by the court, and as to the giving of the same as modified by the court, there seems to have been no specific exception, and for that reason the assignments of error thereon will not be considered.

It is further contended by defendants in error that the assignments of error did not sufficiently point out the action of the court, or the language of the instructions excepted to. The fifth and sixth assignments, upon the first and second instructions given for defendants in error, set out *in hæc verba* the instructions excepted to, and it is impossible to conceive how they could be more specific. The rule does not require that the assignments of error should be an argument, and to require more particularity than has been pursued in this case would be to require an argument establishing the error complained of.

It only remains to inquire whether in giving such instructions as plaintiffs in error properly excepted to at the trial below, and upon which they have assigned error in this court, there is any material error prejudicial to plaintiffs. The fifth assignment goes to the first instruction asked by and given for the defendant below. In the instruction there is error for two plain reasons: (1) There was no plea of accord and satisfaction or payment of any damages arising upon the breach of warranty; and (2) because there was no evidence which justified such instruction. The following is the instruction: "The court instructs the jury that if you believe from the evidence that, before the plaintiffs arrived in Saguache with said horses, on the way home, they discovered said defects in their traits and qualities, that they notified defendants about it, and defendants, or any one for them, came to plaintiffs, and settled for such defects so supposed to exist, by paying plaintiffs one hundred dollars, or any other sum, then the jury are instructed that was an accord and satisfaction of any claim plaintiffs had on account of any defects in said horses, and you will find for defendants."

It has already been said that the only issue made by the pleadings was as to the fact of a warranty of the disposition of the horses, and in the trial the giving of the warranty was confessed by Buchanan. There must be some correspondence and relation between the claim or defense and the evidence; and though a party may, through ignorance or inadvertence, sit by and allow his adversary to prove a case that he has not pleaded, no judgment should be given upon a case so made without at least an amendment of the pleadings. *Thomas v. Mackey*, 3 Colo. 390; *Burdsall v. Waggoner*, 4 Colo. 256, 261. Had there been a plea of payment or accord and satisfaction, or of partial payment, and any evidence to support such defense, the instruction would have been proper; but in this instance there was no foundation for it, either in the pleadings or evidence. No witness testified to any settlement of the damages or payment thereof. Buchanan, who paid the \$20 or \$30 and stable bill, did not pretend to have understood that this money was paid or accepted for any such purpose, but for the expenses caused by the delay occasioned by the horses balking on the way to Colorado Springs. He says, after speaking of his going from Monument to Colorado Springs with appellant Fish: "Then I told Mr. Fish that as they had been delayed on the road, that I wanted to pay them something for their trouble, and paid them some \$20 or \$30 for their trouble, and paid their stable bill. * * * He took the money from me, and did not say whether it settled the matter or not, and told me that he was satisfied that there would be trouble." He was then asked by appellants' counsel, "Did not you tell Fish to take the horses along, and, if they were not all right, that we would make it 'all right?'" to which he answered, "I did." It is too clear for dispute that neither Buchanan nor Fish intended this payment to be settlement or satisfaction to appellants for breach of the warranty. Such payment might be applied in reduction of the damages arising upon the breach of warranty, had there been any plea to justify such application of the payment; but in this case there was not. The court overlooked the pleadings, and mistook the effect of the evidence, and in that way fell into the error pointed out.

The sixth assignment is directed against the second instruction for the defendants below, which is in the following language: "The court directs the

jury that if you believe from the evidence that the plaintiffs, or either of them, were present when the horses were sold, and examined them, and hitched them up and drove them, then you are instructed that there is no implied warranty, as to their traits or qualities, which have been discovered, and the plaintiffs must show, by preponderance of evidence, that there was an express warranty of said horses by defendants; and, if they fail to do so, you will find for the defendants." Plaintiffs below did not proceed upon an implied warranty, and in the trial there was no contention upon it, but in their complaint alleged and on the trial proved an express warranty. The instruction therefore was inapplicable to any issue in the case, and was calculated to lead the minds of the jurors from the true issue.

The seventh and eighth assignments of error are based upon the failure on the part of defendants to number the instructions prayed by them, and of the judge to sign the exceptions of appellants' counsel thereto. These omissions are not fatal, and the judgment is not vitiated by any such omission.

The tenth and last assignment of error is that the court erred in overruling plaintiffs' motion for a new trial, because the evidence did not support the verdict, and because defendants admit by their answer all material allegations of the complaint, and upon the further reason that the law, as given by the court, is not the law in the case. As to the last clause in this assignment, it has already been discussed and disposed of, and it is unnecessary to go over the same grounds again. That the evidence did not support the verdict we cannot inquire into, for the reason that the bill of exceptions shows affirmatively that all the evidence elicited in the case is not contained therein; and, as to the defendants admitting the material allegations of the complaint, we have only to say that there are no admissions in the answer by which appellants can have any advantage, because the only cause of action stated in the complaint is explicitly and positively denied in the answer, viz., the giving of a warranty of the horses; but, for the errors in the instructions above pointed out, the judgment should be reversed, and the cause remanded for further proceedings according to law.

STALLCUP and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed, and the cause remanded.

HACKETT and another v. LATHROP and another, Partners, etc.

(Supreme Court of Kansas. June 11, 1887.)

1. SERVICE BY PUBLICATION—PROOF—AMENDMENT.

Where service is made by publication in an action named in section 72, c. 80 Comp. Laws 1879, and the notice is regular in form, but it appears from the proof of publication that the notice was first published only 37 days before judgment, such proof may, after judgment, be amended, in order to show that the notice was in fact first published 44 days before the date of the rendition of the judgment.

2. SAME—EVIDENCE.

The evidence offered in this case for the purpose of showing that such amendment ought not to have been allowed because it was not in furtherance of justice, stated in the opinion, and held to be insufficient.

(Syllabus by Holt, C.)

Error from Woodson county.

All the parties to this action were non-residents of the state of Kansas, living at Kansas City, Missouri. In 1880, Lathrop & Smith brought their action against plaintiffs in error, M. A. Hackett and Thomas Hackett, in the Coffey district court, upon a note and mortgage executed by the Hacketts. Service was made by publication, and sufficient in form and substance, but the proof of publication showed the notice was first published on the fourteenth day of

October, 1880. Judgment was rendered on the tenth day of December, 1880, being 37 days from the date of publication, as appeared from the proofs on file. An order of sale was issued, and the property upon which the mortgage was given sold, at sheriff's sale, on the twenty-third day of July, to the plaintiffs. The first notice of sale was published June 23, 1881. Afterwards the plaintiffs asked leave to amend their proof of service by publication, showing that the first publication of the notice was upon the seventh day of October, instead of the fourteenth. Such amendment was allowed by the court. Afterwards the cause was changed from Coffey county to Woodson county, because Hon. C. B. GRAVES, who was one of the attorneys for the plaintiffs in this action, had in the mean time been elected judge of the Fifth judicial district. In Woodson county the Hacketts made a motion to vacate the judgment, and to set aside the order allowing the proof of the notice of the service by publication to be amended. They introduced in evidence the affidavit of George H. English, Esq., who stated that he was an attorney of Margaret A. Hackett, one of the defendants, and who was also plaintiff in an action between her and one Lewis Hammerslough, and that he had a conversation with Gardner Lathrop, one of the plaintiffs, and requested him not to bring action against Hackett until the action of Hackett against Hammerslough should be decided; and, although Lathrop did not at any time refuse to so inform affiant, yet affiant was under the impression that Lathrop would notify him before bringing his action against the Hacketts. Lathrop did not notify said English of the pendency of this action.

G. H. English and *J. B. Scroggs*, for plaintiffs in error. *G. E. Manchester*, for defendants in error.

HOLT, C. The defendants complain of the confirmation of the sale of the land, stating that the notice of the sale was not published the time required by law before the day the land was sold. The statute provides that the publication should be for at least 30 days before the day of sale. The first publication being upon the twenty-third day of June, and the sale not being made until the twenty-third day of July, shows that it was published the time required by statute; the day of the first publication being included within the required 30 days. *Northrop v. Cooper*, 23 Kan. 432. The court allowed the amendment to be made to the proof of service by publication, and refused to vacate the judgment, and found from the testimony that the first publication was made upon the seventh day of October, 1880. It had abundant evidence to support such finding, and it is conclusive in this court. The plaintiffs in error contend that, even if this should be true, the amendment ought not to have been made, because it was not in furtherance of justice. If the first notice was published upon the seventh day of October, sufficient time elapsed before the date of the rendition of the judgment to give the court jurisdiction of the subject-matter. If it was first published upon the fourteenth day of October, then the notice was insufficient under the law.

Ordinarily all amendments of the proof of publication should be allowed in order to show the real facts in the case. Defendants contend, however, in this case, because the attorney of Margaret A. Hackett, one of the defendants, who was also a party in another action, had a talk with Lathrop with regard to giving him notice if this action should be brought, and his failure to give such notice on his part, it would not be in the furtherance of justice to allow plaintiffs to make the amendment suggested. The evidence introduced is that of the attorney of Margaret A. Hackett; and, giving it the strongest construction in defendants' favor, it appears that, by a conversation he had with Mr. Lathrop, he was left with the impression that Mr. Lathrop would notify him when Lathrop & Smith brought their action against the Hacketts upon the note and mortgage in question. He further states that Mr. Lathrop at no time refused to give such notice. In his affidavit there

was no attempt to set forth what Lathrop said in the conversation between them, and certainly nothing tending to show that Lathrop misled or attempted to mislead him. We do not see that this statement of the facts would take the case out of the ordinary rule prescribed in such cases. It was not the duty of Mr. Lathrop to give such notice. It was not in evidence that he promised to, nor did he refuse to, give it; and we think it would have been as easy for the attorney for Mrs. Hackett to have asked Mr. Lathrop in regard to the action as it would have been for Mr. Lathrop to hunt up her attorney to notify him of a matter about which it was his own special business to inquire.

We see no error in this proceeding, and hence we would recommend that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered, all the justices concurring.

YAPLE v. STEPHENS.

(Supreme Court of Kansas. June 11, 1887.)

1. SUBROGATION—WHEN ALLOWED.

Generally, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor, or in the place of the creditor, such person will be so substituted. *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. Rep. 453.¹

2. SAME—CHATTEL MORTGAGE.

Where Y. paid off certain chattel mortgages which were liens on the property of the firm of D. & Co., although executed by one of the members of the firm prior to the formation of the co-partnership, and where the same was done at the request, and with the knowledge and consent, of all the members of the firm, and with the understanding and agreement that he should have a new mortgage on the firm property to secure him, *held*, that Y. is subrogated to the rights of the prior mortgagees, upon the annulment of such new mortgage.

(Syllabus by the Court.)

Error from Atchison county.

On November 8, 1884, Myron L. Stephens commenced his action against J. C. Dowd, Hiram Yaple, W. M. Stephens, for an accounting and winding up of the business of J. C. Dowd & Co. Subsequently, Seaton & Lee, W. P. Rounds & Co., and Hill, Clark & Co. filed their interpleas, and there was also pending in the court the case of Hill, Clark & Co. against J. C. Dowd & Co. On June 26, 1885, by consent of all parties, the matters pending in all said cases were submitted to the court, a jury being waived, and thereupon the court made the following conclusions of fact:

"(1) Prior to April 17, 1884, the said J. C. Dowd owned and operated a planing-mill in the city of Atchison, the building being upon leased ground, and the machinery being contained in said building. Said J. C. Dowd was indebted to James Nesbit, and also Albert Bracke, in considerable sums of money, and the indebtedness was secured by chattel mortgages upon said planing-mill property in favor of each of said creditors. Said J. C. Dowd also became indebted to Seaton & Lea, but the same was not in any way secured.

"(2) on April 17, 1884, Norman E. Yaple purchased a one-fourth interest in said planing-mill property, for the sum of \$700, and from that time the business was conducted in the name of J. C. Dowd & Co.; and on June 14, 1884, the plaintiff, Myron L. Stephens purchased of said J. C. Dowd another one-fourth interest in said planing-mill property, for the sum of \$700, of which about the sum of \$600 was paid under the written agreement, a copy of which is set forth as Exhibit A to the plaintiff's petition. Neither said

¹ Respecting the doctrine of subrogation, and its application in equity, see *Bush v. Wadsworth*, (Mich.) 27 N. W. Rep. 535, and note. See, also, *Ferkins v. Hall*, (N. Y.) 12 N. E. Rep. 48; *McNeil v. Miller*, (W. Va.) 2 S. E. Rep. 535.

Norman E. Yaple nor the plaintiff ever agreed to assume any part of the indebtedness of said J. C. Dowd mentioned in conclusion of fact 1.

"(3) Although it was provided by the agreement of June 14, 1884, that the name of the firm should be known as J. C. Dowd & Co., yet the business was conducted principally in the name of J. C. Dowd; accounts for lumber and material being usually charged to him, and he paying the same from the earnings of the planing-mill in some instances, and in others giving his individual promissory note therefor. The plaintiff did not wish it to be generally known that he was a partner in the said firm, and this was one of the reasons for incurring the liabilities in the individual name of J. C. Dowd.

"(4) On July 15, 1884, the said J. C. Dowd executed his promissory note to L. F. Bird, for money obtained from said L. F. Bird for the use and benefit of the firm, and said J. C. Dowd at the same time executed to said L. F. Bird a chattel mortgage upon said planing-mill property to secure said indebtedness. This note, and the mortgage securing the same, were executed by the said J. C. Dowd, with the knowledge and consent of the plaintiff Myron L. Stephens and said Norman E. Yaple, and the money was used in the firm business, and for its benefit. The amount of money so obtained on said note was \$200, which was payable October 15, 1884, with interest at 12 per cent. per annum from date of note and mortgage.

"(5) The said firm of J. C. Dowd & Co., consisting of said J. C. Dowd, Norman E. Yaple, and the plaintiff Myron L. Stephens, also incurred indebtedness to W. P. Rounds & Co., and another indebtedness to Hill, Clark & Co. In the running of said business the claim of said W. P. Rounds & Co. was upon book-account for lumber and material furnished to said planing-mill, and the claim of said Hill, Clark & Co. was principally for machinery for the planing-mill, for which, on July 28, 1884, the defendants, under the name of J. C. Dowd & Co., executed their promissory note to said Hill, Clark & Co. for the sum of \$300, payable four months after date, with interest at 8 per cent. per annum. Said firm also became indebted to said Hill, Clark & Co. in the sum of \$38.41, being balance of book-account; the last item thereof being a credit of date October 21, 1884.

"(6) In September, 1884, said Norman E. Yaple became anxious to dispose of his interest in said firm. The chattel mortgage creditors, Albert Bracke, James Nesbit, and L. F. Bird, were also anxious to realize on their claims. Said J. C. Dowd consulted with said plaintiff Myron L. Stephens about the payment or securing of said chattel mortgage claims, by obtaining a new loan, and also talked to said plaintiff Myron L. Stephens about the purchase of the interest of Norman E. Yaple, and he told the plaintiff Myron L. Stephens that Hiram Yaple would advance money to pay off the chattel mortgage claims if he, the plaintiff, would buy out the interest of said Norman E. Yaple, who was his son. The plaintiff Myron L. Stephens never consented to the purchase of the interest of Norman E. Yaple, but he did agree that the mortgages should be satisfied, and that a new mortgage might be given therefor.

"(7) The chattel mortgage claims amounted to \$720, and the interest of said Norman E. Yaple was still valued at \$700. Said J. C. Dowd on October 7, 1884, executed his two certain promissory notes to said Hiram Yaple, one for \$720, and the other for \$700, each bearing interest at 10 per cent. from date. At the same time he executed a chattel mortgage upon said planing-mill to said Hiram Yaple, to secure said two promissory notes, a copy of which is annexed to the petition of said Myron L. Stephens, plaintiff, as Exhibit B., and the said Hiram Yaple caused to be paid said three chattel mortgage claims to James Nesbit, Albert Bracke, and L. F. Bird, respectively, amounting in all to the sum of \$720. Said Hiram Yaple, at the same time, executed to his son, Norman E. Yaple, his promissory note for \$700, for the interest of said Norman E. Yaple, which the said J. C. Dowd claimed to be purchased for him and the plaintiff Myron L. Stephens. Said Norman E.

Yaple was indebted to said Hiram Yaple in about the sum of \$375 at the time; and a credit was entered upon said note for said sum.

"(8) On October 21, 1884, said Myron L. Stephens executed to his father, W. M. Stephens, a chattel mortgage upon his interest in said planing-mill property, for the sum of \$796, to secure four certain promissory notes which said M. L. Stephens had previously executed to said W. M. Stephens, amounting, in the aggregate, to said sum of \$796; said sum of \$796 representing only the individual indebtedness of Myron L. Stephens to his father, W. M. Stephens, and said mortgage was executed without the knowledge and without the consent of said J. C. Dowd and Norman E. Yaple, or either of them.

"(9) On December 18, 1884, said Seaton & Lea obtained judgment against said J. C. Dowd, before a justice of the peace of Atchison county, Kansas, for the sum of \$163.82, and upon the same day caused execution to be levied upon the individual one-half interest of said J. C. Dowd in said planing-mill property.

"(10) In December, 1884, said Hill, Clark & Co. commenced an action against said J. C. Dowd, Myron L. Stephens, and Norman E. Yaple, as partners, in this court, on their said claim, and on the sixteenth day of December, 1884, caused an order of attachment to be levied upon said planing-mill property, to secure their claim.

"(11) On December 19, 1884, said W. P. Rounds & Co. obtained judgment against said J. C. Dowd, Norman E. Yaple, and M. L. Stephens, as partners, before a justice of the peace of this county, for the sum of \$289.50 debt, and \$7.40 costs, and on December 30, 1884, caused execution to be levied upon said planing-mill property to satisfy their said judgment.

"(12) When said mortgages of October 7, and October 21, 1884, were executed, said firm of J. C. Dowd & Co. were insolvent.

"(13) On October 7, 1884, when said Hiram Yaple received said notes and mortgages, he knew that the firm name was J. C. Dowd & Co., and who were the members of said firm, and that said firm of J. C. Dowd & Co. were unable to pay their debts, as they matured, and said Norman E. Yaple was largely indebted to him besides, but he had no personal knowledge of the said claims of Hill, Clark & Co. and W. P. Rounds & Co.

"(14) Said mortgage of October 7, 1884, was executed by the said J. C. Dowd, and accepted by the said Hiram Yaple, in order to give the said Hiram Yaple a lien upon said property that should be prior to and cut out any claim of partnership creditors to the extent of the claims of James Nesbit and Albert Bracke, and the said purchase price of Norman E. Yaple's interest. And the said mortgage of October 21, 1884, was given by the plaintiff M. L. Stephens, and accepted by said W. M. Stephens, for the purpose of cutting out and defeating any claim of the creditors of the firm of J. C. Dowd & Co. upon the interest of said M. L. Stephens in said property.

"(15) After June 14, 1884, part of the indebtedness to Albert Bracke and James Nesbit was paid out of the earnings of the planing-mill, and this with the knowledge of Norman E. Yaple and W. M. Stephens; but there is no evidence as to the understanding of the parties as to whether such payments were to be charged to said J. C. Dowd or not."

And thereon the court also made the following conclusions of law:

"(1) After deducting the costs in the action of M. L. Stephens against J. C. Dowd *et al.*, including the costs of the receivership, the claim of said Hiram Yaple under his mortgage, to the extent of the firm indebtedness to L. F. Bird, being \$200, with interest thereon at the rate of 12 per cent. per annum from July 15, 1884, is in equity a first lien upon the fund in the hands of the receiver.

"(2) The claim of Hill, Clark & Co. for the sum of \$338.41, with interest on \$300 thereof from July 28, 1884, at 8 per cent. per annum, and on \$38.41 thereof from October 21, 1884, at 7 per cent. per annum, together with the

costs in said action of Hill, Clark & Co. against J. C. Dowd & Co., is in equity a second lien upon the fund in the hands of the receiver.

"(3) The claim of W. P. Rounds & Co. on their judgment for \$289.50, and \$7.40 costs, is in equity a third lien upon said fund in the hands of the receiver.

"(4) If there be any residue of said fund in the hands of the receiver, the same should be divided between the said Hiram Yaple and the said W. M. Stephens, in the following proportions, namely: To the said Hiram Yaple, 910-1109 thereof, and to said W. M. Stephens 199-1109 thereof, to pay to said Hiram Yaple the sum of \$1,214, and to said W. M. Stephens the sum of \$796.

"(5) And thereafter, if any sum be remaining, the same should be applied upon the said judgment of Seaton & Lea for \$163.82."

Conclusions of law in case of Hill, Clark & Co. against J. C. Dowd & Co.:

"(1) The giving of said mortgages of October 7, and October 21, 1884, by J. C. Dowd and M. L. Stephens, respectively, was in fraud of the rights of the creditors of J. C. Dowd & Co., and sufficient ground for the order of attachment herein.

"(2) The said Hill, Clark & Co. are entitled to recover of the said J. C. Dowd, Myron L. Stephens, and Norman E. Yaple, as partners as J. C. Dowd & Co., the sum of \$338.41, together with interest on \$300 thereof from July 28, 1884, at 8 per cent. per annum, and on \$38.41 thereof from October 21, 1884, at the rate of 7 per cent. per annum, and costs of suit."

Subsequently the court rendered the following judgment, viz.: "And thereon it is adjudged and decreed by the court that the plaintiff Myron L. Stephens take nothing by his said action, and that the proceeds of the sale of the property of J. C. Dowd & Co., as heretofore reported by, and now in the hands of, Henry Denton, receiver, be apportioned, paid out, and applied as follows: (1) That there be first paid the costs in the action of Myron L. Stephens against J. C. Dowd, Hiram Yaple, and W. M. Stephens, including the costs of the receivership. (2) That there be paid to Hiram Yaple the sum of (\$200) two hundred dollars, with interest thereon at the rate of twelve per cent. per annum from July 15, 1884. (3) That there be paid to Hill, Clark & Co. the sum of three hundred thirty-eight and 41-100 (\$338.41) dollars, with interest on three hundred dollars thereof from July 28, 1884, at eight per cent. per annum; and on thirty-eight and 41-100 dollars thereof, interest at seven per cent. per annum from October 21, 1884; together with all costs in the action of Hill, Clark & Co. against J. C. Dowd & Co. (4) That there be paid to W. P. Rounds & Co. the sum of two hundred eighty-nine and 50-100 (\$289.50) dollars debt, and seven and 40-100 (\$7.40) dollars costs, in the action of W. P. Rounds & Co. against J. C. Dowd & Co. (5) That there be paid to Hiram Yaple the sum of one thousand two hundred fourteen (\$1,214) dollars, and to said W. M. Stephens the sum of seven hundred ninety-six (\$796) dollars; and, if the fund in the hands of the receiver be sufficient to pay said amounts, that the residue so in the hands of said receiver, after the payment of said claim of W. P. Rounds & Co., be paid to said Hiram Yaple and W. M. Stephens in the following proportion: The said Hiram Yaple, 910-1109 of said residue; and to W. M. Stephens, 199-1109 of said residue. (6) That if any sum be remaining after the payment of said claim to Hiram Yaple and W. M. Stephens, that the same be paid upon the said judgment of Seaton & Lea for \$163.82."

Hiram Yaple, one of the defendants, excepted to all the rulings, findings, and judgment of the court, and brings the case here.

Gilbert & Walker and *Everest & Waggener*, for plaintiff in error. *Jackson & Roysse*, *Martin & Orr*, and *Tomlinson & Eaton*, for defendant in error.

HORTON, C. J. On October 7, 1884, J. C. Dowd, of the firm of J. C. Dowd & Co., executed two promissory notes to Hiram Yaple, one for \$720, and the
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other for \$700, each bearing interest at 10 per cent. per annum from date. At the same time he executed to Hiram Yapple a chattel mortgage upon the planing-mill property operated by J. C. Dowd & Co., to secure these notes. At the time of the execution of the chattel mortgage, James Nesbit, Albert Bracke, and L. F. Bird, respectively, held claims secured by mortgages upon the planing-mill property, amounting in all to the sum of \$720. The mortgages of Nesbit and Bracke had been given by J. C. Dowd, upon property subsequently acquired by the firm of J. C. Dowd & Co., prior to the formation of the partnership. The mortgage of Bird was given by J. C. Dowd after the formation of the partnership, with the consent of his partners, for money for the use and benefit of the firm. Hiram Yapple paid off the mortgages of Nesbit, Bracke, and Bird, and executed to Norman E. Yapple his promissory note of \$700; but \$375 of this was entered as a credit upon the note for certain indebtedness from Norman E. to Hiram Yapple. It appears from the findings that although the firm consisting of J. C. Dowd, Norman E. Yapple, and Myron L. Stephens, was known as J. C. Dowd & Co., the business was conducted principally in the name of J. C. Dowd. Before J. C. Dowd executed the mortgage of October 7th, he consulted with his partners, Norman E. Yapple and Myron L. Stephens, about the payment of the mortgages of Nesbit, Bracke, and Bird, and all of the partners agreed that the prior chattel mortgages should be satisfied, and a new mortgage given to Hiram Yapple therefor. Although the mortgages executed to Nesbit and Bracke by J. C. Dowd were executed prior to the formation of the firm of J. C. Dowd & Co., they were prior liens upon the property in which the partners were interested. Norman E. Yapple and Myron L. Stephens never assumed any part of this indebtedness, and were not personally responsible therefor, but these mortgages covered the planing-mill property operated by the firm. It is conceded that Hiram Yapple furnished the money to pay off the chattel mortgages of Nesbit, Bracke, and Bird, and that he did so at the request, knowledge, and consent of all the members of the firm, and with the understanding and agreement that he should have a new mortgage on the firm property to secure him. He cannot, therefore, be said to have been a stranger, or a mere volunteer, in paying the mortgages of Nesbit, Bracke, and Bird.

Generally, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor, or in place of the creditor, such person will be so substituted. *Crippen v. Chappel*, 35 Kan. 495, 11 Pac. Rep. 453. Under the general doctrine of subrogation, or of equitable assignment, this case comes within this doctrine; and as the new mortgage of October 7, 1884, has been set aside, Hiram Yapple should have been subrogated to the rights of Nesbit and Bracke, as well as of Bird. The learned trial court decided that the claim of Hiram Yapple under his mortgage of October 7, 1884, was a first lien upon the fund in the hands of the receiver to the extent of the firm indebtedness to L. F. Bird for \$200, with interest from July 15, 1884, at 12 per cent. per annum. The indebtedness of J. C. Dowd to Nesbit and Bracke should also have been included as a first lien upon the fund in the hands of the receiver. The payment of the prior mortgages of Nesbit and Bracke by Hiram Yapple was not in fraud of the rights of the creditors, or any of the partners, and Yapple is entitled to be substituted in the place of Nesbit and Bracke.

The judgment of the district court will be reversed, and the cause remanded, with direction for judgment to be entered, upon the findings of fact, that Hiram Yapple have a first lien upon the fund in the hands of the receiver for all sums due him upon the chattel mortgages of Nesbit, Bracke, and Bird.

(All the justices concurring.)

BROQUET v. TRIPP.

(Supreme Court of Kansas. June 11, 1887.)

1. CONFUSION OF GOODS—BREACH OF WARRANTY—EVIDENCE.

T. bought 400, and O. 200, sheep, out of the same flock, of B. The sheep were diseased, at the time of sale, with an infectious disease, though that fact was not known to either party to the sale. They were placed in one flock, and kept by one man, the agent of both T. and O., and became so commingled that the sheep of O. could not be distinguished from those of T. with any certainty. The sheep were put in one flock because they could be kept cheaper than in separate flocks. In an action brought by T. against B. for damages arising from a breach of warranty that the sheep sold T. were sound and healthy, *held*, not error to allow testimony to be introduced showing the general condition of all the sheep after they had been in one flock some time: it appearing that the commingling of the flock was not for the purpose of defrauding B., nor in any way concealing evidence from him, or manufacturing evidence in favor of T.

2. SALE—WARRANTY—DAMAGES.

Where a flock of sheep are purchased under a warranty that they are sound and healthy, but are diseased with an infectious disease, the injury to the lambs resulting from such disease, and which were dropped soon after the purchase, is a proper item of damages to be considered in an action upon a breach of such warranty.

3. EVIDENCE—EXPERT—QUALIFICATION.

Where a witness is offered as an expert, but it appears upon his examination that he possesses little general intelligence, it is in the discretion of the court to refuse to allow him to give opinion testimony, even though it may appear that he has had some experience in the matter about which he was offered as a witness.

4. DAMAGES—REMITTITUR—POWER OF COURT.

A court has the power, in an action for damages, to remit a part of the verdict, and enter judgment for the residue, when the party in whose favor the verdict was rendered consents to such remission.

(Syllabus by the Court.)

Error from Mitchell county.

Hiram S. Tripp, defendant in error, plaintiff below, brought his action against Ernest Broquet, plaintiff in error, defendant below, for damages arising from the sale of sheep. Plaintiff claims, in his petition, that he purchased of Broquet two flocks of sheep; one in the fall of 1882, and the other in February, 1883. He stated that they were warranted by the defendant to be sound, healthy sheep, but, at the time he bought them, they had an infectious disease known as the "scab." He first bought 200 through his agent, Mr. Ramage, plaintiff himself being a commercial traveler, and did not give them any personal attention whatever. The sheep, when bought appeared well and healthy, but almost immediately thereafter showed signs of the disease. The defendant denies that there was any warranty given at the time of the sale of the sheep. There was no question, in the evidence, but that the sheep were diseased, but they were not known to be diseased by the defendant at the time of the sale. Ramage took the 200 sheep bought by him, and cared for them. The following February, plaintiff bought 200 more sheep of Mr. Broquet; and at the same time another traveling man, by the name of Ovelman, bought the same number of Mr. Broquet out of the same flock. After a time all these sheep bought in February were placed in the care of Mr. Ramage, and turned in with the sheep bought in November. Mr. Ramage put a mark on the first 200 sheep, in order to distinguish them from those he received in February. There was some testimony tending to show that Ramage did not take proper care of the sheep, did not give them sufficient feed, and did not provide them with sufficient shelter. The sheep became almost worthless. A verdict was rendered for plaintiff for \$850. Defendant moved for a new trial. The court overruled the motion upon the condition that the plaintiff should remit \$350 of the verdict.

L. J. Crans and *J. J. McFarland*, for plaintiff in error. *A. H. Ellis*, for defendant in error.

HOLT, C. Plaintiff in error, defendant below, makes several assignments of error. The first one that we wish to consider is that the court erred in admitting testimony, over the objection of the defendant, tending to show the condition of the entire flock of sheep kept by Mr. Ramage, including the 200 purchased by Ovelman in February, 1883. He claims that, unless the sheep of the plaintiff were distinguished from those of Ovelman, there could be no testimony introduced showing that they were diseased. We think that this objection is not well taken. The testimony of the witnesses was that they were all of the same quality of sheep, purchased from Broquet, and came from the same flock owned by him, and that it was impossible to tell which sheep belonged to either purchaser, except the 200 that were marked by Ramage. If the claim of the defendant is correct, neither Ovelman or the plaintiff could have recovered any damages arising from the breach of the warranty of the defendant of the sheep bought in February. There was no confusion or commingling of the sheep by the plaintiff or his agent, for the purpose of concealing the facts from, or manufacturing evidence against, Broquet, or in any manner defrauding him. The flocks were put together simply for the reason that they could be more easily cared for in one flock than in separate flocks. The court, moreover, in his instructions to the jury, cautioned them against allowing damages, in this case, to plaintiff, which Ovelman may have sustained because his sheep were diseased, in language so strong that the defendant, at least, can have no grounds of complaint.

Defendant further complains that there was testimony introduced, over his objection, tending to show that the lambs were diseased, and claims that the damages to the lambs was not a proper item to be considered under the warranty of the defendant. The sheep purchased by the plaintiff were almost entirely ewes, and were bought for the purpose of breeding. If the lambs had died when they were dropped, by reason of the disease of the ewes, that would certainly have been an item of damages, or if the ewes, at the time of parturition, had died by reason of weakness occasioned by the disease, that also would have been a matter to be investigated and allowed in the claim for damages. If the lambs naturally and necessarily became diseased by running with the flock of diseased sheep, as it appears from the evidence in this case they did, we believe that fact could properly be considered in ascertaining the amount of damages to be recovered.

Another assignment of error is that the court permitted one Hill to testify as an expert. There was no substantial error in the admission of his evidence. He said that the sheep were diseased, and described how they appeared,—a description that any person who had examined the sheep, whether he was an expert or had any skill at all, could have easily seen and described. The testimony he gave, claimed by defendant to be expert testimony, was that the sheep were diseased. The testimony of other witnesses, showing that they were diseased, was overwhelming; and we presume that a witness, not an expert, could say that an animal was diseased, if he did not attempt to describe the nature and effects of such disease.

Defendant further claims that a witness which he sought to introduce,—Witt, by name,—should have been allowed to testify as an expert; but his examination shows that he was unskilled, so far, at least, as the use of the English language is concerned. He testified that the disease called "scab" was caused by an insect, which was not visible to the naked eye, but which he had examined often through the telescope, and then corrected himself by saying that he had looked at it through the telephone. Other parts of his testimony indicate about the same degree of general intelligence. The ability or disability of a witness to testify, under the legal requirements for the admission of opinion evidence, is a matter often most conveniently and satisfactorily determined by a personal examination of the witness, and we presume that the court, having this witness before it, and perceiving his mental caliber, was

justified in excluding his testimony. The questions propounded to him were allowed to be answered fully by other witnesses produced by the defendant, whom the court thought were qualified as experts. The defendant, therefore, could not have been materially prejudiced by the court refusing to allow him to testify.

The defendant complains, further, that the court erred in refusing No. 16 of the instructions asked. The record does not show that there was any exception to the refusal to give such instruction. The defendant still further complains that the court, as a condition for overruling his motion for a new trial, remitted \$350 of the verdict. We think he had ample authority to do so. If the plaintiff consented thereto, the defendant ought not to complain, as the reduction was in his favor. It seems to be well settled that in actions for damages of this kind, an excess in the verdict above what the evidence might justify or satisfactorily establish, may, with the consent of the party in whose favor the verdict was given, be remitted, and judgment entered for the residue. The exercise of such power is sanctioned on the theory that the excess arises either from error of law, misapprehension of the facts, or error in computation by the jury, and that such error does not permeate the entire verdict, and therefore it is competent to correct it. When the assent of the party is obtained whom alone the correction would prejudice, the other party has nothing of which to complain; such order of the court being in his favor. *Pendleton St. Ry. Co. v. Rahmann*, 22 Ohio St. 446; *Brockman v. Berryhill*, 16 Iowa, 183; *Dawson v. Wisner*, 11 Iowa, 6; *Craig v. Cook*, 23 Minn. 232; *Corcoran v. Harvan*, 55 Wis. 121, 12 N. W. Rep. 468.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

ATCHISON, T. & S. F. R. CO. v. RICE.

(*Supreme Court of Kansas. June 11, 1887.*)

1. COURTS—VALIDITY OF—CONSTITUTIONAL LAW.

Chapter 140 of the Laws of 1885 is constitutional and valid, and the superior court of Shawnee county, Kansas, created by it, was a valid court from March 13, 1885, up to the first Monday of April, 1887.

2. JUSTICE OF PEACE—JURISDICTION—CRIMINAL LAW.

A justice of the peace has no authority outside of his own township to entertain a criminal complaint made under section 36 of the Criminal Code, and issue a warrant thereon for the arrest of the accused; but, if he does so act outside of his own township, his proceedings are void.

3. PLEADING—VARIANCE—AMENDMENT.

Where a petition intending to state a cause of action for an unlawful arrest and imprisonment, sufficiently states a cause of action for malicious prosecution, and defectively states a cause of action for false imprisonment, and the evidence clearly shows a cause of action for false imprisonment, and the defendant is not misled, *held*, that the petition might be amended at any time during the trial so as to make it sufficiently state a cause of action for false imprisonment; and query, is the variance between the petition and the proof material?

4. DAMAGES—SPECIAL—PLEADING—FALSE IMPRISONMENT.

Where a petition sets forth a cause of action for an unlawful arrest and imprisonment, but does not set forth any sickness, nor any facts from which it might be inferred, or from which the law would imply that sickness would necessarily follow from the facts alleged, or from the arrest and the imprisonment, it is error for the court to permit evidence to be introduced, over the objection of the defendant, tending to show that after the arrest and the imprisonment the plaintiff became sick, and that the sickness was produced by such arrest and imprisonment.

(*Syllabus by the Court.*)

Error from Shawnee county.

Geo. R. Peck, A. A. Hurd, W. C. Campbell, and Robert Dunlap, for plaintiff in error. *Walters & Chase*, for defendant in error.

VALENTINE, J. 1. One of the principal questions urged by counsel for the plaintiff in error in this case, and one to which they have devoted 10 pages of their brief, is whether the superior court of Shawnee county, Kansas, was, at the time of the trial of this case, or, indeed, at any time, a valid court. It is claimed that it never was a valid court, and this upon the ground that the act of the legislature creating it is unconstitutional and void; and it is claimed that such act is unconstitutional and void for the reason that the court was to continue in existence from March 13, 1885, up to the first Monday of April, 1887, without any provisions being made for the selection of a judge of such court except by an appointment by the governor. Laws 1885, c. 140. We think that the act is constitutional, and that the court was valid; and in support of this opinion we would refer to the reasoning in the case of *Matthews v. Commissioners Shawnee Co.*, 34 Kan. 606 *et seq.*, 9 Pac. Rep. 765, and the provisions of the constitution there cited.

2. The next question presented for our consideration, and one to which counsel for plaintiff in error have devoted 13 pages of their brief, is whether the court or magistrate before whom the proceedings out of which the cause of action in this case arose, was a valid court or magistrate at the time and place when and where such proceedings were instituted. On this question counsel for the respective parties occupy different positions from those which they occupied upon the other question. On this question counsel for plaintiff in error, defendant below, claim that the action of the court or magistrate before whom such proceedings were instituted, was, at all times, in all places, and in all respects, legal and valid; while counsel for the defendant below claim that such court or magistrate had no power or jurisdiction whatever to act at the time and place when and where such action was had. This action was instituted for the recovery of damages alleged to have resulted from an unwarranted criminal prosecution and imprisonment instituted and carried on by the plaintiff in error, defendant below, against the defendant in error, plaintiff below. It appears that during the months of June and July, 1883, one L. C. Hartman was a justice of the peace of Dodge township, Ford county, Kansas; that Hamilton county, Kansas, was attached to Ford county for judicial purposes; that the plaintiff below, Levi T. Rice, was then at Coolidge, in Hamilton county, in the employment of the defendant below, the railroad company; that on June 29, 1883, the defendant below, through its agents, procured the said justice of the peace to go to Coolidge, a distance of about 115 miles from his office, and there to entertain a complaint made by one of the company's agents against the plaintiff below and seven others, charging them with grand larceny, to administer the necessary oath, and to then and there issue his warrant for the arrest of said persons so charged; and that the plaintiff, along with the others, was so arrested and taken to Dodge City, and there imprisoned in the county jail until July 2, 1883, when he was discharged.

The real question now presented is whether a justice of the peace has jurisdiction outside of his own township, and 115 miles from his office, but in a county attached to his own county for judicial purposes, to entertain a criminal "complaint" made under section 36 of the Criminal Code, and then and there to "examine on oath the complainant and any witness produced by him," and if from the evidence given to the justice by such complainant, and any other witness or witnesses so produced, it has been made to "appear that any such offense has been committed," to then and there, as a "court or justice," "issue a warrant" "requiring the officer to whom it shall be directed, *forthwith* to take the person accused, and bring him before some court or magistrate of the county, to be dealt with according to law; and in the same warrant" to "require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination."

About all that is necessary for the decision of this question is to refer to the following decisions made by this court, and to the following sections of

the constitution and the statutes, to-wit: *Wilcox v. Johnson*, 34 Kan. 655; 659, 9 Pac. Rep. 610; *Phillips v. Thralls*, 26 Kan. 780; *Morrell v. Ingle*, 23 Kan. 32; *Commissioners Marion Co. v. Barker*, 25 Kan. 258, 260. Section 36 of the Criminal Code, above referred to, reads as follows:

"Sec. 36. Upon complaint, made to any such magistrate, that a criminal offense has been committed, he shall *examine*, on oath, the complainant, and any *witness* produced by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and, if it shall *appear* that any such offense has been committed, *the court or justice* shall issue a warrant, naming or describing the offense charged to have been committed, and the county in which it was committed, and requiring the officer to whom it shall be directed, forthwith to take the person accused, and bring him before some court or magistrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination."

Section 4, art. 9, of the constitution, in effect declares that justices of the peace are *township* officers. Section 9, art. 3, of the constitution, provides for electing at least two justices of the peace in each township, and further provides that that number may be increased. Section 11, art. 3, of the constitution, requires justices of the peace to reside in their respective townships during their terms of office.

Section 3 of the general township act makes the township the locality territorially which elects justices of the peace. Comp. Laws 1885, c. 110, par. 6421. Section 4 of that act requires that justices shall reside and hold their offices in the townships for which they shall have been elected, as the constitution does. Sections 35, 36, and 37 of that act clearly show, by providing for more than two justices in a township, and by other provisions, that it was not intended that they should be perambulatory. Section 1, c. 140, of the Laws of 1877, reads as follows:

"Section 1. That any justice of the peace in any organized county to which any unorganized county is or may be attached for judicial purposes, *and in which there shall be no justice of the peace*, shall, in all criminal matters where a felony or misdemeanor is charged, have the same jurisdiction over such unorganized county, and of offenses committed therein, as in such organized county; *and their processes may be served by the sheriff or any constable of such organized county, and the offender be brought for hearing, and witnesses compelled to attend before such justice*, the same as in cases arising in such organized county." Comp. Laws 1885, c. 83, par. 5141.

Section 2 of the general justice's criminal act declares that the offender must be *brought before* the justice for trial. Comp. Laws 1885, c. 83, par. 5143. Sections 5 and 7 of that act use the expressions "appear before the justice," and "attend before" him. Section 12 requires the jurors to *appear before* such justice. And it is the same way all through the Civil Code relating to justices.

In 1883 Hamilton county was an unorganized county, attached to Ford county for judicial purposes, (Laws 1881, c. 99, § 3;) and an unorganized county attached to another county for judicial purposes is in effect a township of such other county, (Laws 1883, c. 143, § 1;) and, as before stated, *every township must have at least two justices of the peace*, and may have more, (Const. art. 3, § 9; Gen. Township Act, § 4.)

We think it follows from the foregoing decisions, and the sections of the constitution and statutes cited, that justices of the peace must perform all their official acts within their own townships, and that whenever they wander beyond the boundaries of their own townships, and into the jurisdiction of justices of the peace of other townships, they cease to be justices of the peace, and any attempted official acts there performed are mere null-

ities. There are two sections of the statutes which tend to support the inference that justices of the peace might in some cases perform duties outside of their townships, but within their respective counties. These statutes are section 1 of the act relating to oaths, and section 7 of the act relating to criminal procedure. These statutes mention justices of the peace as "justices of the peace in their respective counties," and not as justices of the peace in their respective townships. We do not, however, think that the inference that might be drawn from these last-mentioned sections can overturn or destroy the unavoidable implications that must arise from the constitution and the other statutes. A justice of the peace is a township officer, under the constitution, and cannot be a county officer or a state officer. It is true that justices of the peace are in some sense "justices of the peace in their respective counties," and also *in the state*; it is true, that a justice of the peace may, within his own township, perform the duties of an examining magistrate in cases, or hear cases, arising *in any part of his county*; and it is also true that he may, within his own township, issue criminal process *to be served in any part of the state*. But it does not follow from these powers given that he may go into any part of the county, or into any part of the state, and there perform official acts. He can perform his official acts only in his own township. Criminal complaints must be taken to the justice, and not the justice to the criminal complaints. If for any reason it is more desirable to commence a criminal prosecution in one township than in another, it must be commenced before some justice of the peace of that township; but, if it is preferable to commence before some particular justice, then the parties must go to that justice, and not transport him into some other township or county, and into some other jurisdiction. His office is not migratory.

3. But it is claimed by the plaintiff in error that even if the superior court of Shawnee county was, while this action was pending before it, a legal and valid court, and even if the justice of the peace, while he was in Hamilton county, was beyond his jurisdiction, and without legal power to act still the plaintiff's petition is defective in not alleging this want of jurisdiction, and this want of power to act. It is claimed that, although it may be true that some of the facts necessary to constitute a cause of action for false imprisonment may have been set forth in the plaintiff's petition, still that the petition does not set forth all of them, nor enough of them to show a cause of action for false imprisonment; and therefore that this action must fail as an action for false imprisonment. In other words, it is claimed that the plaintiff's petition does not set forth or show that any of the proceedings under which the plaintiff was arrested and imprisoned were the acts of the justice while he was outside of his township, or that the proceedings for any other reason were void. It is true that the petition is defective in these respects. It properly alleges an arrest and an imprisonment, and it alleges that the plaintiff below was arrested and imprisoned "unlawfully," but why the arrest and imprisonment were unlawful is not particularly stated. It may be possible that the pleader believed that they were unlawful wholly because they were malicious and without probable cause, and not even partly because the justice of the peace was outside of his jurisdiction, and his proceedings therefore void.

And here we might say that counsel for the plaintiff in error, in their brief, enter into an elaborate disquisition upon the distinctions that existed at common law between the old common-law actions of false imprisonment, and malicious prosecution. These distinctions, however, have but little value in this state; for in this state all the old forms of action are abolished, and in their place only one form of action is given, called "a civil action," (Civil Code, § 10;) and in this form of action redress for all "injuries suffered in person, reputation, or property" (Const. Bill of Rights, § 18) may be had. In this form of action the plaintiff in drawing his pleading, which is called a "petition," is not required to know just what could have been set up in the

old common-law action of "trespass" or "case," or what the distinctions between "false imprisonment" and "malicious prosecution" were; but all that he is required to know or to do is *to know how to state the real facts of his case as they actually occurred, and to so state them*; and, if these facts show a cause of action, he is entitled to his relief, whether such facts show a cause of action in "trespass" or in "case," or in both, or for "false imprisonment" or for "malicious prosecution," or for both; and no objection to the petition could be maintained, even if the facts should show a blending of the two kinds of action. *Bauer v. Clay*, 8 Kan. 580; *Wagstaff v. Schtippel*, 27 Kan. 454.

The elements of any cause of action are: (1) A *right* possessed by the plaintiff; (2) an *infringement* of such right by the defendant,—and it can make no difference that such infringement is accomplished partly by a *direct and immediate force*, as that denominated "a false imprisonment," and partly by *fraud, or indirect force*, as that denominated "a malicious prosecution;" for prosecutions for wrongs committed by direct force, and those committed without direct force, and merely by fraud or indirection, are not necessarily kept separate in this state. We think it is true that the petition in this case states a cause of action for malicious prosecution; but we think it is also true that it states, or comes very near stating, a cause of action for false imprisonment, and this cause of action was undoubtedly proved. If the petition had said nothing about a "warrant," or if it had stated that the "warrant" was void, which in fact it was, then it would have stated a good cause of action for false imprisonment. The object of this present action is to recover damages for the unlawful imprisonment of the plaintiff, for arresting him on June 29, 1883, near midnight, in his own house at Coolidge, and taking him from his bed, and from his wife and children, and carrying him to Dodge City, a distance of 115 miles, and there confining him in jail for about two and one-half days, along with several other persons charged with crime, and amid surroundings loathsome and humiliating; and whether this imprisonment was procured by the defendants in maliciously, and without probable cause, suing out a *valid* warrant, or in unlawfully causing his arrest upon a *void* warrant, can make but very little difference to him. The principal ground for damages in either case is the wrongful imprisonment, with its loathsome and humiliating surroundings.

Under the circumstances of this case, if the plaintiff had asked to amend his petition at any time during the trial, and possibly at any time before or after judgment, so as to make it a perfect petition for false imprisonment, the trial court should have allowed it to be done. Civil Code, § 139. Besides, can it be said, even without amendment, that the variance between the pleadings and the proof is material under the circumstances? The defendant was not misled. The defendant knew precisely when and where, and by whom and before whom, the complaint was made, and when and where, by whom, and under what circumstances the warrant under which the plaintiff was arrested was issued; and all these matters the defendant itself, and by its own testimony, proved on the trial. Without deciding the question, we would cite, in support of the proposition that the variance between the pleadings and the proof is not material, the following statute and cases: Civil Code, § 133; *Missouri Val. R. Co. v. Caldwell*, 8 Kan. 244; *Mitchell v. Milhoan*, 11 Kan. 630. *Hummer v. Lamphear*, 32 Kan. 445, 4 Pac. Rep. 865. If this case is ever tried again, we think it would be well for the plaintiff to amend his petition so as to make it show that the proceedings under which he was arrested and imprisoned were void.

4. It is also claimed by the plaintiff in error, defendant below, that the court below erred in admitting evidence of special damages not specifically alleged in the petition. The court permitted the plaintiff, as a witness, to testify that shortly after his arrest and imprisonment he was taken down with

a fever, and by reason thereof was obliged to give up work entirely. This evidence was permitted over the objections and exceptions of the defendant below, and under the claim, on the part of the plaintiff below, that such sickness was produced by the imprisonment. There is no allegation in the petition, or elsewhere, that the arrest or imprisonment caused the plaintiff to become sick, nor any allegation of facts from which such sickness would necessarily follow as a consequence. The plaintiff, in his petition, simply claims damages for injury to his reputation as an honorable citizen, and for having suffered remorse and humiliation, by reason of the prosecution, and for damage to his reputation as a business man. Under this petition evidence could not be given of any such consequential damage as sickness, for no notice was anywhere given that any such evidence would be offered. Upon this subject the court instructed the jury, among other things, as follows: "The plaintiff should be made whole for his loss of time, of health, his anxiety and suffering," etc.

Mr. Sutherland, in his work on Damages, uses the following language: "Under a general allegation of damages, the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; for these damages, the law implies, will proceed from it. These are called general, as contradistinguished from special, damages, which are the natural, but not the necessary, consequence." "Special damages are required to be stated in the declaration, for notice to the defendant, and to prevent surprise at the trial." 1 Suth. Dam. 763.

In the case of *Roberts v. Graham*, 6 Wall. 579, the following language is used: "Special damage, whether resulting from tort or breach of contract, must be particularly averred, in order that the defendant may be notified of the charge, and come prepared to meet it. *Special*, as contradistinguished from *general* damage, is that which is the natural, but not the necessary, consequence of the act complained of."

In 1 Chit. Pl. (16th Amer. Ed. from 7th Eng. Ed.) 411, the following language is used: "Damages are either general or special. *General* damages are such as the law *implies*, or presumes to have accrued from the wrong complained of. *Special* damages are such as *really* took place, and are *not implied* by law, and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent, and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. * * * And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. Thus, in an action of trespass and false imprisonment, where the plaintiff offered to give in evidence that during his imprisonment he was stinted in his allowance of food, he was not permitted to do so, because that fact was not, as it should have been, stated in his declaration. *And in a similar action, it was held that the plaintiff could not give evidence of his health being injured, unless specially stated.*"

We think the court below erred in the admission of this evidence. No person could have anticipated from the facts alleged in the plaintiff's petition, including the arrest and imprisonment, that any such sickness would have followed. Such sickness would not be a necessary result from such facts, nor would the law imply any such result. If it was the desire of the plaintiff to recover enhanced damages because of his sickness, he should have alleged the sickness in his petition, or at least he should have alleged facts from which it might be inferred, or from which the law would imply that sickness would

necessarily follow. No such facts were alleged. This question was raised in the court below by objecting to the introduction of the evidence, by excepting to the ruling of the court permitting it to be introduced, by exceptions taken to the instructions of the court to the jury, by motion for a new trial, and by excepting to the ruling of the court overruling the motion for a new trial.

A few other questions have been discussed by counsel in this case, but we do not think it necessary to consider them.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

CHAPMAN and others v. SUMMERFIELD.

(*Supreme Court of Kansas. June 11, 1887.*)

FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—CONSIDERATION.

A *bona fide* indebtedness may be paid by the husband to the wife, by a conveyance to her of his real estate, although the husband is in failing circumstances, and the effect may be that the other creditors get nothing.¹

(*Syllabus by Simpson, C.*)

Error from Leavenworth county.

Edward Chapman and Sarah W. Chapman were married in September, 1870. At the time of the marriage, Sarah W. Chapman, who was a widow, was possessed of real and personal property of considerable value. She had 80 acres of land adjoining the city of Emporia, that had been laid out as an addition to said city; two lots on the corner of Vermont and Berkley streets, and lot No. 122, Kentucky street, in the city of Lawrence; household goods and jewelry, of the value of \$1,000; and about \$2,000 in money, part of the proceeds of sale of lots in the Emporia addition. From the years 1872 to 1875 she realized about \$4,000 from the sale of lots at Emporia. She loaned her husband, Edward Chapman, the greater part of the money at various times, the largest amount at any one time being \$2,000. This, in the year 1875. In this year, Chapman claims to have conveyed directly to his wife certain real estate in Leavenworth county, but, the conveyance not having been recorded, in February, 1880, Chapman conveyed the land to his wife through a third person, subject to a mortgage to his mother, upon which about \$3,000 is due. Chapman gave a note to Melville for \$500. In 1875, this note was transferred to Summerfield, and a judgment obtained on it in April, 1880. This action is one to subject the real estate in Leavenworth county, conveyed by Chapman to his wife, to the lien of the Summerfield judgment. Trial to court, and a finding and judgment for Summerfield. The error assigned and principally discussed here is that the facts set forth in the petition of the plaintiff (Summerfield) are not sufficient in law to maintain the action.

J. W. Green and *J. H. Gilpatrick*, for plaintiff in error. *Lucien Baker* and *V. H. Harris*, for defendant in error.

SIMPSON, C. The fact of the indebtedness of Edward Chapman to his wife, Sarah W. Chapman, is very clear under the evidence. The details of their transactions, the sources from which she derived the money, the amounts received, and the date of their reception, are all given by depositions taken months before the trial, and, had they not been true, could so easily have been

¹As to the right of a wife to enforce a debt against her husband, and to receive a transfer of his property in payment thereof, or as security therefor, see *Lyon v. Zimmer*, 30 Fed. Rep. 401, and note. See, also, *Webb v. Ingham*, (Va.) 1 S. E. Rep. 816; *Jackson v. Beach*, (N. J.) 9 Atl. Rep. 380; *Burns v. Thompson*, (Ia.) 1 South. Rep. 913; *Miller v. Krueger*, (Kan.) 13 Pac. Rep. 644; *Dice v. Irvin*, (Ind.) 11 N. E. Rep. 488.

disproved that we are compelled to conclude that, as late as the year 1875, Chapman was indebted to his wife in a sum probably exceeding \$4,000. He had an undoubted legal right to prefer her as a creditor, even if the effect had been that she absorbed all this property in satisfaction of her debt. *Munroe v. May*, 9 Kan. 473. The relation existing between Edward and Sarah W. Chapman, being that of husband and wife, induces the court to scrutinize very closely their dealings with each other; but when it is clearly established that there is an honest *bona fide* indebtedness by the husband to the wife, then their mutual transactions may be reviewed in the light of the trust and confidence incident to the marriage relation.

This court, in a very recent case, that of *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. Rep. 606, has passed upon almost every question that can be raised on the record of the one under consideration. Indeed, the similarity as to the facts between the cases is remarkable, and of course the law governing that case, as announced by the court, must control this one. Most of the material testimony was taken in the form of depositions, and read on the trial below. Edward Chapman was examined on the trial, but we probably place the same estimate on his testimony as did the learned judge who tried the case. Mrs. Chapman, being a *bona fide* creditor, holds the title to the farm in Leavenworth county not subject to the lien of the Summerfield judgment, no matter what the intention of Edward Chapman was in making the conveyance.

We recommend the judgment of the district court of Leavenworth county be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

BROOKS v. HALL.

(Supreme Court of Kansas. June 11, 1887.)

SETTLEMENT—VALIDITY—MISTAKE.

If two parties having, or supposing they have, claims upon each other, agree to compromise those claims, and thereupon make a settlement of their matters in dispute, and they act at the time with good faith, and stand on an equal footing, and have equal means of knowledge as to the facts, the compromise and settlement are binding; and it is not enough to invalidate the compromise and settlement that one of the parties made an error in the calculation of the items of his claim.¹

Error from Shawnee county.

G. N. Elliott and *Thomas Archer*, for plaintiff in error. *David Overmeyer*, *G. W. Carey*, and *E. E. Chesney*, for defendant in error.

HORTON, C. J. Action by Hall against Brooks to recover \$131, alleged to be a balance due for work and labor. Hall built a frame dwelling for Brooks on the corner of Lane and Eighth streets, in the city of Topeka, under a written contract executed June 22, 1882, the contract price being \$525. He constructed one or two outside buildings under a verbal contract, and alleges that he did some extra work upon the dwelling, for all of which he charges \$180.50. He admits credits by payments of \$574.50. Brooks alleges that the work on the dwelling was done in an unworkman-like manner, and, because of this, that he has been damaged \$552. He also alleges that, after the completion of the work, there was a compromise of their claims upon each other, and that

¹The settlement of claims asserted in good faith, the validity of which has been doubted, constitutes a valid compromise, which will not be disturbed, in the absence of fraud, undue advantage, or mistake. *Shipman v. District of Columbia*, 7 Sup. Ct. Rep. 134; *Gaines v. Molen*, 30 Fed. Rep. 27; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. Rep. 546; *Stimpson v. Poole*, (Mass.) 6 N. E. Rep. 705; *Stone v. Chicago & W. M. R. Co.*, (Mich.) 33 N. W. Rep. 24; *Baumier v. Antiau*, (Mich.) 31 N. W. Rep. 888; *Adams v. Adams*, (Iowa) 30 N. W. Rep. 795; *Zimmer v. Becker*, (Wis.) 29 N. W. Rep. 228, and note; *Anthony v. Boyd*, (R. I.) 8 Atl. Rep. 701.

Hall was paid by him thereon \$65. Upon the trial the jury returned a verdict for Hall of \$151.09. In the motion for a new trial, filed by Brooks, it is alleged that the verdict is not sustained by any evidence, and that the damages given by the jury are excessive, and appear to have been given under the influence of passion or prejudice. The evidence in the case clearly establishes a compromise and settlement. The great preponderance of the evidence shows that the dwelling was defectively constructed. The architect testified "that the work was not done in a good and workman-like manner." The evidence in the case also shows that, after all the work was done by Hall, Brooks was dissatisfied with it. About November 1, 1882, Hall went to see Brooks to get a settlement with him for the building of the dwelling, and for his other work. Brooks told him to go down town, and get Mr. Hadley, the architect. Hall did as requested. Hadley came up, and the parties went through the house together, Hadley pointing out to Hall the porches, steps, and windows as not having been properly constructed. After looking through the dwelling, the parties went into one of the rooms, and tried to settle. There were differences between them. Hall wanted his pay for the work, and Brooks objected to its character, and made claim for large damages. Finally, in the presence of Hadley, the architect, Hall and Brooks made a compromise and settlement of their claims upon each other, Brooks paying \$65, and Hall accepting the same, and executing the following writing:

"Received of W. H. Brooks, Jr., sixty-five dollars, in full of all demands to date, of whatever nature and character, for all work of every description done for him, or at his suggestion, on house, barns, shed, privy, and porches.

"W. J. HALL."

The next day Hall went to Brooks, and claimed that he had made a mistake in his figures, and wanted \$131 more, but he did not offer to return the money received by him upon the settlement. The rule is if two parties having, or supposing they have, claims upon each other, agree to compromise those claims, and to come to a general settlement of the matters in dispute between them without resorting to litigation, and they act with good faith, and stand upon an equal footing, and have equal means of knowledge as to the facts, the compromise is binding. It is not enough to set aside the compromise that one of the parties may have been in error as to his figures. It is not claimed in this case that there was any mutual mistake of the parties, or that Brooks was guilty of any fraud, deceit, or misrepresentation. The only reason that Hall claims the compromise and settlement should be set aside is because he made a mistake in subtraction at the time of the compromise. This is not enough to invalidate the transaction. Of course, if there was nothing in this case but the mere writing or receipt executed by Hall, the receipt would be open to explanation. *Thompson v. Williams*, 30 Kan. 114, 1 Pac. Rep. 47; *Bridge Co. v. Murphy*, 13 Kan. 35. But as it appears that there was a compromise and settlement between the parties at the date of the writing or receipt, and as the jury had no evidence before them tending to show that such compromise and settlement were the result of any mutual mistake or fraud or unfairness, there was no evidence upon which they had the right to reject or overturn such compromise and settlement, and therefore the verdict of the jury, being unsupported by the evidence, must be set aside.

(All the justices concurring.)

ATCHISON, T. & S. F. R. Co. v. JOHNS.

(Supreme Court of Kansas. June 11, 1887.)

1. NEGLIGENCE—EVIDENCE OF—RAILROAD COMPANY.

Where the evidence shows that three servants of a railroad company, a brakeman and two section foremen, in removing a trunk from where it lay, on the company's station platform, which was covered with ice, to a baggage car, slid it on the

ice, and out of a straight line, and against the plaintiff, who was standing in plain view upon the platform, *held*, that the evidence was sufficient to prove culpable negligence on the part of the railroad company's servants.

2. MASTER AND SERVANT—SCOPE OF AUTHORITY—RAILROAD COMPANY.

And in such case, as such servants were then on the company's premises, performing this duty for the company, in the presence of other servants, and as they had performed similar services on prior occasions, *held*, that it will be presumed that they were acting within the scope of the authority given to them by the railroad company.

3. CONTRIBUTORY NEGLIGENCE—RAILWAY PREMISES.

Where an old lady went to a railroad station to assist friends, who intended to remove from the country permanently, to get to the station, and upon a train then about to depart, and after bidding her friends good-bye, and after they had got upon the train, stood for about five minutes upon the station platform to see the train start, and to bid her friends a last farewell, *held* that, while so standing upon the platform, she was not, by reason thereof, guilty of such culpable contributory negligence as would prevent her from recovering for injuries received through the negligence of the railroad company; and *further held*, that no culpable contributory negligence in any respect was shown.

4. EVIDENCE—DECLARATIONS—PAIN.

Declarations of a party with regard to a *present and existing* pain or suffering, or with regard to the *present* condition of the body or mind, may generally be shown by any person who heard the same; and *held*, that no material error was committed in this case by the admission of evidence tending to show the declarations of the plaintiff with regard to pain, suffering, and condition of the body.

(*Syllabus by the Court.*)

Error from Greenwood county.

This was an action brought by Mary Johns in the district court of Greenwood county, against the Atchison, Topeka & Santa Fe Railroad Company, to recover damages for injuries received by her while standing on the railroad company's station platform at Severy, in said county, by reason of being struck and thrown down by the company's agents and servants in removing a trunk from the platform to the baggage car of a train then standing at the station. The general verdict of the jury, and the special questions of fact presented to them, with their answers thereto, read as follows:

"GENERAL VERDICT.

"We, the jury in the above-entitled cause, do find for the plaintiff, and we assess her damages at the sum of four thousand dollars.

"SPECIAL QUESTIONS OF FACT AND ANSWERS.

"(1) If the jury find that the plaintiff was injured by the negligence of any of the employes of the defendant, they may state the names of such employes.
Answer. Skidmore, Short, and Crowley.

"(2) What are the actual damages which the plaintiff has suffered from the injury complained of, if the jury find she has suffered any? *A.* [This question the court refused to submit to the jury.]

"(3) Is it not a fact that the plaintiff received the injury complained of upon a platform of a station belonging to the defendant, and in its possession and under its exclusive control? *A.* It was at a platform and station belonging to and in possession and under control of defendant and St. L. & S. F. R. R.

"(4) Was not the sole and only purpose of the plaintiff, in being upon that platform and at that station, the purpose of seeing friends off who were going upon a train of cars belonging to the defendant, going north upon that day? *A.* No.

"(5) Is it not a fact that, prior to receiving the injury complained of, the plaintiff had seen her friends, whom she was at the station for the purpose of seeing off, onto the cars, and had bid them good-bye, and had left the car which they were on? *A.* No.

"(6) Is it not a fact that a reasonable time had elapsed from the time she had bid good-bye to the friends she had come to the station to see off, to have enabled her to leave the station and platform before she received the injury complained of? If not, how long a time had elapsed? A. No. About five minutes.

"(7) Did not the plaintiff, all the time she was at the station and platform prior to the time of her injury, know that the platform upon which she was standing, at the time of her injury, was icy and slippery? A. Yes.

"(8) Did the plaintiff not know, prior to her injury, that the employees of the defendant were about to move two or more trunks from the point where the trunks were, (in the moving of which she received the injury complained of,) to put the same into the baggage car on defendant's train at that time? A. Yes.

"(9) Is it not a fact that the plaintiff, at the time of her injury, was standing on the platform of defendant's station at Severy at a point between where the trunk was before it was moved (in the moving of which she received her injury) and the door of the baggage car, into which the employees of defendant were attempting to put the said trunk? A. No.

"(10) Is it not a fact that there were at least three large trunks placed upon the platform of the station at Severy, at and prior to the time of the injury complained of, which were to be loaded into the baggage car on defendant's train, which was standing by said platform at the time of such injury? A. Yes.

"(11) At the time the plaintiff received the injury complained of, had she any business of any kind to transact with the defendant, or any of its employees, at the station where she was injured? A. No.

"(12) What, if anything, prevented the plaintiff from seeing the movement of the trunk (the moving of which caused the injuries complained of) at and before the receiving of such injury? A. Nothing.

"(13) Did not the plaintiff see the employees of the defendant when they caught hold of the trunk, (the moving of which caused the injury complained of,) at the time they caught hold of it to move it? A. Yes.

"(14) Did not the plaintiff see the employees of the defendant as they were moving the trunk (the moving of which caused the injuries complained of) from the point where it was towards the baggage car? A. Yes.

"(15) If the jury answer the last question in the affirmative, they may state if the plaintiff did not see such employees moving the trunk towards her. A. Yes.

"(16) If the jury answer the last question in the affirmative, they may state if the plaintiff did not have time and opportunity to get out of the way of this trunk when she saw it first started towards her, if she had at that time desired to have gotten out of its way? A. Yes.

"(17) Was not the plaintiff, at the time of receiving the injuries complained of, through with all her business at the depot? A. No.

"(18) Was not such platform level, and about 16 feet wider? A. Yes.

"(19) Had not the plaintiff bid good-bye to her friends who had taken the cars some little time previous to the accident complained of? A. Yes.

"(20) Did not the plaintiff, after the alleged injury, remain standing, looking at the train some ten minutes before it pulled out? If not so long, how long? A. Yes.

"(21) Did the plaintiff, previous to leaving the platform that day, inform any one how the accident happened, and, if so, who? A. No.

"(22) Had the plaintiff any business on the platform that day except going to see some acquaintances at the train? A. Yes; to assist her friends.

"(23) How much damage, if you allow plaintiff any, do you allow her for the services of a physician? A. [This question the court refused to submit to the jury.]

"(24) If you allow the plaintiff any damages for the services of a physician, who is the physician for whose services you allow her? A. [This question the court refused to submit to the jury.]

"(25) The jury may state how long a time had elapsed from the time plaintiff had bid her friends good-bye to the time when she received her claimed injury? A. About five minutes.

"(26) What was there which in any way would have prevented the plaintiff from leaving that portion of the platform which was between the three large trunks and the baggage car into which they were to be loaded after the men caught hold of the trunk which plaintiff claims struck her, and commenced to move it towards said baggage car? A. Nothing, only she was not directly between them.

"(27) How far would plaintiff have had to have moved, from where she was standing at the time of injury, to have got off from that portion of the platform which lay between the baggage car and the trunk which she claims struck her before the same was moving? A. About twenty feet would have taken her past the baggage-car-door.

"(28) How long a space of time would it have taken the plaintiff to have left that portion of the platform referred to in the last question after she saw or knew that the trunk which she claims hit her was to be moved from the point where it was to the baggage car? A. It would have taken her about one-half minute to have gone that distance.

"(29) Is it not a fact that the plaintiff believed that the trunk which she claims was pushed against her was to be moved from the spot where she first saw it to the baggage car, north of her, before it was actually taken hold of to be moved? A. Yes.

"(30) If the jury answer the last question in the affirmative, they may state if it is not a fact that plaintiff knew that in order to move that trunk to the baggage car, that the employes would have to take the same either to one side of her, where she was standing, or over the spot on which she was standing? A. Yes.

"(31) What was the distance from the point where the three large trunks were standing on the platform, including the one which plaintiff claims struck her, before they were moved to the baggage car into which they were to be loaded? A. About thirty-eight feet.

"(32) What was the distance from the point where the three large trunks, referred to in the preceding question, were standing before the removal to the baggage car, to the point where plaintiff was standing at the time she claims to have been injured? A. About fifteen feet.

"(33) What was the distance from the door of the baggage car, into which these trunks referred to in the preceding questions were to be loaded, to the point where plaintiff was standing at the time she claims to have been injured? A. About twenty-three feet.

"(34) About how wide was the trunk which plaintiff claims struck her? A. About two and one-half feet.

"(35) About how long was the trunk which the plaintiff claims struck her? A. About three and one-half feet.

"(36) How many men had hold of the trunk, moving it, which plaintiff claims struck her, prior to its striking her, if it did strike her? A. Three.

"(37) Which way was this trunk being moved, which plaintiff claims struck her, prior to its striking her, as to being moved sideways or endways? A. Endways.

"(38) How much space on the platform was necessarily occupied by this trunk, and the men moving it, as they moved, prior to the time plaintiff claims it struck her? A. About four feet in width.

"(39) Did not the drayman who brought the trunks to the station deposit them at a point about the middle of the platform? A. Yes.

"(40) Was not the trunk which plaintiff claims injured her started from the point where the drayman had deposited it? A. Yes.

"(41) Is it not a fact that the plaintiff, at the time of receiving the injury claimed to have been received, had bid good-bye to the friends she had come to the depot to see off, and was, just prior to the time of being struck, standing upon defendant's platform at its station in Severy watching the men who were to move the large trunks from the place where they were on the platform to and into the baggage car, to see them move them, and place them in the baggage car? A. Yes, and waiting for her friends.

"(42) Did not plaintiff see the men who moved the trunk, which was claimed injured her, as they took hold of it, and started it towards the baggage car? A. Yes.

"(43) Did any of the men engaged in moving the trunk which plaintiff claims injured her see plaintiff after starting the trunk towards the baggage car, and prior to striking plaintiff? A. We do not know.

"(44) If the jury answer the last question in the affirmative, they may state which one of the employees saw plaintiff prior to the time she was struck, and after starting the trunk towards the baggage car. A. ———.

"(45) Was not the trunk which plaintiff claims injured her, prior to her injury, pushed and shoved or pulled by the men hold of it, from the point where it was started, in a direct and straight line to the point where it was stopped at the moment plaintiff fell, if it was so stopped? A. Yes, or nearly so.

"(46) Did not plaintiff see the trunk which she claims injured her, and the men hold of it, from the very instant it started up to the time that she fell? A. We cannot tell.

"(47) Did not plaintiff know, realize, or believe that the men who had hold of this trunk did not see her, and could not see her, from the position of their bodies and heads, from the time they started the trunk up to the time she fell? A. No, she did not know.

"(48) What, if anything, prevented, or would have prevented, plaintiff from getting out of the way of this trunk, if she had made the attempt so to do, when she first saw that it was being moved towards her? State fully. A. Nothing.

"(49) After plaintiff first saw that the trunk was started in her direction, did she not stand still, under the belief that the men hold of the trunk would not run it onto her, although believing at the time that the men did not see her? A. She attempted to move back when they were in about six feet of her, but did not know whether they saw her or not.

"(50) Did plaintiff make any effort to get out of the way of this trunk prior to its getting within six feet of her? A. No.

"(51) If the jury answer the last question in the affirmative, they may state how many feet away from plaintiff the trunk was when she first made an effort to get away? A. ———.

"(52) Did plaintiff make any other effort to get away except that of stepping back with her right foot? A. No.

"(53) If plaintiff stepped back with her right foot, did she not step on her cloak with such foot? A. We do not know.

"(54) If plaintiff stepped back with her right foot, and stepped on her cloak, did that trip her in the least? A. We cannot tell.

"(55) Did not the trunk, if it struck her at all, hit her on both knees, so that it struck her with the same force on each knee? A. It did.

"(56) In what position was plaintiff standing so that she could have her right foot stepped back out of the way of the trunk, and yet have each knee struck with equal force by the trunk? A. Somewhat facing the trunk as she stepped back.

"(57) Has not plaintiff, since her injury, been visited on an average of once a week by Doctor McDonald? A. Yes.

"(58) If the jury answer the last question in the affirmative, they may state if Doctor McDonald did not, on each visit, give her a different kind of medicine to take? A. We do not know.

"(59) Were any of the parties hold of the trunk, except Skidmore, acting within the scope of their employment with defendant in helping to move such trunk, and, if so, who? A. Yes, Crowley and Short.

"(60) Were not each of the persons, except Skidmore, hold of the trunk at time of plaintiff's injury, merely volunteers helping Skidmore? A. No.

"(61) Give the name of each person helping to move the trunk at time of plaintiff's injury. A. Skidmore, Crowley, and Short.

"(62) Was not Skidmore's back to the plaintiff, as the trunk was being moved, prior to and at the time plaintiff fell? A. Yes.

"(63) If the jury find for the plaintiff, they may state what acts of negligence the defendant, or any of its employes, were guilty of which produced the injury complained of, stating fully. A. [This question the court refused to submit to the jury.]"

Upon this verdict and these findings the court below rendered judgment in favor of the plaintiff, and against the defendant, for \$4,000 and costs, and the defendant, as plaintiff in error, brings the case to this court for review. The other facts will be found in the opinion of the court.

George R. Peck, A. A. Hurd, and C. N. Sterry, for plaintiff in error. T. J. Hudson, T. L. Davis, and R. P. Kelley, for defendant in error.

VALENTINE, J. The facts of this case, stated briefly, are substantially as follows: On February 6, 1883, the plaintiff, Mrs. Johns, who was then about 63 years of age, went to the railroad station at Severy, Greenwood county, Kansas, along with certain of her friends who were then about to start for Washington Territory to make it their permanent home. She went along with her friends to assist them in getting to the railroad train and upon it, and to bid them good-bye. These friends were Mrs. Pitzer, who was also an old lady about the plaintiff's age, and Mrs. Pitzer's daughter and son-in-law and their several children. This station is a union station or depot belonging to the Atchison, Topeka & Santa Fe Railroad Company and the St. Louis & San Francisco Railroad Company. These two railroads cross each other at that place at right angles,—the Atchison, Topeka & Santa Fe Railroad running north and south, and the other railroad running east and west,—and the station is situated in the south-west angle formed by this crossing, immediately west of the Atchison, Topeka & Santa Fe Railroad, and immediately south of the other railroad. A platform, about 16 feet wide and 195 feet in length, is situated between the station-house and the defendant's railroad track. This platform at that time was covered with ice, and had been in that condition for several days. The railroad train upon which the plaintiff's friends expected to travel, and which consisted of an engine, a baggage car, and a passenger car, was then standing on the defendant's railroad track, east of the station platform, and headed to the north. The plaintiff bid good-bye to those of her friends who were about to leave, and they, with other friends who did not intend to leave, went into the passenger car. The plaintiff then stepped back about 10 feet from the east edge of the platform, and opposite the coupling between the baggage car and the passenger car, and stood there on the platform for the purpose of waiting till the train should start, and to bid her friends a last farewell. There was a waiting-room in the station-house or depot, to which she might have retired if she had so chosen. There were also, at that time, two or three large trunks, belonging to "drummers," situated on the platform several feet south, and slightly to the east of where

the plaintiff was standing, which were to be removed and placed in the baggage car, which was north and east of where the plaintiff was standing. This platform was slightly inclined downward from the west side to the east side. Three of the company's servants undertook to remove these trunks. They did not use trucks, or any other vehicle or instrument of conveyance, but slid the trunks on the ice. In removing the first trunk, they struck the plaintiff, and knocked her down, and in this manner inflicted the injury of which she now complains. The trunk itself was propelled against her. This occurred within five minutes after the time when the plaintiff had bid her friends good-bye. She saw the men removing the trunk, and watched them, not thinking, however, that they would run against her, or molest her in any manner; but, when they came within about six feet of her, she attempted to move out of their way, but did not succeed in doing so. The evidence did not show whether the men saw her or not until after she fell; but there was nothing to prevent their seeing her if they had looked in that direction. There was plenty of room on the platform, east of where the plaintiff stood, within which the trunk might have been moved without touching her. The only persons near her at the time, except the three men who were moving the trunk, were a friend of the plaintiff, Mrs. Miller, and Mrs. Miller's little boy.

The case was tried before the court and a jury; and after the plaintiff had introduced her evidence, which tended to prove all the foregoing facts, the defendant demurred to the evidence upon the ground that it did not prove, or tend to prove, any cause of action, which demurrer the court overruled. No other evidence was introduced. The defendant then presented to the court 41 special instructions for the jury, and asked the court to give them to the jury, all of which the court refused, and gave only its own instructions. The defendant then presented 63 special questions of fact for the jury, and asked the court to submit them to the jury, all of which, except four, to-wit, the second, twenty-third, twenty-fourth, and sixty-third, the court did submit to the jury as requested. The jury found a general verdict in favor of the plaintiff, and against the defendant, and assessed the plaintiff's damages at \$4,000, and also gave answers to the foregoing special questions of fact. The defendant then moved for a judgment in its favor upon the special findings of fact notwithstanding the general verdict, which motion the court overruled. The defendant then moved for a new trial upon various grounds, which motion the court also overruled. The court then rendered judgment upon the verdict and findings of the jury in accordance with the general verdict. Afterwards the defendant made a case for the supreme court, and, as plaintiff in error, has brought such case to this court, and asks for a reversal of the judgment below.

The first question to be considered in this court is whether the plaintiff below introduced sufficient evidence to authorize the jury to find in her favor with reference to every essential fact constituting her cause of action. This question was raised in the court below by the demurrer to the evidence, by the motion for judgment on the special findings, and also by the motion for a new trial. The plaintiff in error (defendant below) claims that the evidence is insufficient, for the following reasons: (1) There was no evidence tending to prove any culpable negligence on the part of the defendant; (2) there was no evidence tending to prove that the three servants of the defendant who moved the trunk were acting within the scope of their employment; (3) the evidence discloses culpable contributory negligence on the part of the plaintiff below. The first two points, we think, should be discussed together. Of course, the plaintiff below knew the exact condition of the platform and its surroundings, and that the defendant's servants were moving the trunk towards her; for all these things were in plain view, and she had eyes. But so, also, did the defendant's servants know all these things; for they also had eyes, and probably fully as good ones as the old

lady had. But, if they did not know these things, then they were guilty of culpable negligence in not knowing the same. Presumably, they knew that the plaintiff was standing on the platform where she stood, and that, unless she hurriedly got out of their way, they would run against her in moving the trunk in the direction in which they were moving it, and as rapidly as they were moving it on the smooth ice of that platform; but, as before stated, if they did not know the same, they were equally as guilty of negligence, in running against the plaintiff and in knocking her down, as though they had in fact known all about these matters. It was their duty to know these things. The three men who undertook to remove the trunk were a brakeman belonging to that train and two section foremen at that place, all in the employment of the defendant. They had also all done similar work on several prior occasions; and being on the company's premises performing this duty of removing trunks for the defendant in the presence of other employees of the defendant, and having done similar work on prior occasions, it must be presumed that they were acting for the defendant, and within the scope of the authority given to them by the defendant. The defendant, then, is responsible for their negligence, and they were clearly guilty of culpable negligence. The question as to whether the plaintiff was guilty of contributory negligence was fairly submitted to the jury, and they found that she was not guilty of any such negligence; and upon the evidence introduced we think their verdict is correct. As the train upon which the plaintiff's friends were expecting to depart was soon to start, we do not think that the plaintiff was guilty of any contributory negligence in remaining on the platform where she stood until the train started. She was not necessarily in any person's way, and such a thing is common at all stations on all railroads. The plaintiff certainly could not be considered as a trespasser upon the company's premises; and, if not, then the defendant and its servants owed her the duty of exercising reasonable and ordinary care and diligence to avoid injury to her. We do not think they exercised any such care or diligence, but really they were guilty of gross negligence. The plaintiff was not standing in a straight line between the place where the trunks lay on the platform and the place on the platform from which they were to be taken into the baggage car; and the men moving the trunk had to move the same out of a straight line, and up a slightly inclined plane, in order to strike the plaintiff. There was plenty of room on the platform, and in a straight line, within which the trunks might have been moved from where they lay to the baggage car, without molesting the plaintiff.

The plaintiff in error (defendant below) also claims that the court below committed material error in permitting the following evidence to be introduced, to-wit: Mrs. M. D. Thatcher was permitted to testify, over the objections of the defendant, among other things, as follows: "Well, I only know what Mrs. Johns has told me of her suffering, and I have been called in there as a neighbor. She complained of the misery in her side, and she told me that she suffered a great deal with a numbness and a tingling sensation in her left side, I believe it was. And the other evening I was called over there, and she told me that she was suffering now a great deal with that feeling, and also a depression about her heart, she said, in her left side, and she had sent for the physician, I believe, that evening. And that was some of the symptoms, I believe, that she had,—of some kind of depression about her heart, a smothering, I think. * * * Mrs. Johns has complained of her limb and her foot to me." Joseph H. Pitzer was permitted to testify, over the objection of the defendant, among other things, as follows: "*Question.* Now, Mr. Pitzer, state to the jury what facts you may know with reference to her condition,—with reference to her suffering and bodily pain and mental distress. *Answer.* I don't know anything; only what she has told me herself. *Q.* What have you heard her say about it? Of what has she complained? *A.* She has

told me frequently that she has suffered. She complained of her head and leg having a great misery in it. * * * She complained of misery in her side and hip." On cross-examination, he testified, among other things, as follows: "Question. All you know about her suffering and pains since the injury is what she has told you, is it not, Mr. Pitzer? Answer. That is all, sir."

We think it is well settled that it is incompetent to prove the declarations of an injured party, or of a party suffering from some cause, made after the injury has happened, or after the cause of his suffering has transpired, with regard to the facts of the injury, or the cause of his suffering. *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Morrissey v. Ingham*, 111 Mass. 63; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485; *Denton v. State*, 1 Swan, 279; *Spatz v. Lyons*, 55 Barb. 476. And even proof of the declarations of a party with regard to past suffering or pain, or past conditions of body or mind, is not competent. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537; *Lush v. McDaniel*, 13 Ired. 485; *Reed v. New York Cent. R. Co.*, 45 N. Y. 574; *Rogers v. Crain*, 30 Tex. 284; *Chapin v. Inhabitants of Marlborough*, 9 Gray, 244; *Rowell v. City of Lowell*, 11 Gray, 420; *Emerson v. Lowell Gas-Light Co.*, 6 Allen, 146; *Inhabitants of Ashland v. Inhabitants of Marlborough*, 99 Mass. 48; *Insurance Co. v. Mosley*, 8 Wall. 397, 405. There are probably no authorities opposed to these propositions, and yet there are authorities which seem almost to oppose the last one, especially where the declarations are made to a physician or surgeon while he is examining the party as a patient. *Quaife v. Chicago & N. W. Ry. Co.*, 48 Wis. 513, 33 Amer. Rep. 821, 4 N. W. Rep. 658; *Barber v. Merriam*, 11 Allen, 322; *Fay v. Harlan*, 128 Mass. 244; *Gray v. McLaughlin*, 26 Iowa, 279; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 23 Amer. & Eng. R. Cas. 522, 22 Cent. Law J. 322, 3 N. E. Rep. 389, and 4 N. E. Rep. 908. Declarations, however, of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who has heard them. *Insurance Co. v. Mosley*, 8 Wall. 397; *Hatch v. Fuller*, 131 Mass. 574; *Denton v. State*, 1 Swan, 279; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 23 Amer. & Eng. R. Cas. 522, 22 Cent. Law J. 322, 3 N. E. Rep. 389, and 4 N. E. Rep. 908; 1 Greenl. Ev. § 102, and cases there cited; 1 Whart. Ev. § 268, and cases there cited. There are authorities seemingly opposed to this last proposition. *Reed v. New York Cent. R. Co.*, 45 N. Y. 574; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.

We think, however, that whenever evidence is introduced tending to show a real injury or a real cause for suffering or pain, as in this case, the declarations of the party concerning such suffering or pain while it exists, and as simply making known an existing fact, should be allowed to go to the jury for what they are worth, and the jury in such a case should be allowed to weigh them, and to determine their value. If they were made to a physician or surgeon while he was examining the party as a patient, for the purpose of medical or professional treatment, and for that purpose only, the declarations would be of great value. If, however, they were made at any other time or under any other circumstances, they might not be of such great value. If made casually to some person not a physician, and with whom the party had no particular relations, they might possibly, in some cases, be of but very little or no value. *Reed v. New York Cent. R. Co.*, 45 N. Y. 574. Yet, generally, they should be permitted to go to the jury for what they are worth. *Insurance Co. v. Mosley*, 8 Wall. 397; *Hatch v. Fuller*, 131 Mass. 574; *Rogers v. Crain*, 30 Tex. 284; *Matteson v. New York Cent. R. Co.*, 35 N. Y. 487; *Gray v. McLaughlin*, 26 Iowa, 279; *Kennard v. Burton*, 25 Me. 39; *State v. Howard*, 32 Vt. 380; *Lush v. McDaniel*, 13 Ired. 485. Also, if the declarations are made to a physician or other person merely for the purpose of ob-

taining testimony in the party's own case, they might be of but very little value, and possibly might in some cases be wholly excluded. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537. But the mere fact that the declarations are made after suit has been commenced, and while it is pending, will not be sufficient to exclude the declarations; and, generally, they should be allowed to go to the jury. *Barber v. Merriam*, 11 Allen, 322; *Hatch v. Fuller*, 131 Mass. 574.

In the present case we cannot say that the court below committed any material error in admitting the evidence objected to. Everything that the witnesses Mrs. Thatcher and Mr. Pitzer testified to was proved by the competent testimony of other witnesses. The injury, the impaired health, the suffering, the pain, and the entire condition of the plaintiff's body, were fairly shown by evidence that cannot be questioned; and very nearly all the declarations of the plaintiff, as testified to by Mrs. Thatcher and Mr. Pitzer, were, in substance, declarations of present and existing pain, suffering, and conditions of the body, and not narratives of past pain or suffering, or conditions of the body; and to this extent they were unquestionably competent. Those declarations, if any, which were not concerning present and existing pain, suffering, and conditions of the body, were so small in amount, and so trifling and insignificant in their influence, and were concerning matters which were so thoroughly and incontestably proved by other competent evidence, that their admission by the court could not be material error.

There are a few other questions presented by counsel which we hardly think it is necessary to discuss. The special question of fact, No. 63, which the defendant asked the court to submit to the jury, and which was refused, was sufficiently covered by other more specific questions. Besides, that question might perhaps be objectionable under the rule stated in the case of *Foster v. Turner*, 31 Kan. 58, 60 *et seq.*, 1 Pac. Rep. 145. The instructions refused, so far as they stated the law of the case, were sufficiently covered by other instructions given by the court.

The judgment of the court below will be affirmed.

(All the justices concurring.)

SMITH v. NESCATUNGA TOWN Co. and others.

(Supreme Court of Kansas. June 11, 1887.)

1. APPEAL—BOND—VALIDITY.

In an appeal from a judgment rendered by a justice of the peace of Comanche county, which was then unorganized, and attached to Barber county for judicial purposes, the justice was referred to in the appeal-bond as an officer of Comanche county, instead of being designated as an officer of Comanche township, in Barber county. Held, that the technical defect did not prejudice any one, nor invalidate the undertaking.

2. SAME—SURETIES—QUALIFYING.

The mere failure of the sureties upon an appeal-bond to make affidavit of their qualifications, where it does not appear that the sureties are insufficient, is not an adequate ground for a dismissal of the appeal.

(Syllabus by the Court.)

Error from Barber county.

J. A. Smith, for plaintiff in error. *Ellis & Ellis*, for defendants in error.

JOHNSTON, J. *J. A. Smith* brought an action against the defendants in error before a justice of the peace of Comanche county, which was then unorganized, and attached to Barber county for judicial purposes, and thereby, for the time being, became and was a municipal township of Barber county, and on the fourteenth day of March, 1885, he recovered a judgment against the town company for the sum of \$300. On the seventeenth day of March, 1885, the following appeal-bond was filed and approved:

"IN JUSTICE'S COURT, BEFORE H. CHAPMAN, JUSTICE OF THE PEACE OF COMANCHE COUNTY, KANSAS.

"J. A. Smith, Plaintiff, v. The Nescatunga Town Company.

"Whereas, the defendant the Nescatunga Town Company intends to appeal from a judgment rendered against it, in favor of the plaintiff, J. A. Smith, on the fourteenth day of March, 1885, by the justice of the peace of said county, now we, the undersigned residents of said county, bind ourselves to said plaintiff in the sum of \$800 that said defendants shall prosecute this appeal to effect, and without unnecessary delay, and satisfy such judgment and costs as may be rendered against it therein.

[Signed] J. E. TINCHER.

"J. W. McWILLIAMS.

"H. N. CUNNINGHAM.

"C. L. DUNN.

"Approved by me this seventeenth day of March, A. D. 1885.

"H. CHAPMAN, J. P."

The cause was transferred to the district court of Barber county, and at the May term, 1885, the plaintiff moved to dismiss the appeal, alleging that the bond was insufficient.

The first objection is that, in the heading of the bond, the justice of the peace is designated as an officer of Comanche county, Kansas, instead of Comanche township, in Barber county. The justice of the peace resided in and was an officer of Comanche county, which was then unorganized. It was at that time attached for judicial purposes to Barber county, and therefore it would have been more accurate to have designated him as an officer of Comanche township, in Barber county. However, there was but one county of that name, and, as the bond otherwise correctly described the cause and judgment, the technical error did not prejudice anybody, nor render the bond invalid. "Appeals are favored, and mere technical defects or omissions are to be disregarded, as far as possible, without obstructing the course of justice." *Haas v. Lees*, 18 Kan. 454.

The next ground of objection is that the sureties on the appeal-bond have failed to justify. To support this objection, the plaintiff in error cites section 723 of the Code, which makes it the duty of an officer, taking an undertaking provided for by the Code and other statutes, to require the person offered as surety to make an affidavit of his qualifications. This provision is merely directory to the officer taking the security, and his failure to perform the duty will not invalidate the undertaking. It does not appear but what the sureties upon the bond are amply sufficient, and a mere failure to justify cannot be held a sufficient ground for a dismissal of the appeal. *St. Louis, L. & D. R. Co. v. Wilder*, 17 Kan. 239.

The judgment of the district court will be affirmed.

(All the justices concurring.)

BUTTS v. PRIVETT and another.

(*Supreme Court of Kansas. June 11, 1887.*)

CHATTEL MORTGAGE—BILL OF SALE—PAROL EVIDENCE.

A bill of sale, absolute upon its face, if taken as a security, is in effect only a chattel mortgage, and the party executing the same may show by parol evidence the real transaction between the parties at the time of the delivery of the written instrument; and may also show that it was the contract that the possession of the personal property described in the written instrument should remain with the mortgagor.

(*Syllabus by the Court.*)

Error from Harper county.

On November 29, 1883, J. D. Butts commenced his action against F. P. Privett, to obtain the immediate possession of one span of mules, twenty-four head of stock cattle, one standard mower, one horse-rake, certain farming implements, consisting of wagons, plows, harrows, etc., and also a quantity of hay in stack; the property being valued at \$600. Privett, at the time of the commencement of the action, was sheriff of Harper county, and held the property in controversy as such sheriff by virtue of an order of attachment issued by the clerk of the district court of Harper county, in an action pending in the court, wherein one John H. Roark was plaintiff and John Meyer was defendant, and these facts Privett, as such sheriff, alleged in his answer. Said Privett also alleged in his answer that John Meyer was the owner of the property in controversy, and that, for the purpose of defrauding John H. Roark and other persons, Meyer made a pretended sale of the property to Samuel J. Butts; that the plaintiff well knew that the sale of the property from Meyer to Samuel J. Butts was fraudulent, and for the purpose of defrauding the creditors of said Meyer; and that the plaintiff never purchased the property of any person, but merely attempted to get possession of the property for the purpose of assisting Meyer and Samuel J. Butts to perpetrate a fraud upon Roark and the other creditors of Meyer; and said Privett also denied that either Samuel J. Butts or the plaintiff ever had possession of the property.

Plaintiff filed a general denial to this answer. Subsequently John Meyer, alleging that he was the owner and interested in the property in controversy, obtained leave to be made a party defendant, and filed the following answer in the case, omitting caption:

"The defendant John Meyer, for his separate answer to the petition of the plaintiff, J. D. Butts, says that he denies that the plaintiff, at the time of the commencement of this action, was the owner and entitled to the possession of the property, or any article thereof, described in his petition. He also denies that his co-defendant, F. P. Privett, detained said property to the great damage of the plaintiff. This defendant alleges that at the time of the commencement of this action he was the owner of each and every article of said property; that on or about the thirtieth day of October, 1883, he was indebted to divers persons to the aggregate amount of four hundred dollars; that said debts were then due, and defendant's said creditors were urging the immediate payment of their demands; that defendant had no money with which to liquidate his said debts, and was greatly embarrassed and troubled about obtaining sufficient funds for that purpose; that one Samuel J. Butts, well knowing and understanding the financial embarrassments of this defendant aforesaid, and craftily and fraudulently contriving and intending to cheat and defraud this defendant out of his property, and, with such fraudulent intent, represented to this defendant that he, the said Samuel J. Butts, greatly sympathized with this defendant in his embarrassment, and that he, the said Samuel J. Butts, was a single man, with plenty of money for which he had no present use, and that he could well spare four hundred dollars of his said money for an indefinite time, and until this defendant could get able to repay the same; that he could loan this defendant the said sum of four hundred dollars for such indefinite time, and charge only ten per cent. interest per annum for the use of the same, which was a much less rate of interest than defendant would have to pay any other person for said money; that if defendant would make him, the said Samuel J. Butts, a deed to defendant's land, and a bill of sale to the personal property mentioned in plaintiff's petition, that the said Samuel J. Butts would hold said deed and bill of sale until this defendant could make the money with which to repay the said four hundred dollars and interest to the said Samuel J. Butts, and that, upon repayment of the same, he, the said Samuel J. Butts, would deed the said lands back to this defendant, as he was a single man, and had no wife to interfere, and that he

would also deliver the said bill of sale to be canceled; that in the mean time said defendant should have the actual possession and absolute control of all of said property, both real and personal.

"Defendant further alleges that, by reason of the false and fraudulent representation of the said Samuel J. Butts as aforesaid, he was persuaded and induced to enter into said agreement, and that, in pursuance of the same, this defendant and his wife executed and delivered to the said Samuel J. Butts a deed of conveyance to defendant's land, to-wit, three hundred and seventy acres in Harper county, Kansas, and this defendant executed a bill of sale for the personal property mentioned in plaintiff's petition; that the defendant is not now, nor has he been since the execution of the deed and bill of sale aforesaid, able to make the money with which to repay the said four hundred dollars and interest; that the plaintiff, J. D. Butts, well knowing the fraudulent transaction aforesaid of the said Samuel J. Butts, and, well knowing this defendant's title to and possession of said property, fraudulently took an assignment of the said bill of sale from the said Samuel J. Butts to himself, for the purpose of defrauding this defendant out of said personal property. Defendant further alleges that, on the twelfth day of November, 1883, and before the commencement of this action, A. H. Broadstone, as clerk of this court, issued an order of attachment against the property of this defendant in a cause then and still pending in this court, wherein John H. Roark was plaintiff and this defendant was defendant; that his co-defendant, F. P. Privett, was, at the time said order of attachment was issued, sheriff of Harper county, Kansas, and it became his duty as such sheriff to levy and execute said order of attachment; that said co-defendant, F. P. Privett, as sheriff aforesaid, on the thirteenth day of November, 1883, and before the commencement of this action, levied said order of attachment on all the property mentioned in plaintiff's petition as the property of this defendant, and took said property into his possession by virtue of said order of attachment, and was detaining said property under said order and levy at the time of the commencement of this action; that said defendant F. P. Privett had no other or further interest in any of said property than as hereinbefore set forth. Wherefore this defendant prays judgment for the said property mentioned in plaintiff's petition, subject to the levy of the order of attachment, and defendant F. P. Privett's possession of the same under and by virtue of said levy."

Subsequently the plaintiff demurred to the answer of Meyer, which, upon hearing, was overruled. Before this action was tried in the district court, the attachment case of *John H. Roark v. John Meyer*, referred to in the answers of Privett and Meyer, had been tried, and a judgment rendered in favor of Meyer. Trial had at the March term of the court, 1884, before the court without a jury. Findings were made in favor of the defendant, which were subsequently set aside, and a new trial granted. Second trial was had at the November term of the court, 1884, before the court with a jury. On November 25, 1884, a verdict was rendered in favor of the defendant. Plaintiff filed a motion to set aside the verdict, and for a new trial, which was overruled, and he excepted, and brings the case here.

Finch & Finch and *W. A. McDonald*, for plaintiff in error. *Campbell & Glenn* and *Byrns & Appley*, for defendants in error.

HORTON, C. J. Action of replevin. The plaintiff claims that he is the owner of and entitled to the possession of the property in controversy under the following instrument of writing:

"Know all men by these presents, that, in consideration of the sum of six hundred and no 100 dollars, the receipt of which I do hereby acknowledge, I do grant, sell, transfer, and deliver unto Samuel J. Butts, his heirs, executors, administrators and assigns, the following goods and chattels, viz.: One span of mules, one gray and one bay, 24 head of stock cattle, one standard mower,

one horse-rake, and all farm implements belonging to John Meyer, and on the farm this day purchased by said Samuel J. Butts from said John Meyer,—being the S. E. $\frac{1}{4}$ sec. 35, T. 32 S., R. 9 W., and N. E. $\frac{1}{4}$ sec. 2, T. 32 S., R. 9 W., and all the hay in stack on said above-described land, and all the corn on said land, corn to be put in crib; to have and to hold, all and singular, the said goods and chattels forever; and the said grantor hereby covenants with the said grantee that he is the lawful owner of the said goods and chattels; that they are free from all incumbrance; that he has good right to sell the same as aforesaid; and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

"In witness whereof the said grantor has hereunto set his hand this thirtieth day of October, A. D. 1883.

JOHN M. MEYER."

"NOVEMBER 3, 1883.

"I have this day sold J. D. Butts the within described property.

"SAMUEL J. BUTTS."

Plaintiff claims that his brother, Samuel J. Butts, paid Meyer \$1,150, and assumed the payment of mortgages on real estate to the amount of \$550, in consideration of the sale and transfer to him of the real and personal property described in the foregoing instrument of writing, and that he purchased the property in controversy of Samuel J. Butts on November 3, 1883. John Meyer denies that Samuel J. Butts ever bought any of said property of him, but alleges that the bill of sale was intended to operate only as a chattel mortgage to secure \$400 which he loaned from Samuel J. Butts, and which as yet has not been returned or paid; and he further claims that there was a verbal arrangement between himself and Samuel J. Butts whereby he was to retain possession and control of the property described in the written instrument until the money loaned should become due.

It is urged, however, that as Meyer admits he received of Samuel J. Butts \$400, and that as he has never paid back the same, the plaintiff, standing in the shoes of his brother, Samuel J. Butts, by the sale and transfer to him of his interest in the property described in the written instrument, has the right of possession of the property under section 15, c. 68, Comp. Laws 1879, which provides: "In the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession." A bill of sale of personal property, absolute upon its face, if taken as security, is only a chattel mortgage, and it has always been sufficient in a court of equity to show a state of facts outside of the written instrument which would render the same a mortgage.

The question in this case to be determined by the jury was whether the transaction between Samuel J. Butts and John Meyer was, in substance, a mortgage, notwithstanding the form the parties had given to it; and this question the jury had the right to determine upon the evidence, independently of the form of the instrument itself. The parties had the legal right, also, to contract that the possession and control of the personal property should remain with the mortgagor, and this arrangement could be proved by parol. *Moore v. Wade*, 8 Kan. 381; *McDonald v. Kellogg*, 30 Kan. 170, 2 Pac. Rep. 507; *Jones, Chat. Mortg.* §§ 23-25; *Pierce v. Stevens*, 30 Me. 184. This also disposes of the demurrer which was presented to the answer of Meyer.

It is urged, again, that the jury trying the case did not follow the instruction of the court which directed them to find in favor of the plaintiff if the property described in the bill of sale had been attached in legal proceedings against Meyer, and was about to be or had been taken from him, although the time for the payment of the money had not then expired. We would be inclined to agree with counsel, and grant a new trial for the failure of the jury to act in obedience to this instruction, if it were not conceded that after the commencement of this action the legal proceedings referred to in the in-

struction terminated favorably to Meyer, and therefore there were no legal proceedings pending at the time of the trial under which the property was likely to or could be taken away from the possession of Meyer. The district court approved the verdict, and virtually withdrew such instruction from the case. Therefore the error in this particular matter was wholly immaterial, and, upon the finding that the bill of sale was merely executed as security, the judgment of the court was properly rendered. The judgment must therefore be affirmed.

(All the justices concurring.)

GANO v. WELLS and others.

(*Supreme Court of Kansas. June 11, 1887.*)

1. DEPOSITION—OBJECTION—TRIAL.

An objection on the trial to the introduction of evidence contained in a deposition must state the particular evidence objected to.

2. APPEAL—RECORD—EVIDENCE.

Where an objection is made to the evidence of a witness for the reason that he is not competent to testify upon the subject, and the ruling of the trial court admitting the evidence is complained of in the supreme court, it must be made to appear to the supreme court that all the evidence concerning the competency of the witness has been brought to the supreme court.

3. NEW TRIAL—MOTION—ORAL TESTIMONY.

Where a motion is made for a new trial, and in such motion it is stated that affidavits will be used; and afterwards, on the hearing of the motion, the court refuses to hear the oral testimony of jurors, to show irregularities in their proceedings: *held* not error; and *further held*, that whether oral evidence might be used in such a case is largely within the sound judicial discretion of the trial court; and unless the supreme court can clearly see that, in the particular case, the trial court abused its discretion, it will not reverse its ruling.

(*Syllabus by the Court.*)

Error from Marshall county.

This was an action brought in the district court of Marshall county on May 17, 1884, by Jay Gano against John D. Wells, James S. Warden, and Thomas Johnson, to dissolve a copartnership existing between Gano and Wells, and for an accounting between them. The case was tried before the court and a jury, and the jury, in answer to the following questions, made the following findings, to-wit:

"(1) What was the value of the horse in controversy on the sixteenth day of May, 1884? *Answer.* \$341.60. (2) How much did the defendant James S. Warden pay the defendant John D. Wells for said horse? *A.* \$200. (3) How much did the defendant James S. Warden agree to pay to the defendant John D. Wells for said horse? *A.* \$200. (4) At the time said James S. Warden purchased the horse from said John D. Wells, had he knowledge or notice that said John D. Wells and plaintiff, Jay Gano, were partners in said horse? *A.* He had. (5) Did said James S. Warden and John D. Wells in the purchase and sale of said horse agree together for the purpose, and with the intention, of cheating and defrauding plaintiff, Jay Gano, out of his interest in said horse? *A.* They did not. (6) At the time said horse passed into the possession of said Warden from Wells, and from defendant Warden to defendant Thomas Johnson, was there at that time any agreement or understanding that said horse was to be the property of said Wells, or that said Wells thereafter had any interest in said horse? *A.* There was not. He had not. (7) Was said sale from said Wells to Warden a pretended sale, or was it made in good faith? *A.* In good faith. (8) Did Wells pay over, or offer to pay over, to Jay Gano, his one-half of the proceeds arising from the sale of said partnership property, before the commencement of this suit? *A.* He did not. (9) How much, if anything, on the sixteenth day of May, 1884, was the defendant Wells indebted to the plaintiff, Gano, for service and money expended in care

of the partnership property? A. Nothing. (10) Did the defendant Wells, when he sold the horse to Warden, intend to defraud plaintiff, Gano, out of his interest in the partnership property, and in the horse, or any part thereof? A. He did not. (11) Was Thos. Johnson agent for Wells in taking and holding possession of the horse on or after the day of sale? A. He was not. (12) For whom did defendant Thomas Johnson act in taking the possession of and holding the horse in controversy? A. James S. Warden. (13) Did the defendant John D. Wells agree to pay to the plaintiff, Jay Gano, the sum of \$12.50 per month as his, Wells', portion and part of the compensation of said Gano for taking care of the partnership property? A. He did not. (14) How many months did plaintiff, Gano, take care of the horse? A. About thirty-three months. (15) Is Jay Gano, under the contract, entitled to have pay for doctoring the horse? If so, how much, if anything, is the plaintiff, Gano, entitled to recover of Wells for doctoring the horse in controversy? A. Not anything."

Upon the foregoing findings, and the facts admitted in the pleadings, the court rendered judgment dismissing the action as against Warden and Johnson, and for \$106.50 and costs in favor of Gano and against Wells; and Gano, as plaintiff in error, brings the case to this court for review.

S. D. McKee, E. A. Berry, and J. A. Broughten, for plaintiff in error.
John V. Coon, Mann & Patterson, and Brownell & Gregg, for defendants in error.

VALENTINE, J. The first claim of error in this case is the introduction in evidence of the deposition of J. B. Smith. This was at the trial, and the objection to the evidence and the exception taken are as follows: "To the introduction of said deposition, and the evidence therein contained, and to each and every part thereof, the said plaintiff at the time objected, on the ground and for the reason that the same was incompetent and irrelevant; which objection was by the court overruled; to which ruling of the court the said plaintiff at the time duly excepted." It will be seen from this language that there was only one objection, and that this objection embraced the whole of the deposition, although it stated that it was to each and every part thereof. Such an objection, we think, is hardly sufficient, as some portions of the deposition might properly have been read in evidence. The party objecting should have designated the different parts objected to. Objecting to the whole of the deposition, in the lump, although the statement is "to each and every part thereof," is not sufficient.

The particular portions of the evidence of the witness J. B. Smith contained in this deposition are with reference to the horse in controversy, and are as follows: "We speeded him for a mile. I discovered something was the matter with his heart, as near as I could make out." The witness then stated that he had noticed this at other times; and then said: "He is liable to drop dead at any time when driven at speed."

These particular portions of the deposition were not objected to on the trial, as we have already stated. The court below had no means of knowing what particular portions of the deposition were objected to. We think the objection was insufficient; but, even if the objection were sufficient, still no material error is shown. All this evidence was introduced for the purpose of showing that the horse was unsound, and not worth more than \$200. The plaintiff claims that the evidence is incompetent, for the reason that it was not shown that the witness was an expert, or that he was competent to testify regarding these matters. The record, however, does not show how much evidence was introduced regarding his competency. It does not show whether any other deposition of the witness was introduced in evidence or not, nor whether any other witness testified with regard to his competency or not. He may have been shown to be competent by an abundance of evidence out-

side of the deposition. But this deposition itself shows that the witness had been in the business of taking care of horses, and training them for races, for more than ten years, and that he had this particular horse in charge and training for three or four months during the summer of 1884; and the material question in this connection was what was the value of the horse on May 16, 1884?

This claim of error must be overruled. The objection to the deposition was not sufficient. It is not sufficiently shown in this court that it was not shown in the court below that the witness was sufficiently competent to testify with reference to the matters to which he did testify; and we are also inclined to think that even the evidence brought to this court sufficiently shows that the witness was competent to testify, not that the horse actually had heart disease, but that he was unsound, that something ailed him, and that he was not worth more than \$200. As to the value of the testimony, that is another thing. It was probably sufficient to go to the jury.

The next claim of error is that the court below erred in not admitting, on the hearing of the motion for a new trial, the oral testimony of jurors relating to their finding concerning the value of the horse. The plaintiff made a motion for a new trial, setting forth five grounds therefor, and afterwards amended his motion by setting forth another ground therefor; and in this motion the plaintiff stated that affidavits would be used and read in support of the motion. On the hearing of the motion the plaintiff offered to introduce the oral testimony of certain of the jurors, and the defendants objected, claiming that only affidavits should be used; and the court sustained the objection. Matters of this kind are almost wholly within the sound judicial discretion of the trial court, and, unless the supreme court can clearly see that in the particular case the trial court abused its discretion, it will not reverse its ruling. As a rule, affidavits only are used in such cases, but oral testimony may also be used. Now, it does not appear in this case that the trial court abused its discretion. There was no sufficient showing that the jurors would not give their affidavits concerning the matter; and, besides, the defendants were led to believe, from the motion of the plaintiff himself, that only affidavits would be used; and therefore the defendants made no effort to procure the attendance of jurors.

The next claim of error is that the court below erred in refusing to grant a new trial upon the ground of newly-discovered evidence. Now, it does not appear that there was any newly-discovered evidence; on the contrary, the evidence offered as newly-discovered evidence was not newly-discovered, and was merely cumulative, and principally to impeach the evidence of one of the defendants.

The judgment of the court below will be affirmed.
(All the justices concurring.)

SCHOOL-DISTRICT No. 1 v. NEIL.

(*Supreme Court of Kansas. June 11, 1887.*)

1. NUISANCE—ABATEMENT—SPECIAL DAMAGES.

Where a school-district, as plaintiff, brings an action to abate a public nuisance, it must show that it has sustained damages peculiar to itself. It is not enough that such damages are greater than those sustained by the public at large, differing from them only in degree; they must be different in kind.

2. SAME.

A public nuisance can only be redressed by a public prosecution, unless the party complaining suffers some peculiar damages differing in kind from those sustained by the public at large.

(*Syllabus by Holt, C.*)

Error from Clay county.

C. M. Anthony, for plaintiff in error. *Harkness & Godard*, for defendant in error.

HOLT, C. Trial had at the May term, 1885, and judgment for defendant. The opinion states the material facts. The court below sustained a demurrer to the plaintiff's petition, because the same did not state facts sufficient to constitute a cause of action. The plaintiff in error complains of such ruling. It is the only question in controversy.

The petition states that plaintiff was a corporation, and in 1878 was about to build a new school-house in the school-district; and at a public meeting, held for the purpose of obtaining the expression of the opinion of the legal voters as to the location, it was finally agreed between plaintiff and defendant that a school-house should be located on the land of the defendant, upon the condition that he would allow to be opened and dedicated to the perpetual use of the public a common road or public highway, in consideration of the sum of \$40, to be paid as damages for opening and locating the same. Plaintiff built a school-house worth \$800, and divers persons paid defendant the sum of \$40; that the road was established as a public highway by the order of the board of county commissioners of Clay county. The petitioner further states that on the fifth day of May, 1884, the defendant placed a fence across said road, to prevent the public from using or traveling over the same, and that it was an irreparable damage to the plaintiff and the inhabitants of said district in going to and returning from said school-house; that said fence, so constructed, was and became a public nuisance, and is intended to shut out and prevent the public from having access over said road to said school-house. In the prayer to said petition he asks for the abatement of the nuisance, and an injunction inhibiting the defendant from molesting the public in the enjoyment of said road.

In ordinary actions the statement of facts constitute the cause of action, and it is not generally required to embrace the details of damages; but in cases for losses sustained by public nuisances the rule is different. The gist of the action then is that the plaintiff has sustained some damage peculiar to himself, differing in kind from that common to the public. The plaintiff failing to show such damage in the petition, it is so defective that a demurrer should be sustained thereto. If the loss of the plaintiff is simply greater damage of the same kind than that sustained by the rest of the community, such facts will not be sufficient to constitute a cause of action in favor of the party complaining. The loss to the public consists in the inconvenience in, or the obstruction to, the use of the highway for travel, differing in degree, but not in kind, according to the frequency of use which proximity of residence or peculiarity of occupation may impose. For this no individual can sue, but must resort to such public actions as are given by law.

We presume that it will be admitted that this plaintiff, as a corporation, has no greater right in maintaining a private action than an individual. Its claim for damages is that the inhabitants of said district were prevented in going to and returning from said school-house over said road. It is not claimed in the petition that this was the only public road that could be used by the inhabitants of the district by which access could be had to the school-house. In its petition it claims that the public were prevented from using this road, and that the inhabitants of the school-district were injured because they could not use it, being damages in kind sustained by all,—the plaintiff, the inhabitants of the district, and the public generally; and because there was no peculiar and special damages alleged to have been sustained by the plaintiff, differing in kind from the general public, we believe that the plaintiff's petition does not state a cause of action. *School-District No. 1, Reno Co. v. Shaddock*, 25 Kan. 467; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 627; *Farrelly v. City of Cincinnati*, 2 Disn. 516; *Wood, Nuis.* §§ 819, 820.

In *Holman v. Inhabitants of Townsend*, 13 Metc. 297, Chief Justice SHAW says: "That damage which a party sustains in consequence of not being able to use a highway is one which he sustains in common with all the rest of the community * * * and cannot be properly redressed only by a public prosecution. Were it otherwise, every individual in the town or adjoining towns, who owns a team or carriage, and would occasionally find it convenient to use the road, would have a separate action."

Lord Coke, speaking of this subject in *Coke's Littleton*, 56a, says: "For if the way be a common way, if any man be disturbed to go that way, or if a ditch be made over athwart the way, so he cannot go, yet he shall not have an action upon his case; and this the law provided for avoiding of multiplicity of suits, for, if any one man might have an action, all men might have the like."

Damages sustained by the inhabitants of the school-district, ordinarily and naturally resulting from the obstruction of a public highway, would not authorize the school-district itself to enjoin defendant in this action. They are a part of the public community, and, if they were damaged by a public nuisance which they sought to abate, then the public should take steps to abate it through the public officers. Our legislature has made ample provision in such matters. See section 1, c. 153, Sess. Laws 1885.

We are of the opinion that the agreement between the school-district and defendant, had at the time of the location of the school-house in said district, and the promise to allow the road in question to be opened, is not such a one that a breach thereof by defendant would authorize the issuing of an injunction against defendant.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

GIMBEL and another, Partners, etc., and others v. TURNER.

(*Supreme Court of Kansas. June 11, 1887.*)

ERROR—SERVICE OF CASE—RECORD.

A court or judge has no authority to settle and sign a case for the supreme court, unless it has been made and served within the time fixed by law, or legally granted by the court or judge; and a certificate by the judge that the case was "duly served" will not overcome a specific recital in the record showing that the case was not served in due time.

(*Syllabus by the Court.*)

Error from Cloud county.

L. J. Crans and *A. Cornforth*, for plaintiffs in error. *Laing & Wrong, J. J. McFarlan*, and *L. W. Borton*, for defendant in error.

JOHNSTON, J. This proceeding is brought to reverse a judgment rendered against the plaintiffs in error in an action of replevin by the district court of Cloud county. The validity of the record is challenged upon the ground that the case as made by plaintiffs was not served within the time allowed by law or given by the court. A motion for a new trial was overruled on the twenty-second day of November, 1884, and the court, upon the application of the plaintiffs, extended the time within which they might make and serve a case to the twenty-first day of December, 1884. From the record it appears that the case was not served until the twenty-second day of December, and it does not appear that there was any extension of time by the court or judge within which it might be done. It is true that the judge of the court certifies that the case made was "duly served," but this general statement cannot overcome the specific recital showing that it was served too late. Not being served within the time allowed by the court, the judge was without authority to settle or sign the same, and the case attached to the petition in error is a

nullity. *Railroad Co. v. Wingfield*, 16 Kan. 217; *Weeks v. Medler*, 18 Kan. 425; *Ingersoll v. Yates*, 21 Kan. 90; *Ætna Life Ins. Co. v. Koons*, 26 Kan. 215.

No questions are presented by the petition in error except such as are raised upon the admission of testimony, and the instructions of the court, and therefore there is nothing before us for review. However, we have looked into the record brought up, and, even if the case had been properly served and settled, we discover nothing which would require a reversal. The cause will be dismissed from this court.

(All the justices concurring.)

STETSON and others v. FREEMAN.

(*Supreme Court of Kansas*. June 11, 1887.)

TAXATION—ILLEGAL SALE—RIGHTS OF PURCHASER.

Under the Kansas statute, as frequently decided before, a defeated tax-title claimant may recover from the owner of the land the taxes paid by him, which were justly due, with penalties, interest, and costs, and is entitled to a lien on the land therefor. That the tax deed is void on its face is immaterial.

Error from Marshall county.

John V. Coon and John A. Broughten, for plaintiff in error. *W. H. H. Freeman*, for defendant in error.

PER CURIAM. This was an action in the nature of ejectment to recover lot No. 22 of the public square in the city of Blue Rapids. The defendant set up title under two tax deeds, one under a sale made in 1875 for the tax of 1874, and one under a sale made in 1876 for the tax of 1875. The court found that certain sums were included in the tax levies not authorized by law, and that legal notice was not given as to the place of the tax sales by the county treasurer, and therefore that the tax sales were illegal, and the tax deeds invalid. The lot, however, was subject to taxation for the years of 1874-75. The court rendered judgment in favor of the plaintiff for possession, but adjudged that the defendant was entitled to recover the amount of taxes legally levied and actually paid at the tax sales, with the penalties, interest, and costs allowed by law, aggregating \$143. This sum was also decreed to be a lien upon the lot, and an order of sale was directed to issue therefor, if the same was not paid. The plaintiff claims that the defendant is not entitled to recover any sum whatever for taxes, penalties, interest, and costs, and, if entitled to any sum, that it should not exceed the taxes legally levied, with 7 per cent. interest thereon; this upon the claim that the tax sales were not legal, and that the tax deeds were wholly void.

Within the frequent decisions of this court, the judgment of the trial court cannot be disturbed. In *Smith v. Smith*, 15 Kan. 290, the tax deed was void upon its face, yet the holder of the tax deed was entitled to recover the taxes paid, together with the penalties, interest, and costs. In that case it was said the statute "was enacted for void tax deeds, and not for valid tax deeds. A person holding under a valid tax deed has no need of such a statute; only persons holding under void tax deeds need such a statute." In *Belz v. Bird*, 31 Kan. 139, 1 Pac. Rep. 246, this court said: "It would seem that in all cases of void tax deeds, whatever may be the ground upon which the deeds are held to be void, the holder of the tax deed, when defeated in an action of ejectment, whether he is plaintiff or defendant, may recover the taxes which he has paid." See, also, *Stebbins v. Guthrie*, 4 Kan. 353; *Jeffries v. Clark*, 23 Kan. 448; *Fairbanks v. Williams*, 24 Kan. 166; *Harris v. Curran*, 32 Kan. 580, 4 Pac. Rep. 1044.

The taxes adjudged to be a lien by the court were those which the law allowed to be levied. The illegal sums included in the levies of taxes were deducted from the amount of taxes paid by the purchaser at the tax sales.

HOWELL and others v. McCRIE.

(Supreme Court of Kansas. June 11, 1887.)

1. MORTGAGE—FRAUDULENT ACKNOWLEDGMENT—RATIFICATION.

Where a mortgage of the homestead was executed by the husband, and to which he signed, or procured some one to sign, the name of his wife, and then procured a notary to certify to its acknowledgment by the wife, when in truth no such acknowledgment was made, and after an interval of six weeks the wife executed an instrument attempting to ratify the mortgage, *held*, that the mortgage creates no lien on the homestead property, not being given by the joint consent of the husband and wife, as required by article 15, § 9, of the constitution, and that it is void.

2. SAME.

Where six weeks after the husband had signed, or procured some one to sign, the name of his wife to a mortgage on the homestead, and had procured a notary to certify to the acknowledgment of the same by the wife, when in truth no such acknowledgment had been made, the wife, in the absence of her husband, and at the solicitation and upon the representations of the notary, signed and acknowledged before another notary an instrument attempting to ratify the mortgage, *held*, that the act of the husband in signing the name of the wife to the mortgage, or procuring some one to do so, and the act of the notary certifying to its acknowledgment, when in truth no such acknowledgment had been made, are criminal acts, and are incapable of ratification.

3. SAME—LIEN CLAIMANT.

Any party to the action claiming a lien on the homestead property can properly raise the question of the validity of such a mortgage.

(Syllabus by Simpson, C.)

Error from Atchison county.

Action commenced in the district court of Atchison county on the twenty-fourth October, 1884, to foreclose a mortgage against Samuel A. Stoner and Nannie E. Stoner, and enforce a first lien on the premises described in the petition, the same being the homestead of the Stoners. The plaintiffs in error were made defendants; they being judgment creditors of the mortgagors, and claiming a lien on the premises for improvements on the homestead, and asserting in their answer or cross-petition "that the pretended mortgage set up in plaintiffs' petition was never signed or executed by the defendant Nannie E. Stoner, but that her name was falsely and fraudulently forged to said instrument by her husband, Samuel A. Stoner, and that said pretended mortgage was not made or executed, and that said conveyance was not made, by and with the joint consent of said Samuel A. Stoner and Nannie E. Stoner, husband and wife; that the acknowledgment of said mortgage is false, fraudulent, and untrue."

McCrie, in his reply to the answer and cross-petition of Howell, Jewett & Co., avers "that, in addition to the acknowledgment set up in this petition the defendant Nannie E. Stoner, being fully advised in the premises, did, or the twenty-seventh day of December, 1881, execute the writing, and acknowledge the same as set forth in copy hereto attached, marked 'Exhibit A,' and thereby fully confirming her former acknowledgment, and the acts and doings of her said husband, Samuel A. Stoner."

Exhibit A is as follows:

"EXHIBIT A.

"*State of Kansas, County of Atchison—ss.:* I, Nannie E. Stoner, wife of Samuel A. Stoner, of Atchison county, Kansas, hereby acknowledge as my act and deed the giving and signing, and joining with my husband, Samuel A. Stoner, in the giving and signing, of a certain mortgage dated November 12, 1881, and acknowledged and signed before Chas. F. Goodrich, notary public in and for Atchison county, Kansas, for the sum of five hundred dollars, on Lots No. 1, 2, 3, 4, 5, and 6, of Block No. 1, in Lancaster, Atchison county, Kansas, and hereby agree to and ratify all matters and things done
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for me, and in my name, by my said husband, Samuel A. Stoner, in the giving and making of said above-described mortgage deed.

"Dated at Lancaster, Atchison county, Kansas, this twenty-seventh day of December, 1881. [Signed] NANNIE E. STONER. [Seal.]

"Acknowledged and subscribed before me on the day and date last above written. [Seal.] THOS. B. MCGEE, Notary Public."

Trial by the court at the February term, 1885, a jury being waived. The record does not contain the evidence, but the conclusions of fact and of law are as follows:

"CONCLUSIONS OF FACT.

"(1) On or about November 12, 1881, the plaintiff loaned to the defendant, Samuel A. Stoner, the sum of \$500, upon the note, a copy of which is set forth in the plaintiff's petition, and the mortgage, a copy of which is attached to said petition as Exhibit A. Samuel A. Stoner made the arrangement with the plaintiff in Atchison, where the plaintiff resides, and the said Samuel A. Stoner was to have the note and mortgage executed by himself and wife, and was then to obtain the money. Said Samuel A. Stoner and Nannie E. Stoner were husband and wife, and they, with their children, resided upon and occupied the premises described in said mortgage as their homestead, the same consisting of less than one acre, in the town of Lancaster, in Atchison county, Kansas.

"(2) Said Nannie E. Stoner did not execute said note, nor said mortgage, but her name was signed to each of them, probably by her said husband. Said Samuel A. Stoner brought said mortgage to C. F. Goodrich, a notary public in the city of Atchison, and requested him to certify to the acknowledgment of the same by himself and his wife, but said C. F. Goodrich refused to do so. The next morning said Samuel A. Stoner came again to said C. F. Goodrich, and presented to him a letter purporting to be written by said Nannie E. Stoner, and stating that she had signed the mortgage, and that it was her act and deed, and requesting him to certify to its acknowledgment. Said C. F. Goodrich, as such notary public, then made out and executed the certificate of acknowledgment which forms a part of said Exhibit A; but said Nannie E. Stoner never in fact appeared before said C. F. Goodrich, notary public, as stated in said certificate of acknowledgment, she being at Lancaster, ten miles distant from Atchison, when said official act was done.

"(3) Said Samuel A. Stoner then took the note and mortgage to the plaintiff, and delivered the same to him, and received from him the money as stated in conclusion of fact 1. The plaintiff did not know the signature of said Nannie E. Stoner, and supposed that the note and mortgage had been duly executed by her, and that she had duly acknowledged the mortgage before said C. F. Goodrich, notary public; and in making the loan, and in taking the note and mortgage, he acted in entire good faith, and without suspicion of bad faith on the part of said Samuel A. Stoner, or of any wrongful or criminal act on the part of said C. F. Goodrich, notary public. Said mortgage was duly recorded on November 21, 1881.

"(4) Said C. F. Goodrich afterwards heard that said Nannie E. Stoner had never signed the mortgage, and, being uneasy about his position in the premises, he got Thomas B. McGee, another notary public residing in the city of Atchison, to go with him to Lancaster to see her about it on December 27, 1881. Said Samuel A. Stoner was not at home, and they found her at home alone. Said Thomas B. McGee explained to her the nature of their business, and told her that she had a right to do as she pleased, but that, if her husband had forged her name, he was liable to get into trouble. She expressed her willingness to ratify what had been done, and she signed and executed the instrument, a copy of which is attached to the plaintiff's reply as Exhibit A.

"(5) Soon afterwards said Samuel A. Stoner left this state, but his wife and children remained on said premises, he coming to visit them occasionally, until some time in 1883, when said Nannie E. Stoner and her children also left the state, and ever since said time the premises have been abandoned as a homestead. Said promissory note has not been paid, nor any part thereof, except as follows: About April 1, 1884, after the abandonment of said premises as a homestead, said Samuel A. Stoner turned over the possession thereof to the plaintiff upon the understanding that the plaintiff was to collect the rents thereof, and apply the same on taxes and necessary repairs, and apply the balance as a credit on said indebtedness. The plaintiff has collected \$80, and has paid out \$40.70 for taxes and repairs, leaving a balance of \$39.30 to be credited on said promissory note, and there is due the plaintiff for rent the further sum of \$25 uncollected, which, when collected, together with rent accruing and collected hereafter, shall also be applied upon said indebtedness.

"(6) The defendants G. C. Hixon & Co. furnished to said Samuel A. Stoner certain lumber to be used, and which was used, in making improvements on said homestead premises; and on February 16, 1882, they recovered a judgment therefor against said Samuel A. Stoner before R. B. DEURY, a justice of the peace of the city of Atchison, in Atchison county, Kansas, for the sum of \$74.76 debt, and \$7.10 costs. A transcript of said judgment was duly filed in the office of the clerk of the court on March 16, 1882, and the same was duly entered so as to become a judgment of this court from said time. On July 22, 1882, an execution was duly issued upon said judgment by the clerk of this court. The same was levied upon said premises, which were advertised by the sheriff for sale; but afterwards, on September 21, 1882, said execution was returned by the sheriff unsatisfied, by direction of the attorney of said G. C. Hixon & Co. Costs upon said execution, \$17.30. No part of said judgment has ever been paid or satisfied.

"(7) On July 6, 1882, Howell, Jewett & Co. obtained a judgment against said Samuel A. Stoner in this court for the sum of \$499.52, to bear interest at 10 per cent. per annum on a promissory note given for lumber to be used, and which was used, in making improvements on said homestead premises. Said judgment has not been paid nor satisfied, nor any part thereof.

"CONCLUSIONS OF LAW.

"(1) The plaintiff is entitled to a judgment against said Samuel A. Stoner for the sum of \$500, together with interest thereon at the rate of 11 per cent. per annum from and after November 12, 1881, less the sum of \$39.30, to be applied as a credit of this date.

"(2) The plaintiff is not entitled to any personal judgment against the defendant Nannie E. Stoner.

"(3) The mortgage, as ratified, is valid as to said Samuel A. Stoner and Nannie E. Stoner, and said indebtedness is a lien upon said lots 1, 2, 3, 4, 5, and 6, in block 1, in Lancaster, Atchison county, Kansas, prior to the claim of G. C. Hixon & Co., and Howell, Jewett & Co.

"(4) Said G. C. Hixon & Co. have a valid lien upon said premises for the sum of \$81.86, with interest thereon at 7 per cent. per annum from February 16, 1882, which is subsequent to the lien of the plaintiff, and prior to the lien of said Howell, Jewett & Co.

"(5) Said Howell, Jewett & Co. have a valid lien upon said premises for the sum of \$499.52, with interest thereon at the rate of 10 per cent. per annum from July 6, 1882, which lien is subsequent to the lien of the plaintiff, and subsequent to the lien of said G. C. Hixon & Co.

"(6) Said premises should be sold by the sheriff, without appraisement, and after the payment of costs of this suit, and the charges for such sale, the balance should be applied to the payment of said claim and liens in accordance with the priorities hereinbefore stated."

Smith & Solomon, for plaintiff in error. *T. M. Pierce*, for defendant in error.

SIMPSON, C. The precise question in the case is whether the written instrument executed and acknowledged by Nannie E. Stoner on the twenty-seventh day of December, 1881, considered in connection with the mortgage executed by her husband, Samuel A. Stoner, on the twelfth day of November, 1881, fulfills the requirement of article 15, § 9, Const., and amounts to and is the joint consent of husband and wife to the alienation. In this case, the husband, without the knowledge or consent of the wife, executes a mortgage on the homestead, signs, or procures some one to sign, the name of the wife to the instrument creating the lien, and then fraudulently procures its acknowledgment by a notary public. Subsequently, the notary, learning the facts and becoming uneasy for his own safety, seeks the wife at a time when the husband is not present, and, "explaining to her the nature of his business," she, by a written instrument, attempts to ratify what her husband has done. Is this *consent*? Is it the *joint consent* of husband and wife, as contemplated by the constitution?

The homestead feature of the laws has always been regarded with peculiar favor by the courts of those states by which it has been enacted. It has been the theme of both forensic and judicial eloquence. It has been repeatedly declared, in legislative halls and from the bench, that the policy of these laws is "liberal" and "benevolent;" "their object a noble one;" that "they are an enlightened public policy;" "their provisions the most beneficent." In the convention that framed the constitution of the state there was no one subject that was more carefully considered and more thoroughly discussed than the homestead provision. At least 25 pages of the published debates of that body are devoted to the discussion of the subject. In the various stages and phases of that discussion, among the many opinions and comments made on the section, as it was being perfected, and as finally adopted, the following expressions are selected as guides to the intentions of its authors, to-wit: "The wife's right to the actual control of the homestead." "The guaranty of a home to every member of the family." "A reckless or drunken husband should not have power to alienate the home of his family." "The protection of the family, and not the head of the family merely." "To give permanency and value to the homestead by making its alienation difficult." "To put it out of the power of the husband, or the misfortunes of trade, to take away the homestead." "A home for the family that Shylocks cannot reach." "The woman, the wife and mother, shall have control of the home." "There is no intention to exclude the woman, for that would destroy the object of a homestead." "Neither the hand of the law, nor all the uncertainties of life, can eject the family from the possession of it." "Gives every mother and child in the state a home to which they may retire and find shelter from the storms of life." This was the spirit in which it was conceived, and these the reasons of its adoption, and it must be read in the light, and construed in the spirit, of these declaratory statements of its framers.

In the earliest adjudications of this court on question arising under this homestead feature of our constitution, the same or similar expressions are used. In *Morris v. Ward*, 5 Kan. 239, Mr. Justice VALENTINE says: "The homestead was not intended for the play and sport of capricious husbands merely; nor can it be made liable for his weakness or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and of society, to protect the family from destitution, and society from the danger of her citizens becoming paupers." In *Helm v. Helm*, 11 Kan. 19, Chief Justice KINGMAN, says: "The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against *any act* of her husband or of creditors without her consent. If her husband aban-

dons her, that use remains to her and the family. With or without her husband, the law has set this property apart as her home."

These citations are sufficient to show that both the convention that framed the constitution, and the court whose prerogative it is to construe it, have unitedly declared its purposes and objects to be for "the protection and maintenance of the wife and children against the neglect and improvidence of the husband and father." This court, in the consideration of questions arising under the provision of the constitution, and the statutory enactments in aid thereof and supplemental thereto, must give them a liberal construction, so that the purposes intended by the laws shall the better be advanced and secured. *Thomp. Homest. & Ex.* 8, and authorities cited. These same considerations induce the courts to adopt a strict rule respecting their alienation, to the end that what is regarded so highly as to be embodied in the organic law as the most beneficent legislation, and the most enlightened public policy, is not to be lightly regarded and easily avoided by the parties for whose protection the legislation was adopted. Hence it is held that the homestead right can be barred only by complying strictly with the laws prescribing the mode of alienation. *Moore v. Titman*, 33 Ill. 630; *Kitchell v. Burgwin*, 21 Ill. 45; *Connor v. McMurray*, 2 Allen, 202; *Greenough v. Turner*, 11 Gray, 332; *Hoge v. Hollister*, 2 Tenn. Ch. 606; *Dickinson v. McLane*, 57 N. H. 31. To divest the homestead estate, the mode of conveyance prescribed by the law governing the alienation of such estates must be strictly pursued, is the rule generally adopted in all the states in which such laws have been enacted,—held more strictly in some than in others; and yet in all there must be a literal compliance with the provisions of the statutes in this behalf.

From all the adjudications upon this subject, the three following rules are deducted, and may fairly be considered as settled: (1) The object of the homestead law is to protect the family of the owner in the possession and enjoyment of the property; (2) that construction must be given such laws as will best advance and secure their object; (3) to divest the homestead estate there must be a literal compliance with the mode of alienation prescribed by the statute.

Applying these rules to the mortgage first executed by Stoner, and subsequently to its attempted ratification by Mrs. Stoner, the conclusion is irresistible that it was not done in compliance with the provisions of the homestead law, and that it was violative both of the letter and spirit of the constitution. The requirements of the organic law in this respect are plain and unmistakable. "The homestead shall not be alienated without the joint consent of husband and wife, when that relation exists." The consent of the wife to the execution of this mortgage was not had before or at the time of the attempted alienation, on the twelfth day of November. If she ever consented, it was long after its delivery, and at the time of the acknowledgment of the alleged ratification, on the twenty-seventh of December. Is this the act of "joint consent" as required? The usual and legal signification of the word "consent" implies assent to some proposition submitted. In cases of contract, it means the "concurrence of wills." Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. In the very nature of things, consent to the alienation must precede the act of conveyance. The husband must have made a proposition to the wife, or the wife to the husband, or a purchaser to both, to alienate the homestead, and the mind of the husband and of the wife must have concurred, and they jointly consented to the execution of the conveyance or the creation of the lien, both assenting and both signing the instrument before delivery.

"It might be that a husband and wife, by two separate instruments, could alienate the homestead when it was intended *by both* that such instruments should operate together as a single instrument; for in such a case it might

perhaps be said that the separate consent of each had such a connection with each other that they might together be considered as the joint consent of both." VALENTINE, J., in *Ott v. Sprague*, 27 Kan. 620.

In such a case, where it clearly appears that there had been previous consultation between husband and wife, and both, with full knowledge of all the facts and circumstances, had consented to the alienation, and where there is an entire absence of fraud, intimidation, or concealment of material facts from the wife or the husband, and where, from the temporary absence of either, or being widely separated, there is necessity for prompt action to take advantage of a bargain conducive to the interests of both, under such and similar circumstances an alienation of the homestead by separate instruments, but each containing a reference to the other, might be upheld; but the safer and better rule to observe is to have the joint consent of the husband and wife evidenced by their signatures to the same instrument, at the same time and place, before the same officer, and in presence of each other.

The word "joint" seems to have been used advisedly and with such a purpose, and to hold otherwise would be to ignore it in the construction of the constitutional provision, instead of giving to it the force and meaning it is naturally entitled to.

In *Luther v. Drake*, 21 Iowa, 92, on this question the court say: "The point made by counsel is that, as the husband and wife did not concur in and sign the same conveyance, the homestead title did not pass, and the deed was of no validity under the statute. The question is not free from difficulty. The interests involved therein to property of untold value in the state are too great to justify its determination until it necessarily arises. As at present advised, this court might not be united in its solution; and, as the same can be disposed of upon other grounds, we prefer to leave it open for future consideration."

In *Dickinson v. McLane*, 57 N. H. 31, the case being this: In 1862, John Dickinson, the plaintiff's husband, mortgaged the premises to Z. K. Dickinson, releasing all his right to a homestead therein, but the plaintiff did not sign the deed. In 1863 the plaintiff, by her separate deed, her husband not joining therein, quitclaimed to said Z. K. Dickinson "all the right of homestead that she might or could be entitled to, in any event, or in any change of life or circumstances, in said premises." At this time, John Dickinson and the plaintiff had three minor children. "SMITH, J.: There is nothing in the act of 1851 in relation to homesteads, or in any subsequent statutes, that shows any intention of the legislature that a married woman might release her right of homestead by a separate deed. Indeed, the language used implies that a release of homestead, to be valid, must be by the joint deed of husband and wife. Again, the natural construction of the language of the sixth section, 'unless the wife join in the deed of conveyance,' is that she join in the same deed be executed, and not by her separate deed. But, aside from this, there is nothing in the act which shows that the legislature, in providing that the wife join in the deed of conveyance by her husband of the homestead, intended that any different construction be given to such provision than what the law, as it has been in force in this state up to that time, would permit her to do. From these views it follows that the plaintiff never released her homestead in the premises set out in her bill by any valid deed. CRUSHING, C. J.: The portion of the statute which, according to my understanding, is to govern this matter, is as follows: 'And no release or waiver of such exemption shall be valid unless made by deed executed by the husband and wife, with all the formalities required by law for the conveyance of real estate.' Comp. St. 474, § 1. In the very teeth of this statute we are asked to hold that the homestead has been released by the separate deeds of the husband and wife executed during the life of the husband. The policy of the law has wisely provided that the most important right—this *tabula e naufragio*, this last plank from the ship—

wreck—shall not be lost unless the husband and wife lose their hold of it at the same time and by the same act. In some way, it is not material to us to inquire how, the wife has been induced to execute this deed alone, probably because the husband then refused to join in it. It is proposed that the first time a matter of this kind is brought to the attention of the court the law should be judicially repealed. Why? I am not able to see any reason for doing so, and I therefore think that the homestead of the plaintiff is not released. LADD, J.: The separate deed of the husband and the separate deed of the wife are alike ineffectual to pass the homestead right. By the plain terms of the statute neither can have any effect upon it. It seems to follow that the separate deeds of both must be equally ineffectual. The statute created a new and somewhat peculiar estate, an inchoate right, in which the wife and minor children, as well as the husband, have an interest. It provides the exact mode in which that right may be released or conveyed. It was doubtless thought necessary to guard thus carefully the mode of conveying away the right, in order to secure fully the beneficial purposes of the act. I do not think it is within the power of the court to hold that any mode of conveyance different from that required by the act is effectual, either by way of estoppel or otherwise. Our cases where it has been held that a release by the wife of her right of dower by a separate deed executed subsequently to the deed of her husband, cannot govern this case because of the clear and unequivocal terms of the statute prescribing the only way in which the homestead right can be conveyed."

In the case of *Poole v. Gerrard*, 6 Cal. 71, the case being this: Hiram Poole, the husband, on the fifteenth September, 1853, conveyed the homestead to the defendant by a deed in which his wife did not join, though it was made with her knowledge. Poole, the next day, left the country. The wife, who was residing on the property, under the impression that she had no legal rights to the homestead, conveyed her claim thereto to the defendant by a deed duly executed and acknowledged on the twenty-eighth day of September, 1853. She subsequently brought her action to recover possession of the homestead, and for rents, etc. "HEYDENFELDT, J.: The court below erred in deciding that the deed of the plaintiff [the wife] conveyed all her interest in the property. To make a valid sale of the homestead requires the *joint* deed of husband and wife. The husband must make the contract, and the wife must assent to it by an examination separate and apart from her husband. This is the mode pointed out by the statute, and it must be strictly pursued."

The case of *Ott v. Sprague*, decided by this court, and heretofore cited, was one in which the husband and wife had made separate conveyances of their homestead; but there is an interval of eight years between the execution of the deed of the husband and that of the wife, during all of which time the wife had been separated from the husband, and for the most of that time both had been absent from the homestead. It was held by the court, Mr. Justice VALENTINE delivering the opinion, "that where two separate and distinct instruments are executed, at two separate and distinct times, as in this case; where a long interval elapses after one is executed before the other is executed, the interval in this case being over eight years; and where the two instruments are executed without any reference to each other, or without any intention that the two together may be considered as one single and united instrument,—we think that one cannot make the other valid."

In *Morris v. Ward*, 5 Kan. 239, it is held that a mortgage of the homestead executed by the husband alone is void.

In *Dollman v. Harris*, 5 Kan. 597, it is held that a mortgage of a homestead executed by the wife alone is void, notwithstanding the legal title to the same may be in her and not in her husband. How can it be said, then, that two void instruments, one executed by the husband and the other by the wife, mortgaging the homestead, can have the effect to create a lien? They are void for all purposes, whether considered separately or taken together.

Counsel for defendant in error refers to the case of *Spafford v. Warren*, 47 Iowa, 47, and claims that case as decisive of this. We do not think so. In that case, the wife, having previously been consulted, consented to the execution of the mortgage, and she and her husband, in presence of each other, signed, and at the same time acknowledged, the instrument. The name of the grantee and the description of the property were left blank, and the writing was left in the possession of the husband, to be used, in accordance with the understanding between husband and wife, to secure a creditor of the husband. The wife left home upon a visit, and, during her absence, the husband discovered that the blank instrument executed by her and himself was a deed absolute. He filled the proper blank with the description of the property that he and his wife intended to incumber by the mortgage. A short time thereafter, having bargained a sale of the homestead to Warren, he filled the other blank with the name of the purchaser. On the return of the wife, he informed her of the uses to which the instrument had been put, and of the sale and conveyance of the homestead by means of that instrument. With this knowledge she consulted lawyers, who advised her that her rights in the property had not been divested by the conveyance. With this knowledge and advice she and her husband occupied the premises until the following March, and, while so occupying, it was offered for sale by the purchaser, and Warren took one person, with whom he was negotiating with that view, to see it. They were met by the wife, who knew the object of their visit, and she made no claim to the property. Shortly after this the husband and wife removed from the property, and a tenant of Warren went into the possession, and three years thereafter she commenced an action in chancery to set aside the conveyance. In the mean time Warren had paid off the mortgage resting upon the property at the time of its purchase from her and her husband, had discharged a debt of the husband's that he had assumed to pay as part consideration of its purchase, had made certain improvements upon the house, and had executed a mortgage on the property to one Stevens. The court held, on this state of facts, that "the law raises a presumption that she has assented to the validity of her deed, and thus cured its infirmities by ratification." This case may have been properly decided, on the ground that the wife, with full knowledge of her rights as advised by counsel, and of the action of her husband as communicated by him, voluntarily surrendered her property, made no objection to the defendant's title when he offered to sell it in her presence, permitting him quietly to hold possession of it for more than three years before she commenced her action, knew that he was making improvements, and discharging indebtedness resting on it. All these may have been sufficient to have estopped her from claiming an interest in it. She kept silent when she ought to have spoken. I do not understand that these acts of hers, or rather absence of protest, complaint, or action, ratify her conveyance. I can understand how, by these things, she can be estopped from setting up or claiming any interest in the property. The learned judge who delivered the opinion uses "estoppel" and "ratification" interchangeably, and as if they were synonymous and of the same legal signification. I do not so regard them. Applying the most approved definition of estoppel, that of Bigelow, to the facts in the Iowa case, and the result would be that her acts were such, in respect to the property, that it would be a fraud on the purchaser to permit her to impair or controvert them. The character of estoppel is given to what would otherwise be a mere matter of evidence. Estoppel may be created by silence or non-action, while ratification requires some positive, assertive act; and it does not make any difference whether the ratification is express or implied, for, if implied, it is from the acts of the individual respecting the subject-matter of the controversy.

The case at bar is one in which the contention of the counsel for the defendant in error is that the wife ratified the execution of the mortgage in her name by the husband. The *Spafford v. Warren* case is one in which the

wife placed herself in such a position by her non-action as to be estopped. In this case there is not a single element of the doctrine of estoppel to be found. It may be that, in view of the decision of the supreme court of Iowa in the case of *Stinson v. Richardson*, 44 Iowa, 373, it was necessary for the court, in *Spafford v. Warren*, to deal liberally with the doctrine of ratification. In the first case they say: "It is contended that the plaintiff [the wife] assented to and even advised the sale, and that she is now estopped from setting up her homestead rights in the property, if she ever had any. But if we should hold that she relinquished her homestead rights by verbally consenting to the assignment, or estopped herself by such consent, we should nullify an express provision of the statute. *Whether she knew it was a nullity or not, there was nothing she could do or say about it*, short of concurring in and signing the same joint instrument with her husband, that could give it any validity." It would seem that this comes very close to saying that a married woman could not be estopped by anything she could say or do, except joining in the conveyance, from claiming her interest in the homestead. In this state the question of estoppel is an open one in this class of cases. In the case of *Helm v. Helm*, *supra*, Justice KINGMAN, in commenting on the facts of that case, says: "It may well be questioned whether an innocent purchaser would not hold the land against her who had stood silent while he purchased for a full consideration the land which the record showed belonged to William Helm." No opinion is expressed now with reference to it, there being no facts in this case that invoke it. We will meet it when it comes.

There is another reason why this attempted ratification is not effectual. To make it so, "it must be shown that there was previous knowledge, on the part of the principal, of all the material facts and circumstances attending the act to be ratified; and, if the principal assent to the act while ignorant of the facts attending it, he may disaffirm it when informed of such facts. Indeed, in the very nature of things, this must be true. The effect of ratification is to create a contract. But a contract implies assent, and how can there be assent without knowledge?" *National Bank v. Drake*, 29 Kan. 311.

There is no finding or conclusion of fact that the wife was made acquainted with all the material facts attending the execution of the mortgage by her husband. The court below, in the fourth conclusion of facts, says "that the notary who took the acknowledgment of the mortgage, being uneasy about his position in the premises, procured another notary to accompany him to Lancaster to see her about it, on the twenty-seventh December. Samuel N. Stoner was not at home, and they found the wife at home alone. The other notary explained to her '*the nature of their business*,' and told her that she had a right to do as she pleased; *but that, if her husband had forged her name, he was liable to get into trouble*. She expressed her willingness to ratify what had been done, and she signed and executed the instrument." This does not make the showing of knowledge required by law. A notary who had deliberately violated a criminal statute of the state goes to the wife, whose name has been forged to a mortgage by her husband, and her acknowledgment certified to by this notary, and explains to her the nature of his business, tells her it is true that she can do as she pleases, but couples it with a statement that, if her husband had forged her name, he was liable to get into trouble. The nature of the notary's business was to save himself from trouble. He was not a party to the contract. He did not know all the circumstances attending it. He did not visit the wife in good faith to impart knowledge of all the material facts and circumstances of the transaction. He was there to shield himself from the consequences of a criminal act, and not as a party to the contract. To hold such a ratification effectual would put it in the power of every reckless and improvident husband in the state to render nugatory a plain constitutional provision. They could sign their wife's name to a mortgage of the homestead, have it certified as acknowledged and prob-

ably in every instance the wife would ratify, rather than see the husband suffer. "To constitute a ratification, it must be voluntary, deliberate, and intelligent, and the party must know that without it he would not be bound." The conclusions of fact respecting the execution of this ratifying instrument by Mrs. Stoner do not authorize the conclusion of law that the mortgage, as ratified, is valid.

We will not stop to discuss the question as to whether the act of Stoner in signing the name of his wife to the mortgage, or procuring some other person to do so, is a void or a voidable act, and, if void, not subject to ratification. While the writer of this opinion has a very decided conviction on the question, its solution is not absolutely necessary to the disposition of the case in this court.

There is, however, another most important and serious reason why this attempted ratification is not effectual. A criminal act is not capable of ratification. It is a conclusion of fact in this case that Nannie Stoner never signed the note and mortgage. Her name was signed to them probably by her husband. Whoever did sign her name was probably guilty of a violation of the first subdivision of section 114 of the act regulating crimes and punishments, (page 339, Comp. Laws 1885,) and rendered himself liable to be charged with the crime of forgery in the first degree. The notary certified the acknowledgment of the execution of the mortgage by Mrs. Stoner when in truth no such acknowledgment was made; and this was in violation of the first subdivision of section 119 of said act, (page 340, Comp. Laws 1885,) and he rendered himself liable to be charged with the crime of forgery in the second degree. We will not temporize or refine with this question. It may be said that the wife should be permitted to ratify the mortgage so far as the innocent mortgagee is concerned, he having no knowledge of the fraud; but the answer to this is that both the signatures to and the certificate of the execution and acknowledgment of the mortgage are criminal acts, and cannot be ratified for any purposes. It is always the case that some innocent persons suffer by reason of the commission of a criminal act, for no good results can flow from it, or no rights be acquired by it or in consequence of it. We cannot conceive of any state of facts, or any chain of circumstances, except it possibly be by estoppel, whereby any person can acquire any interest, estate, or lien upon real estate by an instrument to which signatures are forged, and a false certificate of acknowledgment is attached.

This question has been considered by the courts of other states; and probably the most thoroughly considered case is that of *Workman v. Wright*, 33 Ohio St. 405, the best report of which is found in 31 American Reports, 546, and foot-note, in which all the authorities *pro* and *con* are cited. We rest our views upon these two propositions: One is that, there having been no pretended authority for the execution of the mortgage in the name of the wife by the husband, the doctrine of ratification does not apply. Another is that the written instrument executed by Mrs. Stoner on the twenty-seventh day of December was really a promise given for the purpose and in consideration of avoiding a prosecution, and was therefore void as against public policy.

The mortgage of the defendant in error being void, any party to the suit can take advantage of it, and hence the plaintiffs in error, whose lien, by the judgment of the court below, was subordinated to that of the mortgage, can properly raise the question of its validity. "In an action to foreclose a senior mortgage executed by the husband, an answer by a junior mortgagee alleging that the mortgage property was the homestead of the mortgagor when the mortgage was executed, and that the wife did not join in the execution of the same, constitutes a good defense to the action, even when the mortgagor makes no defense." *Alley v. Bay*, 9 Iowa, 509; *Dye v. Mann*, 10 Mich. 291.

It is recommended that this cause be remanded to the district court of Atchison county, with instructions to so modify its judgment as to declare the

mortgage of the defendant in error void, and that it is not a lien on the premises.

By THE COURT. It is so ordered; all the justices concurring.

HIGINBOTHAM v. FAIR.

(*Supreme Court of Kansas. June 11, 1887.*)

1. APPEAL—REVIEW—QUESTION OF FACT.

The verdict being based upon conflicting testimony, and coming with the indorsement of the trial court, cannot be set aside by the supreme court, although the testimony may seem to that court to preponderate against the verdict.

2. SAME—NECESSITY OF OBJECTION.

The improper cross-examination of a witness, or the reception of incompetent testimony, where no objection is made or exception taken, is no ground for the reversal of a judgment.

(*Syllabus by the Court.*)

Error from Wabaunsee county.

Green & Hessin, for plaintiff in error. *Geo. G. Cornell*, for defendant in error.

JOHNSTON, J. W. P. Higinbotham sued Silvester Fair on two promissory notes alleged to have been executed by him on the twenty-ninth day of August, 1883, in favor of the Jacksonville Sulky-Plow Works, or bearer, each for \$150, one of which was payable on the first day of May, 1884, and the other on the first day of June, 1884. Fair denied, under oath, that he executed the notes sued on, and this was the principal question upon which evidence was received. The trial resulted in favor of the defendant, and the plaintiff brings the case here, alleging, as the principal error, that the verdict is not justified by the evidence. The testimony on the part of the plaintiff is to the effect that the notes were given by Fair to the Jacksonville Sulky-Plow Works in part payment on 60 sulky-plow attachments which Fair had contracted to purchase. Two agents, who sold attachments to Fair, testified that they witnessed Fair sign the notes sued upon. Higinbotham testified that, soon after he purchased the notes, he notified Fair of the purchase, in response to which Fair called upon him, and, upon an examination of the notes, said that they were all right, but that he had an impression that they came due at a later time. Sam Kimble, an attorney for Higinbotham, testified that he presented the notes to Fair, and requested payment, and that Fair became angry, and insisted that the Jacksonville Sulky-Plow Works had not complied with the contract made with him when the notes were given, but he admitted that the signatures to the notes were his genuine signatures. In addition to the testimony of these witnesses, several others were called as experts, who stated that they believed the signatures attached to the notes to be the genuine signatures of Silvester Fair. As against this, Fair testified that he never signed or delivered the notes in suit, although he does say that the signatures looked like his own, and that on August 29, 1883, he executed notes which were similar to these, except that they were not payable until January 1, 1885. He denied that he admitted to either Higinbotham or Kimble that he had signed the notes in controversy, or had recognized their genuineness. The testimony of the plaintiff was contradicted in several other particulars of minor importance.

While the evidence seems to us to greatly preponderate in favor of the plaintiff, it will be seen from the foregoing review that there was testimony upon which to found a verdict in favor of the defendant. Under a venerable rule of this court, we cannot weigh the testimony to determine where the preponderance is; and the verdict, supported as it is, and coming here with the

approval of the trial court, as it does, cannot be set aside for insufficiency of the evidence. *Kansas Pac. Ry. Co. v. Kunkel*, 17 Kan. 145; *Union Pac. Ry. Co. v. Diehl*, 33 Kan. 422, 6 Pac. Rep. 566.

Another matter complained of is that the court permitted the witnesses of the plaintiff, who had testified as experts concerning the genuineness of the signatures attached to the notes, to be examined upon other signatures written by defendant's counsel, which were exhibited to the witnesses through a slot cut in a paper, and thus concealed all except the signature exhibited. The fictitious signatures were thus used on cross-examination, probably with a view of testing the accuracy of the experts; but, if it is conceded that the testimony was inadmissible, still the plaintiff is not in a position to complain. This method of cross-examination proceeded without any objection being made or exception taken by the plaintiff. Afterwards, when the defendant proposed to show that some of the signatures which the experts said were written by the same person who signed the notes had been written by his counsel, and an objection was made, the court excluded the testimony, and stated that none of the signatures upon which the witnesses were examined would be allowed to go to the jury except such as were genuine.

The judgment of the district court must be affirmed.

(All the justices concurring.)

CITY OF FORT SCOTT v. DEEDS.

(*Supreme Court of Kansas. June 11, 1887.*)

1. APPEAL—CASE MADE—REQUISITES OF.

Where proceeding in error are prosecuted in the supreme court upon a case made, and there is no statement or showing in the case made that the motion for a new trial was overruled, or that any judgment was ever rendered, the supreme court cannot consider and review the alleged errors of law occurring on the trial.

2. SAME—OTHER PAPERS.

A case made cannot be supplemented and completed by having added or attached thereto certified copies of the record of the district court not embodied therein as a part of the same. *Transportation Co. v. Palmer*, 19 Kan. 471.

(*Syllabus by the Court.*)

Error from Bourbon county.

W. W. Martin, for plaintiff in error. *B. J. Waters* and *J. M. Limbocker*, for defendant in error.

HORTON, C. J. On March 10, 1886, Margaret Deeds fell upon a sidewalk in the city of Fort Scott, and was injured, and May 5, 1886, she presented her claim to the city council of Fort Scott for \$1,000 damages therefor. The city of Fort Scott settled and compromised her claim, and she executed the following writing:

"JUNE 28, 1885.

"Received of W. W. Martin, city attorney, twenty-five dollars, payment in full for all damages caused by my falling on a sidewalk in said city of Fort Scott, Kansas, and breaking my arm, and otherwise injuring myself, on or about March 10, 1885.

her
"MARGARET S. X DEEDS.
mark.

"\$25.00. Witness: F. J. NUTZ."

Subsequently she brought her action against the city of Fort Scott to recover the sum of \$1,000 damages on account of her injury. She alleged in her reply, and attempted to prove, that the settlement and compromise were procured through fraud, misrepresentation, and undue influence. The jury returned a verdict in her favor for \$975, being the amount she claimed, less

the \$25 already paid her. The city of Fort Scott attempts to bring the case here for review.

The proceedings in error are prosecuted in this court upon a case made. No certified transcript of the record and proceedings has been filed. There is omitted from the case made the order overruling the motion for a new trial, and the entry of the judgment. Upon the record, a preliminary question is presented. This is that as the record does not show the motion for a new trial was overruled, or any judgment rendered, the grounds for the petition in error are untenable, and ought not to be considered. The city of Fort Scott attempts to cure the omissions in the case made, by presenting to this court a certified copy of the journal of the district court containing the order overruling the motion for a new trial, and the entry of the judgment. It appears that, after the case made was settled, signed, and filed, an application was made to the trial judge for permission to amend the case made by incorporating therein a copy of the journal. The district court denied the application. Of course, in the absence of any judgment or order overruling the motion for a new trial, and in the absence of any statement or showing in the case made that the motion for a new trial was overruled, or that any judgment was rendered, there is nothing before us to present the errors complained of. It has always been decided by this court that a case made cannot be supplemented or completed by having added or attached to it certified copies of the record of the district court, not embodied therein as a part of the same. *Transportation Co. v. Palmer*, 19 Kan. 471; *Parker v. Machine Co.*, 24 Kan. 81; *Association v. Beebe*, Id. 363.

Within these authorities, the district judge committed no error in refusing the application to amend the case made, and we cannot consider as a part of the case made the copy of the journal not incorporated in the case made at the time it was settled and signed. The judgment of the district court, upon the record presented to us, must be affirmed.

(All the justices concurring.)

HUGHES and another, Partners, etc., v. WILEY.

(Supreme Court of Kansas. June 11, 1887.)

SALE—STANDING GRAIN—VESTING OF TITLE.

A contract for the sale of standing millet, that provided it should be cut and stacked on the farm of the vendor, and within 30 days be measured and paid for, does not vest the title to the millet in the vendee until it has been measured and paid for according to the contract.

(Syllabus by Simpson, C.)

Error from Elk county.

Action commenced on the seventh day of August, 1885, in the district court of Elk county, by plaintiffs in error against defendant in error, to recover the sum of \$970 alleged to be due to plaintiffs in error as damages by reason of the non-performance by Wiley of a contract for the sale of a large quantity of millet and corn by him to the plaintiffs in error. The record shows, substantially, that about the sixth day of September, 1884, the parties entered into an agreement, by the terms of which Wiley sold to Hughes & Zeek 170 tons of millet, to be delivered by Wiley to Hughes & Zeek on the farm of Wiley, in stack, 145 tons at \$2.80 per ton, and 25 tons at \$3 per ton, the difference in price being caused by the length of haul to the farm of Hughes. The millet was cut and stacked on the farm of Wiley, and that of his mother, and was to be paid for within 30 days from the time it was stacked. It was agreed on the trial that the corn in the contract referred to amounted to 1,420 bushels, at 20 cents per bushel, and that 1,135 bushels were delivered, and that \$200 had been paid on the contract. Hughes & Zeek were feeding cattle for sale on the market, and it was understood at the time of the making of

the contract that feed was designed for that use. The millet was not delivered, and it is claimed by reason of the fault of Wiley, and all of the corn was not delivered for the same reason; that feed was scarce, and as winter came on greatly advanced in price; that the plaintiffs were compelled to buy and pay the highest prices, and hence were greatly damaged by the neglect and refusal of the defendant in error to comply with his contract.

At the time the contract was made Wiley signed the following written instrument:

EXHIBIT A.

"HOWARD, KANSAS, September 6, 1884.

"Rec'd of John Hughes one hundred (\$100) to apply on millet and corn bought of me on my farm. Millet No. 1, at \$2.80 and \$3 per ton; corn to be cut in shock, and no stock allowed in field where corn is, and fire-breaks broke sufficient to keep out all fires. This agreement includes all corn on my farm, about fifty (50) acres, more or less, all the corn cut if possible, and not less than thirty-five (35) acres cut. Corn to be delivered at John Hughes' farm, where he may direct. [Signed] L. C. WILEY."

Nichols & Jackson, for plaintiffs in error. *White & Marshall*, for defendant in error.

SIMPSON, C. A jury was impaneled to try this cause. After the plaintiffs in error had stated their case, the defendant in error interposed a special demurrer to that part of the evidence in reference to the millet; and the court sustained it; and this is the principal error alleged and discussed in the brief of counsel for plaintiffs in error. As we gather the facts regarding the millet from the contract of September 6, 1884, they are as follows: Wiley was to cut and stack the millet, and notify Hughes when the same was completed. Thirty days thereafter it was to be measured, and the plaintiffs in error were to pay for it. The millet was cut, and the stacking practically completed, on the twenty-eighth day of September. On the tenth day of October Hughes told C. W. Fleak, the brother-in-law and agent of Wiley, who had been authorized by Wiley to attend to the admeasurement of the millet; that the probabilities were that the millet was damaged to some extent; that the fire-breaks were not broken; and that he had better write to Wiley (who was at Manhattan) to come down in case he (Fleak) could not allow any damages on the millet; that he did not want or would not take damaged millet. Hughes and Wiley had a conversation on the nineteenth day of October about the millet. Wiley said that Martindale wanted it, and would consider it a great favor if Hughes would let him have it. Hughes said he was under obligations to Martindale, and would "give off" for him, but for no other man. At this conversation Wiley insisted that Hughes should consent to the sale of the corn to Martindale, also; but this Hughes declined to do. They agreed to go the next morning, and examine the millet, to see if it was damaged. Hughes went according to agreement, but Wiley had gone to Howard, and Hughes returned home without having made an examination of the millet. Hughes says that he heard about the twenty-fourth of October that Wiley had sold the millet to Chandler, a neighbor, and as a matter of fact Wiley sold the millet on the twenty-fourth day of October, and before the expiration of the time within which it was to be measured and paid for. Hughes, in conversation with Wiley, said he would not pay for damaged millet; that his contract was for good No. 1. millet; that he would pay for every spear of good millet.

We have carefully read and considered both his direct and cross-examination as to the millet, and all that was said about it, and we are at a loss to account for the ruling of the learned district judge on the special demurrer to the plaintiffs' evidence on this branch of the case. It is fair to assume, from the brief of counsel who tried the case below, that the special demurrer was

sustained on the theory that the absolute title to the millet passed to and became vested in Hughes & Zeek at the time the contract was made, to-wit, on the sixth of September, 1884, and that Hughes & Zeek could only bring an action for conversion, or possibly might have maintained replevin. This is a misconception of the law, so far as the question of title is concerned.

A fair construction of the contract is that at the time of its execution the millet was standing in the field, the obligation to cut and stack was cast upon Wiley, and within 30 days after he had done this it was to be measured and paid for by Hughes & Zeek. This necessarily implied that it was to be cut when it was in good condition to make good feed, that it was to be properly stacked, and that fire-guards were to be broken around the stacks, so as to protect it from fire. Hughes & Zeek were to pay for it when it was put in this condition, and the title would not pass to them until these preliminary conditions had been performed by Wiley. If Wiley had not thus performed these conditions, could he have maintained an action against Hughes & Zeek for the contract price of the millet?

There was material error in the ruling of the court on the special demurrer, and for this error we recommend that the judgment of the district court of Elk county be reversed, and the cause remanded, with instructions to grant a new trial.

BY THE COURT. It is so ordered; all the justices concurring.

ATCHISON, T. & S. F. R. CO. v. BURLINGAME TOWNSHIP, in Osage County and State of Kansas, a Corporation.

(*Supreme Court of Kansas. June 11, 1887.*)

1. LIMITATION OF ACTIONS—CONSTRUCTION OF STATUTES.

Statutes of limitation are statutes of repose, which are founded on sound policy, and should be so construed as to advance the policy they were designed to promote.

2. SAME—RUNNING OF STATUTE—PERFECTING RIGHT OF ACTION.

Where preliminary action is essential to the bringing of an action upon a claim such as is required of the township trustee in chapter 105 of the laws of 1876, and such precedent action rests with the claimant, he cannot prevent the operation of the statute of limitations, by long and unnecessary delay in taking such action, but the statute will begin to run in a reasonable time after he could by his own act have perfected his right of action; and such reasonable time will not, in any event, extend beyond the statutory period fixed for the bringing of such an action.

(*Syllabus by the Court.*)

Error from Osage county.

Geo. R. Peck, A. A. Hurd, and W. C. Campbell, for plaintiff in error. Wm. Thomson, for defendant in error.

JOHNSTON, J. This action was brought by Burlingame township, of Osage county, to recover \$7,290, damages alleged to have resulted from the building of the Atchison, Topeka & Santa Fe Railroad across a public highway in Burlingame township, in Osage county. It is alleged that the highway was legally laid out and established long prior to the construction of the railroad, and that by the construction of the railroad, which was prior to January 1, 1884, the highway was materially injured by excavations and embankments which rendered it dangerous for use by the traveling public; that on the third day of June, 1884, the defendant had failed, and continued to fail for more than 90 days preceding that time, to make good the crossing, and at the time of the commencement of the action had failed to do so; that on the third day of June, 1884, the township trustee of Burlingame township notified the board of county commissioners of Osage county of the facts, and made a statement to them showing the location of the crossing and the manner in which it had

been injured by the construction of the road, which was verified by three resident tax-payers of the township; that thereupon the county commissioners appointed three disinterested householders to view the crossing, and assess the damages resulting from the construction of the railroad, designating June 17, 1884, as the time of meeting, and notified the railroad company of the time and place of meeting; that at the time and place designated the viewers met, and from actual view assessed the damages, resulting to the highway by reason of the construction of the railroad, at \$7,290, and on the eighteenth day of June, 1884, they returned to the township trustee a certificate under oath of their action; that thereupon the township trustee immediately notified the railroad company of the amount of damages assessed by the viewers, and demanded payment of the same. It was then alleged that on or before the fourteenth day of July, 1884, the railroad company had constructed its railroad across the highway, and had materially injured it by excavations and embankments; and set forth that the railroad company had, for more than 90 days preceding the fourteenth day of October, 1884, failed to make good the said crossing; and then avers the giving of a new notice by the township trustee, and that new proceedings to assess the damages against the railroad company, the same as those above described, were had; and the viewers then appointed reported on the twentieth day of November, 1884, that the damages resulting to the highway by the construction of the railroad were the same as the first assessment, \$7,290; that notice of the assessment made was given to the railroad company, and payment demanded, but that more than 30 days elapsed; and the company had failed to pay that sum, or any portion thereof. The action was thereupon brought by the trustee in the name of the township, and judgment demanded for the sum of \$7,290.

The railroad company answered in three paragraphs: *First*, a general denial; *second*, that the railroad was built across the highway in 1869, and that the company then restored the highway to its former state, or to such a state as not to have necessarily impaired its usefulness, and did all the grading made necessary by the embankments and excavations at that crossing; *third*, that the railroad was constructed in 1869, and long prior to the ninth day of March, 1876, and "that said plaintiff's cause of action, if any, against said defendant, is a cause of action created by statute, and created by chapter 105 of the Laws of 1876, and accrued to said plaintiff at the expiration of 90 days from and after March 9, 1876; and said cause of action was at the time of the commencement of this suit, and the times mentioned in said plaintiff's petition, and each and all of them, barred by the statute of limitations."

The township filed a reply denying the allegations of the first and second counts of the railroad company's answer, and demurred to the third count on the ground that it did not state facts sufficient to constitute a defense. This demurrer the court sustained, and to that ruling the railroad company excepted. The case came on for trial on August 25, 1885, and the jury found a verdict in favor of the township assessing its damages at \$1,128.81.

We will dispose of the case upon the pleadings; the only question which we need to consider being whether there was error in sustaining the demurrer to the third ground of defense stated in the answer. This is a statutory action, brought upon a liability arising under the provisions of chapter 105 of the Session Laws of 1876, which went into operation March 9, 1876. In section 3 of that act it is provided that "whenever, by the construction of any railway within this state, the crossing of any public highway has been or shall be materially injured, either by excavations or embankments made by said railway company in the construction of said road, and the said railway company have failed to make good the said crossing, and continue to fail to do so for the space of ninety days after the taking effect of this act, it shall be the duty of the township trustee of the proper township to notify the board of county commissioners of the fact, stating the location of the cross-

ing, the manner in which the crossing has been injured, obstructed, or destroyed, verified by the affidavit of at least three resident tax-payers of the said township." It then provides that it shall be the duty of the county commissioners to appoint viewers, and designate a time and place when they shall meet and view the crossing, and assess the damages resulting to the highway from the construction of the railroad, and to give the railway company written notice of the time and place of such meeting. In section 4 it is provided that the viewers so appointed shall meet on the day designated, and from actual view assess the damages, and shall return to the township trustee a certificate under oath of the amount of damages by them assessed. Section 5 provides that it shall be the duty of the township trustee, immediately upon the filing of said certificate, to notify the railroad company of the assessment made against it, and demand payment of the same; and, if the company fail to pay the amount for a period of 30 days, he is authorized to commence an action for the recovery of the amount of damages, and the certificate of the viewers is *prima facie* evidence of the amount of damages sustained. This action was not begun for a period of nearly 15 years after the building of the road, nor until about 8 years after the passage of the act under which it is brought. On the one hand it is contended that the cause of action accrued within 90 days after the taking effect of the act, and on the other that it did not accrue until the proceedings were instituted by the township trustee, and demand for the damages assessed had been made by him. We think the latter theory cannot be sustained. If it could, the township trustee might delay indefinitely the institution of the proceedings and the making of the demand, which are essential to the maintenance of the action. The statute makes it the duty of that officer to take the preliminary steps, and it both enjoins and implies prompt action on his part. On cases that had arisen before the passage of the act, it was made his duty to institute proceedings at the end of 90 days from the taking effect of the act, and on cases that arise afterwards it is fair to say that he is required to act within a reasonable time after the crossing is injured, obstructed, or destroyed. The nature of the case is such that he ought to act with promptitude. The interest of the people whom he represents forbids delay. If the crossing is destroyed, and the highway rendered impassable, it is highly important to the public that the trustee should early take the steps which are necessary to restore and reopen the highway, and which he alone can take. If it has been so injured or obstructed by the railroad company as to make it dangerous to the life or property of those who attempt to use it, a postponement of action on his part would be inexcusable. If it is a disputed question in regard to whether the railroad company had injured the crossing, or had failed to make it good after constructing its railroad over the highway, it is important to both parties that action should be taken before the evidence upon the question is effaced or lost. Certainly there is nothing in the duty cast on the trustee, or in the act imposing it, which contemplates a great delay in perfecting the cause of action. To permit a long and indefinite postponement would tend to defeat the purpose of the statutes of limitations, which are statutes of repose founded on sound policy, and which should be so construed as to advance the policy they were designed to promote. *Taylor v. Miles*, 5 Kan. 499; *Stibert v. Wilder*, 16 Kan. 176.

The period prescribed by the legislature within which actions that are based on a statutory liability, as is the present one, are to be brought, is three years after the cause of action accrues, and not afterwards. Civil Code, § 18. The preliminary steps essential to the bringing of the action are to be taken by the township, and these steps should be taken within a reasonable time after the injury occurs, or after action is required of the trustee. What is a reasonable time is not always easily defined, but, as diligence is required of the trustee, he certainly should have taken the steps essential to the bringing of the

suit within the statutory period fixed for the bringing of such actions. There is as much reason for an early commencement of the initiatory proceedings as there is for the institution of the action itself.

Jones v. Bisler, 3 Kan. 134, was an action to recover upon a promise to pay a certain sum of money when the promisor received a payment from the government, or as soon as otherwise convenient; and it was held that it could not have been contemplated that if the promisor never got his money from the government, or was never in a condition that he could conveniently pay, the money was never payable, but that in any event it was payable in a reasonable time after the statutory limitation would run. The supreme court of Pennsylvania, in considering the effect of the statute of limitations, held that, where a demand or notice was necessary to found an action upon, the right of action would be extinguished if there was unnecessary delay in making the demand. Justice THOMPSON, in giving the judgment, said: "To give effect to the spirit of the statute, the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued by the duty of diligence required of the party. Where the time for doing the act necessarily precedent to bringing the suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins, and, if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run." *Morrison v. Mullin*, 34 Pa. St. 12.

In *Railroad Co. v. Byers*, 32 Pa. St. 22, it was held that, where a call was necessary to precede a suit for a railroad subscription, it must, by analogy to the operation of the statute of limitations, be made within the time fixed as a bar against such suit.

In *Codman v. Rogers*, 10 Pick. 112, it was ruled that, if a demand was essential to the maintenance of an action, it must be made within a reasonable time, and that what is to be considered a reasonable time must depend upon the circumstances of the case; but, if no cause for delay is shown, the demand should be made within the time limited for bringing the action, and is not in time afterwards.

In *Steele v. Steele*, 25 Pa. St. 154, the effect of the claimant's delay upon the starting of the statute of limitations was considered, and it was there said that "a party cannot stop the running of the statute of limitations by his own negligence, or by any arrangements for his own convenience."

The same doctrine was strongly sustained in *Palmer v. Palmer*, 36 Mich. 487, in an action upon a promissory note payable 30 days after demand, where a demand had not been made until after the statutory period of limitation had elapsed. In that case the court said: "If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues, for the purpose of setting the statute in motion, as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable."

The township, by its own act, could have perfected its cause of action regardless of the wish or action of the other party; and within the foregoing principles and the allegations of the answer the action was barred. No excuse is given for the long delay, and it does not appear that it resulted from the action of the railroad company. The precedent action might have been taken in 1876, but, as we have seen, the plaintiff below has remained quiet for about 15 years since the alleged injury occurred, and about 8 years after the claim for the injury should have been perfected and sued upon by the township trustee. Eight years is a longer time than is allowed by law for the commencement of any action for the recovery of money, and much longer

than the time within which an action for a statutory liability may be brought.

For the error pointed out the judgment of the district court must be reversed, and the cause remanded for such action as may properly be taken.

(All the justices concurring.)

KANSAS PROTECTIVE UNION v. WHITT and others.

(*Supreme Court of Kansas. June 11, 1887.*)

1. LIFE INSURANCE—PROOF OF DEATH—WAIVER.

After the death of a person holding a policy of insurance, and the insurance company is notified of his death by the beneficiary named in said policy, and the company refuses to pay upon the grounds that deceased was not a member of the company, and that the policy had been canceled for non-payment of a note given for membership fee, *held*, that no formal proof was necessary, and that by denying all liability the company waived proof of death.

2. SAME—FORFEITURE OF POLICY—EXTENSION OF TIME.

Where a policy contains no express stipulation that the failure to pay a note given for membership when due would render the policy void, and after a note so given becomes due the time of payment is extended by the company, and death occurs before this time of payment runs out, *held*, that no forfeiture of the certificate of membership can be declared for non-payment of the note when first due.

3. MUTUAL BENEFIT SOCIETY—POLICY—ASSESSMENTS.

Where a policy contains an undertaking on the part of the insurance company to pay the beneficiary therein named \$2,000 upon the death of the insured, and not to exceed 75 per cent. of the assessments collected, the beneficiary may recover on said policy without proving demand on the company to make assessments, or showing that assessments have been made, or, if made, the amount collected thereon.

(*Syllabus by Clogston, C.*)

Error from Rice county.

This action was commenced upon a policy of insurance issued June 3, 1884, by the Kansas Protective Union to Andrew Whitt, husband and father of the defendants in error. Trial at the May, 1885, term of the Rice county district court, and judgment for the plaintiffs, defendants in error, for \$2,048.32, principal and interest, and defendant brings the case here on error.

Foster & Hayward, for plaintiff in error. *O. C. Cowgill* and *E. A. Austin*, for defendants in error.

CLOGSTON, C. The policy, the foundation of this controversy, contains the following undertaking on the part of the company: "The said union does hereby promise and agree to pay * * * the sum of two thousand dollars to Ellen Whitt, (wife,) or her executors, administrators, or assigns, within sixty days from the close of the quarter in which satisfactory proofs of the death during the continuance of this certificate of the above named member are received. It is provided, however, that the sum thus to be paid is conditioned upon assessments made therefor, and shall in no case exceed seventy-five per centum of the amount received thereon." The policy also contains some 12 conditions, but two of which are brought into question in this action, and are as follows: "That the annual dues and assessments, and any note given for any indebtedness to the union, shall be paid on or before the day on which they became due." "That if the certificate becomes a claim before the sum of ten dollars for each one thousand dollars of indemnity named shall have been received from payments made thereon for benefit of the reserve fund of this union, the right is reserved by this union to deduct such deficiency from the amount due the beneficiary under this certificate."

The plaintiff in error contends that it is not liable on this policy—*First*, because no proof of death was furnished by the defendants, as required by the conditions of the policy; *second*, that the certificate of membership was canceled for non-payment of note given for membership fee at its maturity; *third*, the court erred in refusing to allow the plaintiff to prove by their sec-

retary that one Doyle was not their general agent; *fourth*, defendants in error failed to show that assessments had been made, and whether collected or paid in; *fifth*, the judgment was too large by \$20. These five assignments are all the errors claimed and discussed in the plaintiff's brief, and we will take them up in the order presented.

The evidence established the following facts: At the time Andrew Whitt became a member of the Kansas Protective Union the fee of membership was eight dollars; that in payment of that sum he gave his note, due August 30, 1884, and after the note became due he wrote to the company for an extension, which was granted, until November 1, 1884; that on November 26th he died, and October 30th his son, one of the defendants in error, wrote to the secretary, inclosing eight dollars, and signed his father's name to the letter; that immediately after the death of Andrew Whitt the beneficiary in the policy informed one Doyle, who was the general agent of the defendant, living in Sterling, Rice county, of such death, and requested him to inform his company, which he did by letter on November 4th, and in reply thereto he was informed by the company that Whitt was not a member of their company, his certificate of membership having been canceled for non-payment of note given in payment for membership fee, and that they were not liable and would pay nothing; that it was the rule and custom of the company, upon being notified of the death of one of its members, to at once forward the proper blanks on which to make proof of death, as required by their rules. No such blanks were furnished to the beneficiaries, and no proof of death was made.

Under this evidence we think no proof was required of the beneficiaries of the death of Whitt. The union had disclaimed their liability, and insisted that the certificate of membership had been canceled, and for that reason they sent no blanks for proof of death. Had they simply refused to pay because no proof of death had been made, then that objection would have been good; but, as the union disclaimed on other grounds, they must rely upon the objection then made.

The court instructed the jury that the denying of the liability on the part of the union to pay the loss was a waiver by the company of its right to demand the proper proof of death, and we think the authorities fully sustain this rule laid down in the charge upon this point. In *Norwich & N. Y. Transp. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561, the court held that presentation of proof, under such circumstances, was of no importance to either party, as the law rarely, if ever, requires the observance of an idle formality, especially after the parties for whose benefit the original stipulation was made had rendered conformity thereto unnecessary and practically superfluous. See, also, *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562; *Insurance Co. v. O'Connor*, 29 Mich. 241; *Aurora Fire & M. Ins. Co. v. Kranich*, 36 Mich. 289; *Donahue v. Insurance Co.*, 56 Vt. 382.

2. Was the policy forfeited by the non-payment of the note? We think not. In the first place, there is no clause in the certificate that by reason of non-payment the certificate shall become void. Of the 12 conditions thereto, two or more contain the provision providing for a forfeiture upon non-compliance, and rendering the certificate void. This certificate was prepared by the company, and its construction must be considered strictly against them. If they desired to render the policy void by reason of non-payment, they ought to have provided for that forfeiture. But outside of this, after the note became due, Whitt requested their agent Doyle to write to the company, and have the time of payment extended to November 1st, and in reply the company wrote that no suit would be brought upon the note until after November 1st. Now, the request must govern in this case, and it can make but little difference in what language the reply was couched. It was enough, whatever was said, to say, in concluding their letter, "as requested." "As requested" meant that the time would be extended, and that no suit would

be brought until after November 1st. This was practically extending the time of payment, and nothing was due on that note at Whitt's death. On October 30th young Whitt sent the money due on the note. This is not denied or disputed; but counsel for plaintiff in error insists that because young Whitt signed his dead father's name to the letter, that it was a payment after Whitt's death. What difference could it make to the union? The payment of the money was all they had a right to demand. It was paid before due. Can they complain because the boy thought he had to send the money in the name of his dead father? And if they did not consider this a payment, why retain the money? They cannot be heard to say, after receiving and keeping the money, that it was no payment on the note, because of Whitt's death.

3. The court committed no error in refusing to let the secretary testify as to whether Doyle was the general agent of the union. The plaintiff's petition alleged such agency, and the allegation was not denied under oath by the defendant's answer, and therefore admitted. Even the copy of the certificate attached to the petition, and made a part of it, bore the indorsement, "A. P. H. DOYLE, General Agent;" and, if the evidence had been competent, the error in excluding it was immaterial, for what was done by Doyle would have been just as binding upon the union if performed by a stranger. What he did was done at the request of the Whitts, as their agent, and not as the agent of the union.

4. Plaintiff also insists that there was a failure of proof to show that the assessments had been made or collected, and the amount, if collected. There was no necessity, we think, for such proof. The undertaking on the part of the union was to pay the beneficiary of Whitt, after his death, \$2,000, but not to exceed 75 per cent. of the amount of the assessments, if the amount exceeded \$2,000. The plaintiff in error had charge of these assessments, and they knew if such sum would be realized from the assessments. The burden of proof would be upon the company to show the amount realized or collected, and not upon the plaintiffs. They made no complaint to the beneficiary about the amount due. They were not going to pay anything; denied all liability, not because the assessments had not been made or paid, but because they claimed that Whitt's certificate had been canceled by non-payment. Fair dealing on the part of the company would require that it make a statement to the beneficiaries of its reasons for non-payment. It had no right to pretend and give, as an excuse for non-payment, one reason before the suit, and now another.

5. And, lastly, the plaintiff in error insists that, if they are liable under this certificate, the judgment rendered was for \$20 too much; but it seems from the record that this objection was made for the first time in this court. The certificate itself shows that the company had a right to retain or deduct \$10 from each \$1,000, but it is nowhere shown that they made claim to this right. The union reserved the right to make this deduction, but, like any other right, they might waive it. Had they suggested this right, and made their claim to the court, that amount would have been deducted from the judgment; but they made no such request or claim, and they are estopped from claiming it here.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

STATE v. McNAUGHT.

(*Supreme Court of Kansas. June 11, 1887.*)

1. CRIMINAL PRACTICE—VERDICT—COUNTS.

A verdict of guilty on one count, in a criminal complaint, saying nothing as to other counts, is equivalent to a verdict of not guilty as to such other counts.

2. SAME—NEW TRIAL—WHAT OPEN.

And where such a verdict has been rendered, and the defendant procures a new trial, he can be tried at the new trial only for the offense charged in the count upon which he was found guilty at the former trial.

(*Syllabus by the Court.*)

Appeal from Crawford county.

S. B. Bradford, Atty. Gen., and *John A. Rankin*, for the State. *John T. Voss*, for appellant.

VALENTINE, J. On July 8, 1885, a complaint was filed before a justice of the peace, charging in four separate counts Joseph E. McNaught with violations of the prohibitory liquor law. On July 17 to 20, 1885, a trial was had upon this complaint, before the justice of the peace and a jury, and the jury rendered the following verdict, to-wit: "We, the jury, find the defendant guilty as charged in the *second count* in the complaint." Upon this verdict the justice of the peace rendered judgment, imposing upon the defendant a fine and imprisonment. On July 20, 1885, the defendant appealed "from said judgment" to the district court, where, on August 28 to September 1, 1885, the case was again tried before the court and a jury upon all the counts; the defendant, however, objecting to being tried upon any count except the second; and on September 1, 1885, the jury rendered the following verdict, to-wit: "We, the jury, find the defendant, Joseph E. McNaught, guilty as charged in the fourth count in the complaint in this action, in the form and manner therein charged, under the election of the county attorney therein."

On September 11, 1885, the court granted a new trial, and continued the case till the next term. At the next term, and on January 11 to 13, 1886, the defendant was again tried before the court and a jury on all the counts; the defendant objecting, and claiming that he had already been acquitted upon all the counts; and the jury found the following verdict, to-wit: "We, the jury, find the defendant, Joseph E. McNaught, guilty as charged in first, second, third, and fourth counts in the complaint in this case, in the form and manner therein charged." On January 14, 1886, the defendant moved for a new trial, which motion was heard on January 21, 1886, and was overruled with respect to the first and second counts, and sustained with respect to the third and fourth counts. On the same day a motion in arrest of judgment was made and overruled; and then the court rendered judgment against the defendant upon the first and second counts, sentencing him to pay a fine, and to be imprisoned in the county jail, and requiring him to pay the costs of the prosecution; and from this judgment the defendant appeals to this court.

The defendant claims that, as he was tried in the justice's court upon the entire charge, and found guilty only upon the second count of the complaint, he was in effect acquitted as to the other counts, and that he could never lawfully be again tried except upon the second count, upon which count, and that only, he obtained a new trial by appealing to the district court. And he further claims that as he was put upon his trial in the district court, and there tried against his will upon all the counts, and found guilty only as charged in the fourth count, he was virtually acquitted as to all the other counts. In other words, he claims that, in legal effect, he was acquitted in the justice's court upon the first, third, and fourth counts, and that he was acquitted in the district court upon the first, second, and third counts; and therefore that in the two counts, and upon the first two trials, he was, in legal effect, acquitted upon all the counts of the complaint, and could not again be legally tried upon any of such counts. He raised this question in the district court in various ways,—by a plea in bar, by objecting to any trial, by objecting to any evidence being introduced, and by motion in arrest of judgment; but the court below held that he could be tried again upon all the counts, and he was so tried and sentenced upon two of them, and a new trial

was granted as to the other two. We think the court below erred in holding that the defendant could be tried again. Mr. Wharton, in his work on Criminal Pleadings and Practice, uses the following language: "A verdict of guilty on one count, saying nothing as to the other counts, is equivalent to a verdict of not guilty as to such other counts." Whart. Crim. Pl. & Pr. (8th Ed.) § 740. See, also, upon this subject, the following cases: *Weinzorpflin v. State*, 7 Blackf. 186; *Bonnell v. State*, 64 Ind. 498; *Dawson v. State*, 65 Ind. 442; *Bittings v. State*, 56 Ind. 101; *Nabors v. State*, 6 Ala. 200; *Bell v. State*, 48 Ala. 684; *Guenther v. People*, 24 N. Y. 100; *State v. Phinney*, 42 Me. 384; *State v. Watson*, 63 Me. 128; *State v. Kattlemann*, 35 Mo. 105; *State v. Cofer*, 68 Mo. 120; *O'Brian v. Com.*, 9 Bush, 333; *Com. v. Bennet*, 2 Va. Cas. 235; *Kirk v. Com.*, 9 Leigh, 627; *Girls v. Com.*, 22 Pa. St. 351.

Of course, the jury ought to make a finding with respect to each separate count, for in all cases like this each separate count charges a separate and distinct offense. *State v. Chandler*, 31 Kan. 201, 203, 204, 1 Pac. Rep. 787. Also see the reasoning in the case of *In re Donnelly*, 30 Kan. 427 et seq., 1 Pac. Rep. 778. But when the verdict of the jury is silent as to some one or more of the counts, and contains a finding of guilty as to the other counts, it must be presumed that the jury intended to find, as to the counts concerning which the verdict is silent, that the defendant was not guilty. Such, we think, is the universal belief in practice. But, whatever may have been the actual intention of the two juries that tried this case at the first two trials, it necessarily follows from section 10 of the bill of rights of the constitution that the defendant could not again be tried after such two trials. That section provides, among other things, as follows: "No person shall * * * be twice put in jeopardy for the same offense."

The case of the *State v. McCord*, 8 Kan. 232, is however cited as authority for the ruling of the court below. Now, that case has no application to this case. In that case there was only one count in the information, and only one offense was charged, that of felonious homicide, including its various degrees,—as murder in two degrees, and manslaughter in four degrees; and the entire charge in that case was founded upon one single set of facts. In that case the whole case, and everything in it, had to be tried at one and the same time, and upon conviction only one judgment could be rendered, and only one sentence could be pronounced. It could not have been separated into parts, and one part tried at one time and another part at another; and after the trial was had, and a conviction by the jury, there could not have been a new trial granted as to one part and a sentence pronounced as to the other parts. In all this the present case differs from that. In the present case there are four separate counts, and each count charges a separate and distinct offense. The offense stated in one count has no connection with any offense stated in any one of the other counts. Each offense is founded upon a wholly different state of facts, and each could be prosecuted in a separate action; and, even when they are all combined in one prosecution, they must be prosecuted as separate offenses, and a separate judgment must be rendered upon each count, and for each separate offense. *State v. Chandler*, 31 Kan. 201, 1 Pac. Rep. 787; *In re Donnelly*, 30 Kan. 429, 1 Pac. Rep. 778.

Counsel for the defendant urges many other grounds for a reversal of the judgment of the court below, out, as such judgment must be reversed for the reasons already stated, we do not think that it is necessary to comment upon any of such other grounds. Judgment reversed.

(All the justices concurring.)

BLAKE v. RIDER and another.*(Supreme Court of Kansas. June 11, 1887.)***ATTACHMENT—LEVY—REAL ESTATE.**

When an order of attachment, issued against a non-resident, is levied upon a large number of town lots, the failure of the officer who served the order to place a copy thereof on each separate lot does not render the service of the order void.

*(Syllabus by Simpson, C.)***Error from Ellsworth county.**

James and W. B. Rider commenced an action against J. O. Briscoe, a non-resident of the state, and on the twenty-ninth day of January, 1885, about 10 o'clock in the morning, caused an attachment to be levied on a number of town lots in Briscoe's First and Second additions to the town of Ellsworth. At the time of the service of the attachment, all the lots were unoccupied and uninclosed. The sheriff attached said lots, and appraised them. A copy of the order of the attachment was posted on lot No. 1, and not on any of the other lots. Only one copy of the order was posted. The sheriff's return shows that he took possession of the lots, and holds them subject to the order of the court. The plaintiff in error is a purchaser from J. O. Briscoe, having bought at 12 o'clock m. of the same day at which the attachment was levied at 10 o'clock. So far as the record shows, he was a purchaser in good faith, Briscoe having been indebted to him in a large sum of money.

His deed was filed for record at 1:40 p. m. on the same day it was executed. The return of the order of attachment was filed in the office of the clerk on the thirtieth of January. Personal service of summons was made on Briscoe in this action at 4 p. m. of the twenty-ninth of January. The plaintiff in error comes into the district court of Ellsworth county, and files his motion to discharge the attachment issued in the case, for the reason that Briscoe had made and delivered to Blake "a good and sufficient conveyance to the lots before any notice, summons, or attachment papers were served on Briscoe;" and for the further reason that the attachment was void because as each town lot was a separate and distinct tract of realty, and was unoccupied, no copy of said order of attachment, or any other notice whatever, was by the attaching officer placed upon said lots. There was evidence heard upon the motion of Blake, and it was overruled. He brings the case here to reverse that ruling.

Lloyd & Evans, for plaintiff in error. *L. H. Seaver and Garver & Bond*, for defendants in error.

SIMPSON, C. It is suggested by counsel for defendants in error that the plaintiff in error does not come within *Long v. Murphy*, 27 Kan. 375, because his interest in the property attached was acquired subsequent to the lien of the attachment; but as this is, in another aspect, the vital question in the case, we prefer not now to pass upon that proposition. There can be no question but that the attachment lien was prior to the execution and delivery of the deed of Briscoe to the plaintiff in error, if the attachment proceedings, or rather the manner of its service by the sheriff, were of any validity. It is urged that, as the lots were separate and distinct tracts of real estate, it was the duty of the sheriff to have posted a copy of the order of attachment on each lot, instead of but one, and that, in consequence of his neglect so to do, the attachment is void. We think this question fairly determined by the case of *Wilkins v. Tourtellott*, 28 Kan. 825.

The facts are much stronger here than in that case, because in the reported case the return of the officer did not show that any attempt had been made to leave on the land a copy of the order of attachment, and that, at most, it was an irregularity, rather than a fatal defect. As it was claimed that, as a matter of fact, the sheriff did leave a copy of the order on the place, but failed to

so state in the return, he was permitted to amend the return in that respect. Here the return of the sheriff, as embodied in the record, recites: "And I took possession of and now hold, subject to the order of the court, the following described property, as the property of the said defendant, at the suit of the within-named plaintiffs, [here follows a description of the real estate;] and, finding no person occupying and in possession of said tracts of real estate, I posted in a conspicuous place thereon a copy of the within order."

Now, the main object of the requirement that a copy of the order should be placed in some conspicuous place on the land, where the attachment is levied on unoccupied real estate, is in aid of service on the defendant in the attachment proceedings. It is another effort to inform the defendant that he has been sued. It is invariably the fact that a non-resident owner of unimproved land has some resident agent in the neighborhood, and the law attempts to utilize it in bringing home to the defendant knowledge of the pendency of the action. We have no doubt but that in many cases persons whose real estate has been made the object of an attachment lien derive their first knowledge of the suit from such a fact; but in this case, within a few hours after the levy, a personal service of the summons was served on the defendant in the attachment suit, so that it is not in fact a practical question in this case as to whether the notice was posted on all instead of but one of the town lots. All we do hold is that the failure to post or leave a copy of the order on all the lots does not render the attachment proceedings void. The purpose for which this motion to discharge the attachment lien on these town lots is used in this action is virtually to try the title to the lots. It is disposing of the title to real estate in a very summary manner, and we do not want to be understood as expressing any opinion except as to the effect of the requirement to leave a copy of the order on the real estate attached.

We see no error in the ruling of the court below, and therefore recommend that it be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

DOWNING v. CITY OF MILTONVALE.

(*Supreme Court of Kansas. June 11, 1887.*)

1. EVIDENCE—JUDICIAL NOTICE—ORDINANCE.

Where a conviction is had for the violation of a city ordinance, and appeal to the district court, the ordinance of the city need not be introduced in evidence. The district court should take judicial notice of such ordinance. But where said ordinance is given in evidence over the objection of the defendant, *held* not error.

2. MUNICIPAL CORPORATIONS—ORDINANCE—ADOPTION OF.

In a city of the second class the records of the city council need not show that an ordinance was adopted by sections. *Held* valid if the journal shows the ordinance was placed on its final passage, and the vote thereon by yeas and nays, and that a majority voted in favor of its passage.

3. SAME—PUBLICATION OF—EVIDENCE.

Where the record of an ordinance has a note appended thereto, containing, among other things, that the ordinance was duly published, and the date of its publication, *held* valid, unless it is shown that said ordinance was not published, and the burden of such proof rests on the defendant.

(*Syllabus by Clogston, C.*)

Appeal from Cloud county.

This was a prosecution for disturbing the peace and quiet of certain persons in the city of Miltonvale. Prosecution under an ordinance of the city. Trial before the police judge. Conviction, and appeal to the district court. Trial, conviction, and sentence at the October term, 1886, and defendant appeals to this court.

J. W. Sheafor, for appellant. *S. D. Houston, Jr.*, and *D. Scott*, for appellee.

CLOGSTON, C. The only question is, was the ordinance under which the defendant was convicted valid? The objections urged are—*First*, that the court erred in admitting in evidence the ordinance book containing the ordinance under which the defendant was prosecuted; *second*, that the ordinance book and journal of the proceedings of the city council show that the said ordinance was not legally passed and published. The journal shows that the ordinance, being ordinance No. 12, came regularly up at a public meeting of the city council, and was passed, all the members of the council present and voting in favor of its passage; and that it was approved October 31, 1883, signed by the mayor, and attested by the city clerk.

The record of the ordinances offered in evidence shows that the ordinance was regularly entered, with a note appended thereto by the city clerk as follows: "These three articles passed the city council October 31, 1883, and was approved October 31, 1883. C. E. DANIELS, Mayor. Attest: E. E. HUSTED, City Clerk. Published November 9, 1883. Journal, page 17." The defendant claims that because the ordinance book failed to show in what paper the ordinance was published, that, therefore, there was a failure on the part of the city to prove a valid ordinance. It is true the record of the ordinances ought to show when published, and the name of the paper in which published; but, because the city clerk fails to make the record so state, it does not make the ordinance invalid, if in fact it was published. The court ought to have sustained the objection of the defendant to the introduction of the ordinance book. It was the duty of the court to take judicial notice of the existence and substance of the ordinance without having the ordinance offered in evidence; but the introduction of the ordinance book in evidence could not prejudice the defendant. It was putting in evidence only what the court must know without proof. Therefore it was immaterial. *City of Solomon v. Hughes*, 24 Kan. 211.

The defendant claims that the journal does not show that the ordinance was legally passed, and we presume he refers to the fact that the journal fails to show that the ordinance was read and adopted by sections. The journal was introduced by the defendant in his cross-examination of the city clerk, and we presume his objection would be valid even though made to his own testimony drawn out on cross-examination. The journal shows the full vote adopting the ordinance as a whole on its final passage, but fails to show that it was adopted by sections. This was not necessary.

Section 19, c. 19, Comp. Laws 1885, is as follows:

"Sec. 19. All ordinances of the city shall be read and considered by sections at a public meeting of the council, and the vote on their final passage shall be taken by yeas and nays, which shall be entered on the journal by the clerk; and no ordinance shall be valid unless a majority of all the members elect vote in favor thereof: provided, however, that when the councilmen are all present and voting, and there shall be a tie, the mayor shall have power to give the casting vote on the passage of any ordinance."

And the presumption that what ought to have been done was done applies. We must presume that the ordinance was regularly passed. *Commissioners Leavenworth Co. v. Higginbotham*, 17 Kan. 62; *State v. Francis*, 26 Kan. 724.

It is therefore recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

STATE v. CASH.

(Supreme Court of Kansas. June 11, 1887.)

CRIMINAL PRACTICE—APPEAL—RECORD.

Where a defendant in a criminal action, upon an appeal to the supreme court, files a record certified to by the clerk of the district court to be a record of the evidence only, the supreme court cannot examine and determine the alleged errors occurring upon the trial, presented in the brief filed for the defendant.

(Syllabus by the Court.)

Appeal from Marion county.

S. B. Bradford, Atty. Gen., and T. A. Bogle, for the State. Dean & Hess, for appellant.

HORTON, C. J. This is an attempted appeal from a conviction under an information charging the appellant with burglariously breaking and entering a dwelling-house in the day-time, with intent to commit larceny. The verdict was guilty of burglary in the third degree, as charged in the information. The appellant was sentenced to be confined at hard labor in the penitentiary of the state for the period of two years from December 1, 1886, and judgment was also rendered against him for all the costs of the prosecution. It is alleged that various exceptions were taken to the instructions given and refused, and it is also urged that the verdict is contrary to the evidence. A preliminary question is raised by the state. It insists that, as no certified transcript of all the record is filed here, there is nothing for us to examine and act upon. The point is well taken. The certificate of the clerk is as follows:

"State of Kansas, Marion County—ss.: I, the undersigned Clk. Dist. court in and for said county and state, do hereby certify that the hereunto attached is a true and correct copy of a transcript of evidence now on file and of record in the office of the district clerk in and for the county aforesaid. Witness my hand and official seal this twenty-seventh day of December, 1886.

"C. F. BROADER, Clk. Dist. Court.

[Seal.]

"By W. F. WATSON, Dep."

A criminal case is brought to this court only in the manner prescribed by statute. When a defendant in a criminal case appeals, he must file with the clerk of this court a transcript of the proceedings and record of the trial court, properly certified to by the clerk thereof. Hence a transcript of the evidence only is insufficient. *Lauer v. Livings*, 24 Kan. 273; *State v. Lund*, 28 Kan. 281; *In re Chambers*, 30 Kan. 450, 2 Pac. Rep. 646; *State v. Nickerson*, 30 Kan. 545, 2 Pac. Rep. 654.

The case will be dismissed.

(All the justices concurring.)

STATE v. DECKER.

(Supreme Court of Kansas. June 11, 1887.)

1. INFORMATION—ATTEMPT—FALSE PRETENSES.

A criminal information, attempting to charge the defendant with the offense of attempting to obtain certain personal property by false pretenses, is not insufficient because it fails in express terms to allege that the defendant failed in the perpetration of the principal offense, or that he was prevented or intercepted in the perpetration of the same.

2. FALSE PRETENSES—INFORMATION—INSOLVENCY OF INDORSER.

Where a criminal information charges the defendant with attempting to obtain from N. four promissory notes by means of a false and fraudulent draft drawn in favor of B., and indorsed by B., the evidence is not necessarily insufficient to prove the guilt of the defendant because it fails to show that B. was insolvent.

(Syllabus by the Court.)

Appeal from Dickinson county.

The defendant, Orr Decker, was found guilty by the jury, and sentenced by the court to one year's imprisonment in the penitentiary, upon a criminal information which reads as follows:

"In the name and by the authority of the state of Kansas, I, George W. Hurd, county attorney within and for said county of Dickinson and state of Kansas, do now here give the said court to understand and be informed that the above-named defendants, James Bottomly and Orr Decker, on the twenty-first day of September, A. D. 1886, at and within said county of Dickinson and state of Kansas, then and there being, did then and there know that said George W. Hurd then and there had in his possession and under his control four certain promissory notes of the goods and chattels of one George M. Noble, to-wit: One promissory note dated May 25, 1886, for fifteen hundred dollars, signed by Orr Decker and Elvina M. Decker, and of the value of one thousand five hundred dollars; and one certain promissory note dated May 25, 1886, for five hundred dollars, and of the value of five hundred dollars, and signed by Orr Decker and Elvina M. Decker; and one certain promissory note for one thousand dollars, dated May 25, 1886, signed by Orr Decker and Elvina M. Decker, and of the value of one thousand dollars; and one certain promissory note dated May 25, 1886, for the sum of one thousand dollars, signed by Orr Decker and Elvina M. Decker, and of the value of one thousand dollars,—all of which said promissory notes were then and there of the goods, chattels, and property of said George M. Noble, and in the possession and under the control of said George W. Hurd, and of the aggregate value of four thousand dollars. And the said defendants, James Bottomly and Orr Decker, then and there being persons of evil disposition, ill will, and ill fame, and devising and intending by unlawful ways and means to obtain and get into their hands and possession the aforesaid promissory notes, with the intent unlawfully, feloniously, knowingly, designedly, willfully, and falsely to pretend to the said George W. Hurd that a certain written paper which the said James Bottomly and Orr Decker then and there produced to the said George W. Hurd, and which said written paper is in form a draft, and in words and figures as follows, to-wit:

" '\$3,000.

ABILENE, KANSAS, September 20, 1886.

" 'At sight, pay to order of J. H. Brady three thousand dollars, for value received, and charge to account of James Bottomly.

" '*To First National Bank, Clinton, Iowa.*'

—And which written paper then and there had written on the back thereof the words following, to-wit: 'Pay to the order of G. W. Hurd. J. H. BRADY,'—was a good and genuine draft for the payment of the sum of three thousand dollars, and of the value of three thousand dollars, whereas in truth and in fact said written paper was not a good or genuine draft or order for the payment of three thousand dollars, and was not of the value of three thousand dollars, or any other sum of money, but was absolutely worthless and of no value whatever; and there was not then, and never had been, any bank in existence known, called, described, or named 'First National Bank, (Clinton, Iowa,' or any name similar thereto, which said defendants then and there well knew; and said defendants then and there well knew that said written paper was not a good and genuine draft of the value of three thousand dollars, and that the same was absolutely worthless, and of no value whatever; and said defendants, James Bottomly and Orr Decker, then and there told and stated to George W. Hurd that said defendant James Bottomly then had in the First National Bank of Clinton, Iowa, the sum of three thousand dollars to pay said draft, whereas in truth and in fact there was no such bank in existence as the First National Bank of Clinton, Iowa, or in any other bank in Clinton, Iowa, which said defendants then and there well knew.

" And said defendants, James Bottomly and Orr Decker, then and there un-

lawfully, feloniously, willfully, designedly, and with the intent the said George M. Noble and George W. Hurd to cheat and defraud, did offer and propose to deliver said false and worthless draft to said George W. Hurd in payment of the sum of three thousand dollars on the value of the above said four certain promissory notes; and to satisfy the balance of the principal and interest of said four promissory notes signed by Orr Decker and Elvina M. Decker by the execution and delivery of another promissory note, the amount and description of which I am unable to give; and did then and there unlawfully, feloniously, willfully, designedly, and with the intent the said George M. Noble and George W. Hurd to cheat and defraud, deliver said false and worthless draft, and said other promissory note, the amount and description of which I am unable to give, to said George W. Hurd, and demanded from said George W. Hurd the said four promissory notes signed by said Orr Decker and said Elvina M. Decker; and by means of said false and fraudulent pretenses said defendants, James Bottomly and Orr Decker, then and there, on the said twenty-first day of September, A. D. 1886, at and within said county of Dickinson and state of Kansas, in the manner and by the means aforesaid, did then and there unlawfully, feloniously, knowingly, willfully, and designedly attempt and endeavor to obtain from the said George W. Hurd the aforesaid four promissory notes of the goods and chattels of the said George M. Noble, and of the value of four thousand dollars, with the intent then and there the said George M. Noble and George W. Hurd to cheat and defraud of the same; contrary to the form of the statutes of the state of Kansas in such cases made and provided."

S. B. Bradford, Atty. Gen., and *G. W. Hurd*, for the State. *J. G. Mohler*, for appellant.

VALENTINE, J. The defendant, Orr Decker, was charged, along with James Bottomly, by information filed by the county attorney in the district court of Dickinson county, with the offense of attempting to obtain certain personal property by false pretenses. A motion was made to quash the information, which was overruled by the court. The charge against Decker was then tried before the court and a jury, and he was found guilty, as charged in the information. He then moved for a new trial, and also in arrest of judgment, which motions were overruled by the court, and he was then sentenced to imprisonment in the penitentiary for one year, from which sentence he appeals to this court.

The first question presented to this court is with regard to the sufficiency of the information. It is attempted to be charged in the information that Orr Decker, in violation of section 283 of the act relating to crimes and punishments, attempted to commit the offense prohibited by section 94 of said act. Said section 283 reads as follows:

"Sec. 283. Every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction thereof shall, in cases where no provision is made by law for the punishment of such attempt, be punished as follows," etc.

It is claimed that the information is not sufficient, because it does not allege in express terms that the defendant failed in the perpetration of the offense, or that he was prevented or intercepted in the perpetration of the same; and this is claimed upon the ground, as we understand, that such failure or such prevention or interception is a part of the offense; and therefore that, as a part of the offense, it must be stated in the information in compliance with section 103 of the Criminal Code, which provides that the indictment or information must contain "a statement of the facts constituting the offense in plain and concise language, without repetition." Now, we do not think that

such failure or such prevention or interception constitutes any part of the offense. When the attempt to commit the principal or ultimate offense is made, the offense of attempting to commit such principal or ultimate offense is complete. If the attempt is carried into complete execution, then not only the offense of attempting to commit an offense is complete, but the commission of the principal or ultimate offense is also complete. Even where an indictment or information charges the full commission of an offense, without the slightest intimation that there was any failure on the part of the defendant in the perpetration thereof, or any prevention or interception in executing the same, still he may be convicted under section 121 of the Criminal Code of attempting only to commit the offense. Said section 121 reads as follows:

"Sec. 121. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, *or of an attempt to commit the offense.*"

Of course where it is intended to prosecute a defendant only for an attempt to commit an offense, it would be better to state in the indictment or information that the defendant had failed in the perpetration thereof, or that he had been prevented or intercepted in executing the same; and such would be in accordance with the precedents. But still no good reason can be given why an indictment or information should be considered as insufficient, if it does not make such a statement. In the present case, however, the whole tenor and effect of the information is to show, impliedly, at least, a failure on the part of the defendant to commit the principal or ultimate offense. We think the information is sufficient, without said statement of failure, prevention, or interception.

The second question presented to this court is whether the evidence sufficiently proves the offense charged in the information. It is claimed by the defendant that it does not. In our opinion, however, it does. It appears from the evidence that on September 11, 1886, and prior thereto, the defendant, Orr Decker, owned a farm in Dickinson county, Kansas, and also owned a livery-stable in the city of Abilene, in that county. He was also at the same time indebted on four promissory notes, owned by George M. Noble, but placed in the hands of Stambaugh, Hurd & Dewey, attorneys at law, for collection. These notes were secured by mortgages on the farm and on the livery-stable. James Bottomly resided at Kansas City, Missouri. Decker had also resided there, or, at least, had been there for some time, and was acquainted with Bottomly. On September 11th and September 14th of the year aforesaid Decker sent telegraphic dispatches to Bottomly to come to Abilene, and also procured the telegraph operator to send a dispatch to the agent at Kansas City to purchase a railroad ticket for Bottomly's transportation from Kansas City to Abilene. Bottomly himself was a man of but little property. On Saturday, September 18th, Bottomly was in Abilene. Whether he arrived there on that day or sooner is not shown. On that day he appeared at the office of a land-agent in that city by the name of James H. Brady, and represented himself to be from the state of Iowa, and that he was desirous of purchasing a farm in Dickinson county. Brady had several farms for sale, and among them the farm of the defendant, Decker. Brady told Bottomly to describe the kind of farm which he wanted, and then he would try to furnish him one of that kind. Bottomly did describe the kind of a farm which he wanted, and Brady believed that the farm of Decker would suit him, and invited Bottomly to ride out with him the next day to see the farm, provided Bottomly have no conscientious scruples in doing so on Sunday. Bottomly said he had none, and they went out to see the farm on Sunday. Bottomly examined the farm carefully, and had much conversation concerning it. The next day was taken up in negotiations concerning the farm. Bottomly concluded that the farm would suit him, and wanted to purchase it. Brady then saw Decker, and

Decker wished to sell it, but both Bottomly and Decker wished to do the business entirely through Brady, and not with each other. Finally Brady introduced Bottomly to Decker, and they showed no signs of recognizing each other, but pretended to be strangers. Finally all the arrangements were made for the purchase and sale of the farm, and it was agreed that on the next morning early they should go to the office of Stambaugh, Hurd & Dewey and deliver to G. W. Hurd, one of the members of such firm, a draft for the sum of \$3,000, drawn on the First National Bank of Clinton, Iowa, by Bottomly, in favor of Brady, and indorsed by Brady, and also to deliver to Hurd a promissory note for something over \$1,000, secured by a mortgage on the livery-stable, and obtain from Hurd the aforesaid four promissory notes belonging to Noble. Some kind of suit had already been commenced by Hurd with regard to these notes, or the mortgages securing them. In pursuance of the foregoing arrangement, the parties did go to Hurd's office, and did deliver to him the aforesaid draft and note and mortgage, Bottomly delivering to him the draft, and Decker delivering to him the note and mortgage, and Decker demanded the aforesaid four promissory notes. Bottomly at the time stated to Hurd that the draft was good, and that he had the amount of money which it called for in said bank. Hurd, however, declined to deliver the notes until he could ascertain whether the draft was in fact good or not, stating that it would take only a short time to telegraph to Clinton, Iowa, and ascertain that fact. Bottomly then demanded a return of the draft, but Decker still demanded the delivery to him of the four promissory notes, and continued to demand the same until Hurd left the office, which was within a few minutes after the draft and note and mortgage were delivered to him. Hurd, being convinced that this transaction on the part of Bottomly and Decker was an attempt, by means of a false and fraudulent draft and false and fraudulent declarations, to procure the four promissory notes aforesaid, procured the arrest of Bottomly and Decker. There was really no such bank in existence as the First National Bank of Clinton, Iowa, nor anything like it; and Bottomly had no money in any such bank, and probably none in any bank. While the foregoing facts tend to inculcate Decker, there was no evidence tending to exculpate him.

The principal ground upon which it is claimed that the evidence is not sufficient to convict Decker of the offense charged against him is as follows: The information charges that it was George M. Noble and George W. Hurd that the defendants intended to cheat and defraud, and that it was by means of the false and fraudulent draft, drawn on the First National Bank of Clinton, Iowa, coupled with the false and fraudulent assertions that the draft was good, and that Bottomly had the money in the bank with which to pay the draft, that the fraud upon Noble and Hurd was intended to be perpetrated. Now, it appears from the evidence that this draft was indorsed by James H. Brady, and *there was no evidence tending to show that Brady was insolvent*. It is therefore claimed that there was a failure of proof with reference to the defendant's guilt, because of this failure on the part of the prosecution to show that Brady was insolvent; and this is claimed solely upon the ground that if Brady was solvent neither Noble nor Hurd could have been defrauded. This claim is plausible, but we do not think that it is good. Even if Brady was entirely solvent, and in all probability he was, still the draft was false and fraudulent. It was not what it appeared to be, or what it was represented to be. It was not a draft drawn upon an actual bank, or for money actually belonging to the drawer, or for any money subject to the payment of the draft. In all this the draft was false and fraudulent, and it was not worth what it otherwise would have been. Even if the draft had some value because of Brady's indorsement upon it, still it was not as valuable as it would have been if it had been drawn on a real bank, and for money actually in the bank belonging to the drawer, and subject to the payment of the draft. It was an

attempted fraud upon Noble and Hurd to attempt to procure the aforesaid promissory notes from Hurd by means of the delivery to him of such a false and fraudulent draft. It was a fraud upon Noble and Hurd to attempt to procure from Hurd said notes without delivering to him just such a paper as the parties represented the draft to be. Noble and Hurd wanted the money, and nothing else, but Hurd would have accepted a draft if he had believed it to be the equivalent of money; but neither Noble nor Hurd wanted to procure a false and fraudulent draft, nor to purchase a lawsuit against Brady, however good Brady may have been financially. It is no defense to say that although the draft was not what it was represented to be, still that it was of some value. It was a fraud upon Noble and Hurd to deliver to Hurd a thing different from what it appeared to be, and different from what it was represented to be, and not as valuable as it was represented to be.

We think, upon the evidence in this case, the jury were justified in finding the defendant, Decker, guilty as charged in the information. Undoubtedly he and Bottomly formed a conspiracy to obtain the aforesaid notes from Hurd by means of the aforesaid draft, and they actually attempted to carry the conspiracy into execution.

The defendant's counsel has presented a few other points to this court, but we do not think that they are tenable, nor do we think that they require any comment.

The judgment of the court below will be affirmed.
(All the justices concurring.)

UNITED STATES v. CLARK.

(Supreme Court of Utah. June 29, 1887.)

1. BIGAMY—EVIDENCE—PROOF.

Upon an indictment, under the laws of the United States, for unlawful cohabitation, it was shown that defendant had lawfully married Sarah Clark, who had borne him children, and that he had thereafter married Hannah S. Clark and Frances Carter Clark, who had also borne him children; that he had made his home with Frances, but was in the habit of visiting Sarah, and had remained over night in her house. It was admitted that he had on one occasion cohabited with Frances. *Held*, that it was not necessary to prove sexual intercourse with Sarah in order to establish the relation of husband and wife, and that the evidence warranted the verdict.

2. SAME—EVIDENCE—PRESUMPTIONS.

In such a case it was proper for the trial court to charge the jury to the effect that a lawful marriage, under the circumstances shown by the evidence in the cause, raises a *prima facie* presumption of matrimonial cohabitation.

3. SAME.

And the charge properly left it to the jury to presume that a man who habitually visits his lawful wife does so in the character of husband.

Appeal from First district court.

Geo. S. Peters, for the United States. J. E. Booth and S. R. Thurman, for appellant.

ZANE, C. J. The appellant has appealed from an order of the First district court denying his motion for a new trial, and from a final judgment of conviction. The defendant was indicted for unlawful cohabitation between the first day of January, 1885, and the twenty-first day of February, 1887.

It appears from the evidence in the record that the defendant married Sarah Clark, Hannah S. Clark, and Frances Carter Clark in the order in which their names are mentioned; that they have all lived in the city of Provo (in which appellant also lived) since their respective marriages; and that the first and last wives have borne him children; that the defendant has made his home with Frances nearly all the time mentioned in the indictment, but was in the habit of visiting Sarah, his lawful wife, and remained in her house

over night on one occasion. Cohabitation with Frances being admitted, the remaining question is, did the evidence warrant the inference of cohabitation with Sarah. It was not necessary that the evidence should prove sexual intercourse, or that they lived permanently together. She was his lawful wife, and had borne him children, and he was in the habit of visiting her at her home. The most reasonable conclusion to draw from these facts is that he visited and associated with her as her husband. Such conduct towards her on his part, under the circumstances, indicated to the world matrimonial association and living. That was the semblance. We are disposed to find that the evidence authorized the verdict. This conclusion is authorized by the cases of *Cannon v. U. S.*, 116 U. S. 55, 6 Sup. Ct. Rep. 278; *U. S. v. Snow*, 9 Pac. Rep. 501, 686, 697.

The defendant insists that the court erred in its charge to the jury.

First, in the following: "If you should find * * * that the defendant was legally married to Sarah Clark, * * * and that she was his legal wife during the time covered by the charge, and that during the same time he was living with one of the other women named in the indictment as her husband, and, while so living, he habitually visited his first wife, then the presumption is that he made those visits in the character of a husband." Assuming the marriage and the habitual visits, the court said that the presumption was that the visits were in the character of husband. The appellant claims that in the language used the court characterized the presumption as a conclusive one. The court announced that the lawful marriage and the habitual visits, affected with the circumstance of living with a plural wife, created the presumption. The court did not say that the presumption could not be rebutted by other facts.

Second, that the court erred in the following portion of the charge: "If you find that he was legally married to one of these women, then I charge you, as a matter of law, that there is a presumption that he continued to cohabit with such wife. * * * As to the character of the presumption of continuing cohabitation with the legal wife, I shall call your attention to that further on." And further on in the charge the court did return to the presumption mentioned, and said: "The presumption is, in this as in other criminal cases of this class, that a man does live and cohabit with his legal wife. * * * And I charge you, as a matter of law, that presumption is not a conclusive presumption, but is a mere presumption of fact; it may be rebutted; but is a presumption in the case which is a matter of evidence, and is to be given such weight as you think it ought to have, and no more." The court informed the jury in unmistakable terms that the presumption of cohabitation from the legal relation of husband and wife was not a conclusive one, but a mere presumption of fact; that it might be rebutted; that it was a matter of evidence, to be given such weight as the jury should think it ought to have. While, from the first part of the portion of the charge last excepted to, the jury might have understood the court to describe the presumption as a disputable presumption of law, from the last part they must have understood it to be a mere presumption of fact. Speaking of these two classes of presumptions, Taylor, in his work on Evidence, (volume 1, p. 126,) says: "In practice, however, the distinction between the two species of presumptions is by no means well defined, and the line of demarkation, even when visible at all, is often overlooked. A presumption which is regarded by some judges as one of law is treated by others as one of fact. Nay, the same judges place the same presumption at different times in different classes." We are not disposed to think that the distinction between disputable presumptions of law and presumptions of fact urged by counsel, as it relates to the point under discussion, is of any importance.

Thirdly, counsel for defendant urge that the court erred in giving the following portion of the charge: "Therefore there is a presumption, if you

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find that he was living with a woman at the time he entered into the plural marriage relation, that he was legally married to such woman, and continued such marriage relation with her; and this presumption is more or less strong according to circumstances, and may be given such weight as you think it ought to have, it being a mere presumption of fact." The court in this mentions two presumptions: (1) The presumption of a legal marriage with Sarah, from the fact that the defendant lived with her; (2) the presumption of the continuance of such marriage relation. The defendant stated on the witness stand, as did all the women named, that he was married to them, and that Sarah was his lawful wife, and that he had never been legally divorced from her; so that it was conceded before the jury that the relation, and the continuance thereof, was precisely in accordance with the two presumptions mentioned by the court. There could be no error in this last portion of the charge sufficient to reverse the judgment of the trial court.

This leaves the two other presumptions: (1) The presumption, from the lawful marriage to Sarah, and the habitual visits to her while living with one of his plural wives, that the visits were in the character of husband; (2) the presumption that a man does live and cohabit with his lawful wife. We will further consider the nature of these two presumptions, and the right of the court to instruct the jury with respect to them as in that part of the charge complained of.

Taylor, in his work on Evidence, (volume 1, p. 85.) says: "Conclusive * * * presumptions of law are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise." Speaking of disputable presumptions, the same author says: "These, as well as the former, are the result of the general experience of the connection between certain facts or things; the one being usually found to be the companion or the effect of the other. The connection, however, in this class, is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence." 1 Tayl. Ev. 125.

Of another class of presumptions Best says: "Presumptions *homini*, or presumptions of fact, are divided into slight and strong, according as they are or are not of sufficient weight to shift the burden of proof. Slight presumptions, although sufficient to excite suspicion, or to produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof, or shift the burden of proof." And gives the following illustration, with others: "Thus the fact of stolen property being found in the possession of the supposed criminal a long time after the theft, though well calculated to excite suspicion against him, is, when standing alone, insufficient even to put him on his defense." 2 Best, Ev. § 319. In section 321 of the same volume is found the following: "Strong presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to rebut them involves the proof of a negative. The evidentiary fact giving rise to such a presumption is said to be *prima facie* evidence of the principal fact of which it is evidentiary. Thus possession is *prima facie* evidence of property, and the recent possession of stolen goods is sufficient to call on the accused to show how he came by them, and, in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them."

Writers upon the law of evidence recognize the following classes of presumptions: (1) Conclusive presumptions of law; (2) disputable or *prima facie* presumptions of law; (3) strong presumptions of fact; (4) slight presumptions of fact.

Defendant's counsel take the position that the presumption of cohabitation from the existence of a legal marriage, and the presumption, from a lawful

marriage and from habitual visits, that the visits are made in the character of husband, (though the circumstance exists that he is living with a plural wife,) are presumptions of fact, and that the court erred, therefore, in charging the jury with respect to them. When the presumption from a fact is slight and unimportant standing alone, or when such presumptions are numerous and conflicting, or the concurrence of a large number of them is necessary to shift the burden of proof,—to overcome the presumption of innocence in a criminal case,—the court ought not to separate any one of them, or any portion of them, and thereby attach to them undue weight, but should leave the jury to consider all the presumptions and evidence in the case together.

The statutes of Utah provide that the court, in charging the jury, "may state the testimony and declare the law," and inform them that they are the sole judges of the credibility of the witnesses, and of the weight of the evidence, and of the facts. Laws Utah 1884, § 30, p. 125. The term "testimony," as here used, is equivalent to the term "evidence." A presumption, though slight, if relevant, is a species of evidence, and may be stated by the court in the charge in accordance with the provision of the statute. But we do not regard the presumption of cohabitation from a lawful marriage, or the presumption, from habitual visits to a lawful wife, that the husband makes them in his character as husband, though he may be living with a polygamous wife, as slight presumptions of fact. The relation of legal marriage authorizes a strong inference of cohabitation, because that holy union without it is a sham,—a mere semblance. Without matrimonial association the institution of marriage, upon which the happiness and welfare of society so largely depends, is shorn of its power to promote chastity and to exalt virtue. Its absence from the matrimonial union deprives the family, which rests upon it, of its efficacy; and infancy and manhood and declining age of the domestic home,—that fountain of the purest affections, from which flows the best inspirations that elevate and exalt humanity. There is a strong presumption that a man will discharge so high an obligation. The obligations of marriage the court cannot regard lightly, and as of but little weight. Married people almost uniformly discharge the duty of cohabitation unless a disagreement occurs, such as the evidence in this case does not show. We are of the opinion that a lawful marriage, under the circumstances shown by the evidence in this case, raises a *prima facie* presumption of matrimonial cohabitation.

As to the other presumption, that a man who habitually visits his lawful wife does so in the character of husband, we are disposed to hold that he should not be permitted, under such circumstances, to say that the visits were made in the character of a paramour, a stranger, or simply as a friend, or in any character than as husband.

Other errors were assigned, but we do not think it necessary to mention them specifically. We find no error in this record. The judgment of the lower court is affirmed.

BOREMAN and HENDERSON, JJ., concur.

UNITED STATES v. SMITH.

(Supreme Court of Utah. June 29, 1887.)

1. BIGAMY—POLYGAMY—EVIDENCE.

In Utah, upon an indictment charging unlawful cohabitation with two women within two years next preceding January 1, 1887, evidence having shown that defendant had married the two women named in the indictment; that the first was a lawful wife, and had never been divorced; that defendant, at the time in question, was living with the polygamous wife,—it was material for the prosecution to show that defendant had said, in regard to polygamy or unlawful cohabitation, that "we" or

"they" (uncertain which) "would never give it up; that the law against it was unconstitutional; and that he had just as good a right to decide on it as the supreme court."

2. **SAME.**

The conduct of defendant towards the women previous to the time stated in the indictment may be considered, in order to determine the relation defendant bore to them during that time.

3. **SAME—INSTRUCTION.**

A charge to the effect that the law aims at the unlawful example or the appearance, as well as the actual continuance, of the polygamious relation, without reference to what actually occurs with the plural wives, is not error. Actual sexual connection is not essential to guilt. The law punishes the semblance of polygamious living.

4. **SAME—COHABITATION—PRESUMPTION.**

A disputable presumption exists that a man does live and cohabit with his lawful wife.

5. **SAME.**

This presumption is stronger in case of a lawful than an unlawful marriage.

6. **SAME—SUFFICIENCY OF PROOF.**

Where cohabitation with both wives is proved to have continued for years, and cohabitation is proved to exist at the time of the indictment for polygamy, evidence that defendant had been frequently seen about the house of the first wife, with the confession that he would not obey the laws against polygamy, and believed them unconstitutional, and a further statement that he "would live with his wives, and be didn't care who knew it," is sufficient to sustain a verdict of guilty.

Appeal from First district court.

Geo. S. Peters, for the United States. *A. G. Sutherland* and *S. R. Thurman*, for appellant.

ZANE, C. J. The defendant was tried in the first district court on an indictment charging him with unlawful cohabitation with Sarah Jane Smith and Christina Smith within two years next preceding the first day of January, 1887. From an order of the court denying his motion for a new trial, and from a judgment of conviction, he has appealed to this court.

On the trial, counsel for the government asked its witness if within two years before the first day of January, 1887, he had heard the defendant say anything about polygamy or unlawful cohabitation, and the witness answered that defendant said "we" or "they" (not positive which) "would never give it up; that the law against it was unconstitutional; and that he had just as good a right to decide on it as the supreme court." This answer defendant's counsel moved the court to exclude from the jury; but the court overruled the motion, and an exception was taken. That ruling is assigned as error.

Conversations with the accused, if they contain voluntary admissions or confessions tending to prove his guilt, are admissible against him. The evidence showed that defendant had married the two women named in the indictment; that Sarah was his lawful wife, and that he had never been divorced from her; that, at the time of the conversation, he was living with the polygamious wife. When, therefore, he said that we or they would never give up polygamy, he must have referred to the class of persons to which he belonged. The assertion by him that it was lawful and right, and of a determination not to give it up, was, in our judgment, material evidence; and, with the other evidence in the case, was proper to be considered by the jury. The ruling of the court denying the motion to exclude was not error.

The defendant also excepted to certain parts of the charge of the court to the jury, and assigns the giving thereof as error. *First*, to so much as stated that the law aims at the unlawful example or the appearance, as well as the actual continuance, of the polygamious relation, without reference to what actually occurs with the plural wives. In this the court said to the jury, in effect, that actual sexual connection was not essential to guilt; that the law punished conduct between the accused and his two wives which presented the appearance and semblance of polygamious living,—that exhibition to the

world of polygamous example. In this we find no error. The supreme court of the United States so held in the case of *Cannon v. U. S.*, 116 U. S. 55, 6 Sup. Ct. Rep. 278. And in this court in numerous decisions; among which are the cases of *U. S. v. Snow*, 9 Pac. Rep. 501, 668, 697.

In its charge the court also said that there was a presumption that a man does live and cohabit with his lawful wife, but that it was not conclusive; that it might be rebutted; that it was a matter of evidence; and that the jury should give it such weight as they might think it ought to have. The giving of this is also assigned for error. We are of the opinion that this alleged error is not well assigned. We so held in the case of *U. S. v. Clark*, ante, 288, (decided at the present term.)

The court also stated in its charge that, "in proving cohabitation under the statute, it is not necessary to show the same facts as to cohabitation with the legal wife as with the plural, because the law presumes that a man does what it is his legal duty to do." The court in substance said that a lawful marriage afforded a stronger inference of cohabitation than an unlawful one; that, these presumptions being different, the other evidentiary facts might differ; that additional evidence would be necessary to show cohabitation with the plural wife, if rebutting evidence should be offered, in case of a conflict in the evidence. This conclusion appears to be axiomatic.

The defendant also excepted to and assigns as error the giving of the following portion of the charge: "Therefore the presumption is, if you find that he was living with this woman [meaning Sarah] at the time he entered into the plural marriage relation, that he was legally married to her, and continued such marriage relation with her; and this presumption is more or less strong according to circumstances, and may be given such weight as in your judgment you may think it ought to have." In this the jury are informed that if they found the defendant was living with Sarah at the time he entered into the plural marriage relation, that the presumption was that he was legally married to her, and continued such marriage relation with her; that the presumption was more or less strong according to circumstances; and that the jury might give it such weight as they believed it entitled to. The evidence established that the marriage to Sarah was first; that it was legal; and that there had been no divorce. Therefore the jury were compelled to find from the testimony that the marriage to Sarah was lawful, and that the marriage relation with her continued. The marriage relation was necessarily continuing until dissolved by death or according to law. The legal marriage to Sarah and the continuance of that relation were established beyond all question by the evidence, without the aid of the presumption stated by the court. The defendant could not have been injured by this portion of the charge.

Appellant also complains of the statement in the charge that the defendant could not be convicted of cohabitation before the time mentioned in the indictment, but such conduct could be considered by the jury in determining the relation he bore to them during that time. We are of the opinion that it was proper for the jury to consider appellant's conduct towards the women during the time covered by the indictment in the light of his previous relations to and conduct towards them. This court has so held in several cases, among which is the case of *U. S. v. Musser*, 7 Pac. Rep. 389.

Appellants' counsel urge a further assignment of error that the evidence was insufficient to justify the verdict of the jury. The evidence established cohabitation with the plural wife during the period mentioned in the indictment. The contention was as to cohabitation with his lawful wife, Sarah. The evidence showed that defendant married her about 33 years ago, and Christina about 3 years later; that, for a period of 12 years thereafter, he lived in the same house with both women, and since then they have lived in separate houses, about one mile apart; and while so living, until about 7 years ago,

defendant made his home alternately with each, and since then he has made his home with his polygamous wife. While there is no direct evidence that he has been in Sarah's house more than once during the last two years, (and that was on a funeral occasion,) there is abundant evidence that he has been seen during the time in the house-yard, at the well, and at the door of the house in which she lived. It also appears that defendant had a blacksmith shop between 30 and 50 feet from Sarah's house. Domonicus Carter, a witness, stated that he heard the defendant say, about one year before the trial, that he intended to live with his wives, and he did not care a damn who knew it. The witness Redfield said that he heard defendant say that we or they never would give up polygamy; that the law prohibiting it was unconstitutional; and that he had as good a right to construe the constitution as the supreme court. The lawful marriage of itself affords a strong presumption of cohabitation; and when to this is added the statement of defendant that he would live with his wives regardless of who knew it, and the expressed determination not to give up polygamy, and the fact that he was seen on numerous occasions around Sarah's house, and at her door, we are of the opinion that the evidence was sufficient to show cohabitation as to her.

We find no error in overruling defendant's motion for a new trial, or in the judgment of conviction. The judgment of the court below is affirmed.

BOREMAN and HENDERSON, JJ., concur.

(19 Nev. 437)

KINKHEAD and others v. BENTON and others. (No. 1,249.)

(*Supreme Court of Nevada. June 27, 1887.*)

INJUNCTION—BOND—ACTION ON, BY STATE OFFICER.

The governor, comptroller, and treasurer of the state of Nevada cannot bring suit, as private individuals, upon a statutory undertaking running to them as officials, and given in consideration of the issuance of an injunction in a suit to restrain them from exercising the authority conferred upon them by the act of February 24, 1881, (Laws Nev. 1881, c. 42,) which directs the construction at Reno of an asylum for the insane, because said suit having been brought against them in their official capacity, there is no privity between them as individuals and the obligors in said undertaking.

Appeal from district court, Ormsby county.

W. E. Deal, for appellants. *C. J. Varian* and *T. Coffin*, for respondents.

BELKNAP, J. This action is brought to recover from the defendants as obligors upon a statutory undertaking given in consideration of the issuance of an injunction. A demurrer to the complaint, both general and special, was interposed and sustained. Plaintiffs declined to amend, and judgment was entered against them. The complaint alleges "that the said plaintiff John H. Kinkhead was the governor of the state of Nevada from the first Monday of January, 1879, to the first Monday of January, 1883; that said plaintiff J. F. Hallock was, for the same period, comptroller of said state, and that said plaintiff L. L. Crockett was, for the same period, treasurer of said state; that on the fourth day of May, 1881, in an action brought by Jacob Klein against said plaintiffs, as such governor, comptroller, and treasurer, in the district court of the Second judicial district of the state of Nevada, in and for the county of Ormsby, an injunction issued out of said last-named court, and was served on said plaintiffs, as such officers, enjoining and restraining them from taking any moneys from the state school fund of said state of Nevada for the purpose of constructing or furnishing any buildings to be used as an asylum for the insane, or for providing plans therefor, and enjoining and restraining the plaintiff J. F. Hallock, as such comptroller, from drawing any warrants against the fund created by the act of the legislature of the

state of Nevada entitled 'An act to provide for the taking care of the insane of the state of Nevada,' approved February 24, 1881, and enjoining and restraining said plaintiff L. L. Crockett, as state treasurer, from paying any such warrants, and enjoining and restraining said plaintiffs, as such officers, from signing, countersigning, or depositing in the state school fund or the state treasury any of the four per cent. bonds mentioned in said act, and enjoining and restraining them, as such officers; from doing any act whatsoever in and about the premises."

The condition of the obligation is that the plaintiff will pay to the parties enjoined such damages, not exceeding the sum of \$500, as they may sustain by reason of the injunction, if the court finally decide that plaintiff was not entitled thereto. The injunction suit was prosecuted for the purpose of restraining the present plaintiffs, as state officers, from exercising the authority conferred upon them by the law directing the construction at Reno of an asylum for the insane. The plaintiffs have brought the present action unofficially and as individuals. They were not sued in their private capacity, and the obligation does not run to them as individuals. There is no privity between them and the obligors, and no recovery can be had. Judgment affirmed.

BELFILS v. FLINT.

(*Supreme Court of Oregon.* April 25, 1887.)

1. FORCIBLE ENTRY AND DETAINER—SUMMONS.

In an action in a justice's court under the Oregon forcible entry and detainer act a summons is not void which requires the defendant to answer in less than six days after its date; the time when the defendant may be required to answer being determined by section 5 of said act, which provides that "the summons shall be served and returned as in other cases. Such service shall not be less than two nor more than four days before the day of trial appointed by the justice;" section 8 of the justice's act, providing that the summons must require the defendant to appear at a time named therein not less than six nor more than twenty days from the date thereof, not being applicable to actions of forcible entry and detainer.

2. SAME—DEFECTIVE SUMMONS—CONTINUANCE.

Where the first service of a summons under the Oregon forcible entry and detainer act was deemed defective by the justice's court, and a continuance granted for more than two days, that another summons might be served, such an act by the court is not a continuance within the meaning of section 8 of the act, which provides "that no continuance shall be granted for a longer period than two days, unless the debt," etc.

3. SAME—SUMMONS—RETURN—SERVICE OF CERTIFIED COPY.

Where the return on a summons in an action under the Oregon forcible entry and detainer act does not show that a copy of the complaint, certified by the justice of the peace before whom the cause was pending, or certified to by the plaintiff, his agent or attorney, was served on the defendant, the service is insufficient to warrant a judgment by default against the defendant, and a judgment so rendered will be set aside; the service of the certified copy being a statutory requirement which must be observed before jurisdiction can be assumed or conferred. Whether the statute has been complied with is to be determined by the officer's return.

William R. Willis, for appellant. *W. T. Hume*, for respondent.

LORD, C. J. This was an action brought in a justice's court to recover the possession of certain premises under the forcible entry and detainer act. Judgment went against the defendant, Belfils, in that action, for the possession of the premises for want of an answer. He then applied to the circuit court, and obtained a writ of review, which, upon the hearing, that court dismissed, and judgment was entered in accordance therewith, from which he appeals to this court. The first assignment of error is to the effect that, in an action of forcible entry and detainer, a summons which requires the defendant to appear and answer in less than six days after its date is void. The summons was dated October 16, 1886, and required the defendant to appear

before the justice on the nineteenth day of October, 1886. The objection is based on the assumption that section 8 of the justice's act (Code Proc. 463) is applicable to actions of forcible entry and detainer. That section provides that the summons must require the defendant to appear at a time named therein, not less than six nor more than twenty days from the date thereof. Section 4 of the forcible entry and detainer act provides that the action, except as herein-after specially provided, shall be in all respects conducted as other actions before justices of the peace. Section 5 provides that "the summons shall be served and returned as in other cases. Such service shall not be less than two nor more than four days before the day of trial appointed by the justice." Misc. Laws, 614. It is argued that by force of these provisions, and particularly the words "shall be served and returned as in other cases," that section 8, *supra*, as to time, applies, and consequently that the summons was void, as the justice could not bring the cause to trial in less than six days.

We are not able to concur in this result. The language referred to, "served and returned as in other cases," only means that the service is to be made in the same manner, whether personally or otherwise, as is done in other cases, and that when done, that the officer make a return thereof to the court,—a report showing the manner in which he performed the duty imposed upon him,—as is done in other cases. It has no reference to the time prescribed by section 8 for other actions, as section 5 shows it was the evident intention to make the time less than that prescribed by section 8. It only indicates that the modes of doing these official acts is the same as in other cases, although the time of appearance of the defendant is shortened after service has been obtained in this character of action. The action of forcible entry or unlawful detainer is a summary proceeding devised to secure a speedy restitution of the premises forcibly or unlawfully detained. This being its object, the purpose of section 5, *supra*, is intended to aid in giving it that effect, which is inconsistent with the instruction claimed.

It is next assigned as error that the court lost jurisdiction by granting a continuance for more than two days. The transcript shows that the first service was deemed defective, and that the action was continued in order that another summons might be served. For myself, I do not think this was a continuance within the meaning of section 6, "that no continuance shall be granted for a longer period than two days, unless a debt," etc., or that the authorities cited sustain a contrary view. But this assignment becomes unimportant, and unnecessary to decide, in view of the fact that the service of the second summons is deemed fatally defective. The return on the summons does not show that a certified copy of the complaint was served. It is assumed that a justice of the peace is authorized to certify to the copy of the complaint, although the act regulating the practice in justice's court does not expressly mention the subject of certifying. See *Marooney v. McKay*, 3 Or. 372. The provisions of the law applicable are Code, p. 115, § 54; Id. p. 463, § 7; Id. p. 465, §§ 20-22. Now, the return on the summons does not show that a copy of the complaint certified by the justice of the peace before whom the cause was pending, or certified to by the plaintiff, his agent or attorney, was served on the defendant. This is a statutory requirement which must be observed before jurisdiction can be assumed or conferred. Whether it has been complied with, we must look to the return of the officer upon whom is imposed this duty. As the return of that officer does not show that a copy of the complaint, certified as required, was served, the service is insufficient to warrant a judgment by default against the defendant.

For this reason we are constrained to reverse the judgment of the court below, with directions to reverse and set aside the judgment of the justice's court.

A petition for rehearing was denied in the above case on the fourteenth day of June, 1887.

ROHR v. PEARSON.

(Supreme Court of Oregon. May 2, 1887.)

1. PARTNERSHIP—DISSOLUTION—ACCOUNTS—REFERENCE.

In a suit to dissolve a partnership and for an accounting, where the cause has been referred to a master, who has filed a report which has been confirmed by the court, it is not the practice of the appellate court to re-examine every item of account between the parties during the existence of the partnership, but to re-examine only those that rest upon some disputed or controverted question of fact or law.

2. SAME—DISSOLUTION—ACCOUNT.

In a suit between partners for a dissolution of the partnership and for an accounting, where one of the partners has made a charge against the other for loss of time of the latter, he will not be permitted to enlarge the charge after the commencement of the suit, where the amount of the first charge is all that appears on the books of the firm, and no sufficient reason appears for increasing it.

Appeal from circuit court, Multnomah county.

Jos. Simon and J. C. Moreland, for appellant. *Geo. W. Yocum*, for respondent.

STRAHAN, J. The object of this suit is to dissolve the copartnership heretofore existing between the plaintiff and the defendant, and for an accounting. The cause was referred to Henry E. McGinn, Esq., to take the evidence and report his findings of law and fact. Upon the referee's report being filed, the same was confirmed by the court, and a final decree entered thereon in favor of the plaintiff, from which decree the defendant has appealed to this court. It is not in accordance with the practice of this court, upon an appeal like this, to re-examine every item of account between the parties during the existence of the partnership. Such a course of procedure here is ordinarily impracticable. We endeavor to re-examine only those items that rest upon some disputed or controverted question of fact or law.

Upon this appeal the plaintiff has presented a carefully prepared statement, embracing all of the items of account between the parties that are controverted on either side; but we are unable to see that the referee failed to find according to the preponderance of the evidence upon those items.

The defendant insists that he ought to be allowed \$25 per month for the use of a certain patented process for graining, and \$20 per month for a certain other patented process for painting roofs, which were owned by him, and used by the partnership in its business. This claim was disallowed by the referee, and properly. The actual utility of those inventions seems to be left in doubt by the evidence; but, aside from this, it sufficiently appears that the defendant voluntarily used those processes occasionally in the work and business of the firm, without any understanding or even expectation that he should be paid for the same.

The defendant's counsel claim that there is an error of some \$600 in the finding of the referee against the defendant which this court ought to correct. No doubt, if there is an error, it ought to be corrected; but we think the error alleged does not appear. The defendant kept the books and received and disbursed all the money of the firm during its existence, and he ought therefore to be able to demonstrate every item of account so clearly as to leave no question about it. Instead of that, however, numerous errors appear to exist in his accounts, innocently, it may be, but in most instances they are in his favor and against the plaintiff. Another gross irregularity in the business methods of the defendant was his manner of handling the funds of the firm. The firm's bank account was kept in his individual name, and all checks thereon were drawn by him in his own name, and not in the name of the firm. It is probable that all of this occurred without any real intention on the part of the defendant to wrong the plaintiff, at least, it does not directly appear that he had such intention, but it certainly imposed upon him the duty of making a

very full and satisfactory statement and showing of all the affairs of the firm. He ought to remove doubts, and clear away difficulties. It is probable the referee did not apply so rigid a rule, though he might have done so. His conclusions are readily sustained without it.

The defendant claimed \$411.75 against the plaintiff for lost time in the business of the firm. Of this amount the referee allowed \$220. This was the amount charged in the company's books by the defendant against the plaintiff for time lost by the plaintiff, and no sufficient reason is shown for increasing it. It is true, the defendant made an additional charge for the same loss, but it was made after this suit was commenced, and, under the facts disclosed, we do not think it ought to be allowed.

Our conclusions lead to an affirmance of the decree; and it is so ordered.

NOTE. A petition for rehearing was denied in the above case on June 14, 1887.

Ex parte ROSENBLATT. (No. 1,267.)

(Supreme Court of Nevada. June 30, 1887.)

1. CONSTITUTIONAL LAW—LICENSE—INTERSTATE COMMERCE.

Gen. St. Nev. § 1269, which provides for the licensing of traveling salesmen, commonly known as "drummers," and forbids their exercising their trade without a license, is a regulation of interstate commerce, and is void as to a citizen of California who is taking orders for goods to be delivered from that state.¹

2. HABEAS CORPUS—REVIEW OF JUDGMENT.

A judgment of a district court declaring valid a law which is in fact unconstitutional and void, may be reviewed on application for a writ of *habeas corpus* by one imprisoned thereunder, because, the law being void, the district court had no jurisdiction under it.

Application for *habeas corpus*.

R. H. Lindsay and S. D. King, for petitioner. The Attorney General and T. Coffin, for the State.

BELKNAP, J. The petitioner was convicted of a violation of an act of the legislature of the state approved February 23, 1885, entitled "An act providing for the licensing of traveling merchants, and merchants doing business through soliciting agents, commonly known as 'drummers,'" (Gen. St. § 1269,) in acting as soliciting agent or drummer without procuring a license therefor. He is held in custody under a commitment issued upon the judgment.

In his petition for a writ of *habeas corpus*, he alleges that he is a resident of the state of California, and that he was, at the time of his arrest, a traveling merchant, soliciting agent, and drummer offering goods, wares, and merchandise for sale in the town of Reno, to be delivered at a future time from the state of California by his principals, residents of that state; that, by the act of the legislature before mentioned, it is made a misdemeanor to exercise any such occupation without having first obtained a license therefor; and that, under this law, he was convicted, first, in the court of the justice of the peace, and afterwards, upon appeal, in the district court of Washoe county. He avers that the enactment of the legislature imposing the license tax is unconstitutional and void, because repugnant to that clause of the constitution of the United States which declares that congress shall have power to regulate com-

¹ A state statute imposing a license tax on drummers and others selling by samples within a certain taxing district is a regulation of interstate commerce, and therefore unconstitutional as applied to citizens of other states, *Robbins v Taxing District*, 7 Sup. Ct. Rep. 592; *Simmons Hardware Co. v. McGuire*, (La.) 2 South. Rep. —; and a statute requiring one who peddles articles grown or manufactured in a foreign country to have a license is unconstitutional, *State v. Pratt*, (Vt.) 9 Atl. Rep. 556. So, also, where the license is made proportionate to the licensee's stock in trade. *Corson v. Maryland*, 7 Sup. Ct. Rep. 655. But see *Ex parte Asher*, (Tex.) 4 S. W. Rep. —.

merce among the several states; and prays to be released from his imprisonment.

The supreme court of the United States in a recent case, that of *Robbins v. Taxing District Shelby Co.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, considered the constitutionality of a statute of the state of Tennessee involving the same question. The Tennessee statute declared that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week, or twenty-five dollars per month, for such privilege, and no license shall be issued for a longer term than three months." Robbins, a citizen of the state of Ohio, employed by citizens of that state having a business house at Cincinnati, was convicted of a violation of the law. On appeal to the supreme court of the state the judgment was affirmed. The case was then carried to the supreme court of the United States upon writ of error. It was held that the business of selling goods which were in Ohio at the time of sale, and were at a future time to be delivered to the purchaser in the state of Tennessee, constituted interstate commerce, and that the license tax imposed by the statute was a tax upon interstate commerce and invalid.

The statute of Tennessee and that of this state do not materially differ. Neither imposes a tax upon citizens of other states that does not equally apply to its own citizens, nor is there any discrimination in either statute against other states or their products. The principles of the decision of the supreme court in the *Robbins Case* must be accepted as establishing the unconstitutionality of the statute under which the petitioner was convicted.

It is urged, however, that the district court had jurisdiction to determine the constitutionality of the statute, and that its judgment cannot be reviewed upon the writ of *habeas corpus*. But the district court did not have jurisdiction, because the state could not lawfully impose the license tax. There was, in legal contemplation, no law creating the offense of which the petitioner was convicted.

"An unconstitutional law," said the supreme court of the United States in *Ex parte Siebold*, 100 U. S. 377, "is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a superior court or judge having authority to award the writ." See, also, *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Farrow*, 110 U. S. 654, 4 Sup. Ct. Rep. 152.

It is ordered that the petitioner be discharged.

HENRY v. COUNTY OF PIMA.

(Supreme Court of Arizona. July 3, 1887.)

COUNTIES—DEED TO COUNTY—NOTARY'S FEE.

When a statute makes it a duty of the collector of taxes to execute deeds of lands struck off to the territory at tax sales conveying same to the territory without charge, services of a notary public certifying the acknowledgment of his signature are not a proper charge against the county.

(Syllabus by the Court.)

BAINES, J. In this action plaintiff sues for the notarial fees for acknowledgment of 206 deeds, at one dollar each. He alleges that the tax collector of Pima county requested him to take and certify the acknowledgment of said

deeds. The provision of the law under which the deeds were made is an amendment to the revenue laws, which provides that in sales of lands for taxes, when the territory is the purchaser, and no person has redeemed the property during the time allowed for its redemption, the collector shall execute and acknowledge a deed to the territory, of such property, and deliver the same to the chairman of the board of supervisors without charge, and it shall be the duty of the county recorder, without fee, to record the same. Laws Ariz. 1885, p. 290, § 3. The tax sales above provided for are to enforce the tax for territorial as well as for county purposes. Comp. Laws, c. 33, §§ 1, 2. The fees sought to be recovered against the county were earned in services rendered to the tax collector, and at his request. The county did not request it. There is no express contract to bind the county, nor is there an implied contract by the county to pay for these services. It is essential to a contract, either express or implied, that both parties assent to it. The service performed was not for the sole benefit of the county. The territory was equally benefited by it. The obligation of the county does not arise by operation of law. The law requires the tax collector to execute these deeds, and without charge. He requested these services, and they were rendered for him in his official capacity. The law does not authorize him to bind the county, or to impose any such expense upon the county. The law expressly says he shall not do so. If the county was to be charged for these services by its proper officers, it should have the opportunity of selecting who should perform the service. If the tax collector assume to do so without authority or direction from the county, or its proper officers, he must assume the responsibility. The clerk of the county court and the recorder of deeds were authorized by law to take and certify these acknowledgments, and all fees earned by them are moneys of the county, as they are salaried officers. There is no reason why these officials should not perform this service; and if the tax collector passes them by, and requests the services of a notary public, he must pay him. It cannot be made a valid claim against the county.

The judgment is reversed, and the cause remanded for judgment for defendant.

WRIGHT, C. J. I concur in these views.

UNITED STATES v. ELLIS and others.

(*Supreme Court of Arizona.* July 3, 1887.)

1. APPEAL—RECORD—EVIDENCE.

The court will not consider objections to evidence which do not appear in the abstract.

2. ARBITRATION—CONTRACT FOR.

Where a party agrees to submit differences and disagreements as to the performance of a contract to certain officers, or board of officers, he cannot recover damages for breach of the contract unless it appear that he has offered to submit such differences.

3. SAME—CONCLUSIVENESS.

In the absence of fraud or mistake, the action of an officer empowered by a contract to perform its conditions is final and conclusive between the parties.

(*Syllabus by the Court.*)

Appeal from district court, Yavapai county.

C. T. Rouse, U. S. Dist. Atty., and J. J. Herndon, Dep. U. S. Dist. Atty., for the Government. Clark Churchill, for defendant.

BARNES, J. This is a suit by plaintiff on a bond to secure a contract made by Nathan Ellis, defendant, to deliver barley to the assistant quartermaster of the United States army at Fort McDowell, Arizona. Plaintiff recovered a judgment for the full penalty of the bond, to-wit, \$500, and defendant brings

the case into this court for review. The abstract shows that plaintiff offered in evidence a certified copy of the bond sued on and of the contract for the delivery of the barley aforesaid, and also certified copies of certain vouchers marked "Exhibits E, F, and G," and copies of other documents from the quartermaster's department from the files of the war department, which seem to have been duly certified by the proper officers of the United States treasury. The abstract does not set out nor state the contents of either the bond sued on or the contract, or either one of the exhibits to which objection is made.

We must presume that the court below ruled correctly in admitting them. Before we can hold that the court below erred, that must clearly appear, and we cannot consider in this court objections to evidence or documents that were offered below unless they are contained in the abstract, so that the court can see what the action of the court and what the evidence was that was objected to.

This disposes of all the objections in the case that we should or can properly consider; but we have, notwithstanding this fact, looked into the record, and find that all of these documents and vouchers were properly authenticated by the proper auditor of the treasury having charge of the accounts of the war department, and are made evidence by virtue of section 886 of the Revised Statutes. These authenticated copies make out a *prima facie* case, and it devolves, then, upon the defendant to defeat the same by competent evidence. It appears that there was a clause in the contract which provides that, in case of failure of said party of the second part thereto to comply with the stipulations of the contract, the party of the first part should have the power to purchase in open market and supply the deficiency, and the party of the second part was to be charged with the excess of cost, if any, over the rate specified in the contract. The contract also provided that deliveries should be made at such times and in such quantities as the acting assistant quartermaster at the station above named, or higher authority, might direct, subject to inspection by such officer or agent as the party of the first part might designate, and also provided that if any objection should be made to the action of the officer designated to receive and inspect the barley, that the case should be decided by a board of officers, subject to the approval of the department commander.

It seems that the defendant delivered at Fort McDowell between sixty and seventy thousand pounds of barley, and that the same was rejected by the inspecting officer at that post. By the terms of that contract, if the defendants were dissatisfied with the rejection of said barley, it was his duty and his right under the contract to call for a board of officers, according to the provisions of the contract, and have the case decided, as provided by the terms of the contract. This he did not do; and, according to the terms of his contract, he cannot now raise the question as to the quality of the barley, and the fault of the officer in rejecting the same. In the absence of fraud or bad faith on the part of the officer under this contract, his action was final as between the plaintiff and defendant contractor; and the contractor's only remedy was the remedy provided by the contract,—an appeal to a board of officers according to its terms. The evidence shows clearly that no such appeal was made, and the court properly instructed the jury that, as a matter of law, the contractor was liable for the difference between the contract price and the price paid in open market by the officer for the barley, which was clearly more than the amount of the bond and the recovery in this case.

In the case of *Kihlberg v. U. S.*, reported in 97 U. S. 398, where there was a contract for the transportation of stores between certain points, provided that the distance should be ascertained and fixed by the chief quartermaster, it was held that, in the absence of fraud, or such gross mistake as necessarily implied bad faith or failure to exercise honest judgment, the decision of the chief quartermaster was conclusive upon the parties.

It was held in *U. S. v. Robeson*, 9 B. & S. 319, that, where parties to a contract fixed a certain mode by which the amount to be paid shall be ascertained, the party who seeks enforcement must show that he did everything on his part that could be done to carry that portion of the contract into effect.

Where the parties, by the terms of the contract, agree upon an arbitrator or other person to construe the contract and fix and determine obligations under it, parties must seek their remedy according to the terms of the contract, and those terms will be enforced in all cases in the absence of fraud, bad faith, or mistake clearly made to appear.

The judgment of the court below is affirmed.

WRIGHT, C. J., and PORTER, J., concur.

BOWDEN v. PIERCE. (No. 11,004.)

(*Supreme Court of California.* June 17, 1887.)

1. EXECUTORS AND ADMINISTRATORS—EXECUTOR DE SON TORT—CALIFORNIA PROBATE PRACTICE.

There is no such officer as executor *de son tort* recognized under the California probate practice.

2. SAME—EXECUTOR DE SON TORT—REFUSAL TO ACT.

The fact that one who was named in a will as executor applied for letters, which the court granted, does not make him a trustee of the estate when he refused or neglected to qualify; and contracts made by him with the executrix, if fair and just, are not void, although they redounded to his benefit.

Department 1. Appeal from superior court, San Francisco.

McAllester & Bergen and *Jas. L. Crittenden*, for Bowden, appellant. *Robinson, Olney & Byrne*, *W. N. Cope*, and *A. L. Rhodes*, for Pierce, respondent.

PATERSON, J. Plaintiff, who is an heir and devisee of A. H. Houston, deceased, commenced this action February 9, 1881, to have certain contracts of sale from the executrix to defendant Pierce declared fraudulent and void; to have defendant adjudged to be a trustee for the devisees as to all moneys realized under the sea-wall contracts so purchased by him, and to require him to account therefor. The answer denies all charges of fraud and undue influence upon the executrix, and, as a separate defense, pleads the statute of limitations. It appears from the findings that Houston, on July 23, 1867, entered into two contracts with the board of state harbor commissioners for the construction of certain sections of the sea-wall; that on December 8, 1868, said A. H. Houston, being in failing health, departed for the Sandwich islands, the work being still incomplete; that said Houston prior to his departure, and on the eighth day of December, 1868, executed a general power of attorney to said Pierce, which was duly accepted and recorded by Pierce, and Pierce, acting under this power of attorney, thereafter collected all moneys paid under said contracts; he first heard of the death of Houston on March 28, 1869; that Pierce, on April 2, 1869, received \$29,952.22 from said board on contract for section 3, and immediately applied the same to the use of said estate; that on April 3, 1869, an attorney, at the request of Pierce and said Caroline, (named in the will as executor and executrix,) filed Houston's will for probate, and Pierce's and Mrs. Houston's joint petition for letters testamentary to Pierce and Mrs. Houston; and that on April 14, 1869, the will was admitted to probate in the probate court of the city and county of San Francisco, and letters testamentary ordered to be issued to Mrs. Houston and Pierce; that Pierce did not qualify and did not file at any time any written renunciation of his executorship, and that Mrs. Houston alone qualified as executrix, (April 20, 1869;) that an inventory of the property of the estate was prepared, verified on April 23, 1869, by Mrs. Houston, and filed on May 5, 1869; that on April 7, 1869, said board advertised for bids for the construction of section 4 of the

sea-wall; that negotiations thereupon commenced for the sale of said contracts and of the plant to Pierce, which resulted in an agreement of sale before April 21, 1869; and that the agreement was "subject to the condition that it was to be executed only in case Pierce obtained from the state board of harbor commissioners the contract for section 4." After the contract for construction of section 4 of the sea-wall had been awarded to Pierce, the agreement made previously between him and the estate of said deceased was reduced to writing, and signed by Pierce on May 6, 1869.

Mrs. Houston and said board and Pierce executed on June 24, 1869, an agreement of release and discharge, showing that the work on Nos. 1 and 2 had been completed, and that Pierce had become the successor in interest of said Houston. No report was made to or order made by the probate court of San Francisco respecting said sales to Pierce, except a statement on August 21, 1871, in the account of Caroline L. Houston as executrix, in these words: "To sale of contracts with state harbor commissioners, horses, carts, tools, dredging machinery, etc., used about sea-wall, office furniture, 30 cords of wood, and 30,000 feet of old lumber, and claim due for grading McHenry lot, \$90,000;" and a statement in the report that "your petitioner has, as directed by the will of said deceased, sold * * * certain contracts in the inventory mentioned, and the horses, carts, tools, etc., used in the construction of the sea-wall, the subject of said contracts, all of which will fully appear by said account;" and thereafter, to-wit, on December 12, 1871, the referee to whom said account was referred reported in favor of its approval. An attorney appointed by the court for the minor heirs appeared before the referee on the hearing of said final account. On December 13, 1871, the probate court adjudged and decreed that the report of the referee be confirmed and allowed and approved, and declared settled, and a decree of final distribution was made on the twenty-second day of March, 1872.

The executrix and defendant were advised by their attorney (Clarke) that she, as executrix, had the power to make the sale referred to, and that no confirmation by the court was necessary. The court also found that the contract with Pierce was fair and just, and that no advantage was taken of Mrs. Houston, and that defendant did not in any manner cheat, injure, or defraud the estate, or any devisee, but, on the contrary, that the sale was an advantageous one to the estate, and to its best interests in all respects. The court further found, and the evidence sustains the finding, "that the superstructure required by the Houston contracts to be erected upon said embankments could not have been erected except after great delay, and at a loss to the estate of said deceased."

The defendant made large profits out of his contracts with the harbor commissioners, but we think the fact is made quite clear that those profits were all made out of the work on section 4, for which the estate could not bid or contract. All the executrix could do was to complete the contracts on hand at the time of the death of Houston. We can find nothing improper in the refusal or failure of Pierce to qualify as executor. He was advised by his attorney "that he could better serve his sister-in-law—Mrs. Houston—by buying the plant and the contracts than by qualifying as executor."

If the findings of the court to which we have referred are supported by the evidence, and we think they are, it becomes unnecessary to determine whether there is a sufficient finding upon the issue raised by the plea of the statute of limitations. The defendant was a trustee by implication for a brief period after the death of Houston, but the estate was in no way injured by his acts during that time. The fact that he was named in the will as executor, and actually applied for letters, did not constitute him a trustee for the estate at the time the contract of sale was made. There is no such officer recognized under our probate practice as *executor de son tort*. *Pryor v. Downey*, 50 Cal. 400; *Valencia v. Bernal*, 26 Cal. 335; *Estate of Hamilton*, 34 Cal.

468. The refusal or neglect to qualify was a disclaimer of the trust. 1 Perry, Trusts, 262.

The estate of Houston could not bid for a contract to do the work on section 4. No profit could have been realized from the McHenry contract. There was no place in which the estate could have used the rock, and the court was justified in its finding that the sale to Pierce "was fair and just, and upon sufficient consideration to the estate, and to its best interests." The profits derived by Pierce came from his contract for the construction of section 4, and his purchase of the estate contract and stock was made upon condition that the board of harbor commissioners should award him the contract for section 4. Even if it be assumed that the sale to Pierce by the executrix was void, and that Pierce was enabled to secure the contract for section 4 because he had secured the Houston contracts, we do not think that he can be held as a trustee of the estate with respect to the contract for section 4. The estate did not and could not have any interest in that part of the work. If Pierce had not paid full consideration for the property purchased by him, or if he had made any profit from the work done under the contract, which the estate could have completed, he could be compelled, perhaps, to account therefor, notwithstanding the good faith of the parties; but such, as we have seen, are not the facts in this case. Order affirmed.

We concur: TEMPLE, J.; MCKINSTRY, J.

72 Cal. 553

WINTERS v. PEARSON. (No. 9,646.)
(Supreme Court of California. June 17, 1887.)

1. ATTACHMENT—AFFIDAVIT—ALTERNATIVE FORM.

An affidavit for attachment, framed or stated in the alternative, is totally defective; following *Wilke v. Cohn*, 54 Cal. 212.

2. SAME—AFFIDAVIT—AMENDMENT.

On a motion to discharge a writ of attachment on the ground that it was improperly or irregularly issued, the affidavit on which the writ was issued is not amendable, under section 473, Code Civil Proc. Cal., but must be discharged under section 558, which provides for the discharge of the writ if improperly granted.

3. SAME—DISCHARGE.

The release of property attached, provided for by sections 554, 555, Code Civil Proc. Cal., by the execution of an undertaking, is not a waiver by the defendant of his right under section 556 to apply to discharge the writ of attachment.

Department 2. Appeal from superior court, San Francisco county.

Wm. M. Pierson, for appellant. *Neuman & Eickhoff* and *Edward Lynch*, for respondent.

THORNTON, J. The attachment was improperly and irregularly issued within the ruling of this court in *Wilke v. Cohn*, 54 Cal. 212. On a motion to discharge a writ of attachment on the ground that it was improperly or irregularly issued, the affidavit on which the writ was issued is not amendable. This, in our opinion, is in accordance with section 558, Code Civil Proc., which provides that if, on such an application, it satisfactorily appears that the writ was improperly or irregularly issued, it must be discharged. To allow the affidavit to be made good by amendment, and upon such action refuse to discharge the writ, would, in our judgment, violate the requirements of the section just above cited. The defendant in the action did not waive his right to apply to discharge the writ under section 556, Code Civil Proc., because he had previously released the property from the operation of the writ under sections 554, 555, Id. The right to make the application under section 556 is expressly given, though the defendant has previously proceeded under sections 554 and 555.

The orders of the court must be affirmed. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

72 Cal. 565

HITCHCOCK v. McELRATH. (No. 9,595.)

(Supreme Court of California. June 21, 1887.)

1. TROVER AND CONVERSION—PLEADING—VARIANCE.

In an action to recover for the wrongful conversion of certain shares of capital stock of a corporation, the complaint averred generally that plaintiff loaned the stock to defendant, and that he converted it to his own use. The proofs showed that it was loaned for the special purpose of being used by defendant to raise money to pay and take up a certain promissory note of which defendant was maker and plaintiff accommodation indorser; and, further, that defendant did *not* use it for that purpose, but converted it to his own use. The answer denied the borrowing of the stock at all, and that the plaintiff owned it, and averred that he had bought it of the plaintiff. Held that, under the pleadings, the variance was not one that "actually misled the defendant to his prejudice in maintaining his * * * defense upon the merits." Code Civil Proc. Cal. § 469.

2. SAME—DAMAGES—PROVINCE OF JURY.

The ascertainment of the *value* of the property in controversy in an action to recover for the wrongful conversion of shares of capital stock of a corporation is for the jury, and their determination will not be reviewed on appeal, when there is a conflict in the evidence, and there is some testimony on the part of the appellant to sustain it.

Department 2. Appeal from superior court, San Francisco.

Wm. H. Fifield, for McElrath, appellant. *Clement, Osment & Clement*, for Hitchcock, respondent.

McFARLAND, J. This is an action to recover for the wrongful conversion of certain shares of capital stock of the Saucelito Land & Ferry Company, a corporation. Judgment went for plaintiff, and defendant appeals therefrom, and from an order denying his motion for a new trial. Appellant relies mainly—*First*, upon a variance between the averments of the complaint and the proofs; and, *second*, upon errors committed in overruling his objections to certain testimony touching the value of the property alleged to have been converted.

1. The complaint avers, generally, that plaintiff loaned the stock to defendant, and that he converted it to his own use. The proofs show that it was loaned for the special purpose of being used by defendant to raise money to pay and take up a certain promissory note of which defendant was maker and plaintiff was the accommodation indorser, and, further, that defendant did *not* use it for that purpose, but converted it to his own use. This is claimed by appellant to have been a fatal variance. But appellant, in his answer, denied that he borrowed the stock at all; denied that respondent owned it at the time of the alleged conversion; and averred that appellant had bought the stock of respondent, and was the owner of it. Under these circumstances it is impossible to see how the variance was one which "actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Code Civil Proc. § 469. We think, therefore, that the position taken by appellant on this branch of the case is not tenable.

2. There was great difficulty in determining the value of the property converted. As there had been no movements of sale and purchase of the stock of the corporation, it had not that kind of market value which attaches to stock frequently dealt in. Recourse was had, therefore, to the value of the property owned by the corporation. This consisted, in part, of wharves and ferry franchises, but mainly in land lying in and near the town of Saucelito, on the water front of the bay, and running back into the hills. The corporation was a *land* company, and a main branch of its business was to sell its land at Saucelito in small lots for residences, as purchasers could be found. Under these circumstances, the purpose of counsel for respondent at the trial, seemed to be to induce the court, as far as possible, to allow testimony tending to show what the land was worth if sold in small quantities, and in the

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usual course of business, and supposing the affairs of the company to be properly managed. On the other hand, the effort of counsel for appellant seemed to be to confine the testimony strictly to the question: How much would the land sell for as a whole, at forced sale, upon 20 days' notice? The court did not fully adopt the theory of respondent. It went, however, too far in that direction, and, if it appeared at all that the value found by the jury rested upon answers of some of respondent's witnesses to one or two questions improperly admitted, there might be ground for a reversal of the judgment. There was, however, ample evidence—and considerable of it coming from appellant's own witnesses—to support the verdict, which was for \$4,050, even upon the extreme theory of value contended for by appellant. And, then, the court, on the motion for new trial, reduced the amount of the judgment to \$983, which respondent accepted. We are satisfied, therefore, that no injustice was done the appellant.

If we have not been noticed in detail all of the many points specially made by appellant, it is not because we have not considered them.

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

72 Cal. 556

CONNER v. STANLEY, Adm'r, etc. (No. 11,648.)

(*Supreme Court of California. June 21, 1887.*)

1. FRAUD—UNDUE INFLUENCE—SPIRITUALISM.

In an action on a contract, evidence that the defendant's intestate was 72 years old, and feeble both bodily and mentally; that he had long been a firm believer in spiritualism; that he relied upon supposed spiritual advice in his business and financial relations; that he was a mental wreck after the death of his only child; and that a medium could do anything with him, is sufficient to support a finding that a relation of personal confidence existed between him and plaintiff, who was a medium, within the meaning of Civil Code Cal. § 2219, declaring persons voluntarily assuming a relation of personal confidence trustees; and by § 2235, which, in cases of contract between such persons, raises a presumption of undue influence, there is a presumption that all transactions between such persons, by which the person trusted obtains an advantage, are entered into under undue influence.¹

2. SAME—UNDUE INFLUENCE—PROOF.

In an action on a contract impeached for fraud, evidence that plaintiff told witness that she (plaintiff) and defendant's intestate had words when the contract in suit was executed; that she locked the door of the room, and kept it locked for two hours; that he had a contract drawn, and the next day had forgotten that he had done so; and that he acted as if he were drugged or crazy,—tends to prove undue influence and adverse pressure.¹

Department 1. Appeal from superior court, Sacramento county.

This action was brought on an antenuptial contract, by which defendant's intestate promised, in consideration of the mutual affection and agreement to marry existing between him and the plaintiff, to deliver to her, on or before marriage, \$10,000 worth of bonds. Plaintiff averred herself as having been always ready to consummate the marriage, but defendant's intestate refused, and so continued to refuse until his death. Plaintiff seeks to recover the value of the bonds.

Robt. T. Devlin, W. H. Beatty, and A. P. Catlin, for appellant. *Freeman & Bates*, for respondent.

¹ As to what constitutes undue influence, and its effects, see *June v. Willis*, 30 Fed. Rep. 11, and note; *Kerrigan v. Leonard*, (N. J.) 8 Atl. Rep. 503; *Conover v. Conover*, Id. 500; *Osthaus v. McAndrew*, (Pa.) 8 Atl. Rep. 436; *Clutter v. Clutter*, (Ky.) 4 S. W. Rep. 182; *McHarry v. Irvins Ex'rs*, (Ky.) 4 S. W. Rep. —, and 3 S. W. Rep. 374; *Carter v. Tice*, (Ill.) 11 N. E. Rep. 529, and note.

TEMPLE, J. The contract on which this action is founded is set out in full on the former appeal. 65 Cal. 183, 8 Pac. Rep. 668. It is there said to be valid as an antenuptial contract. The defendant set up as a defense that at the time the alleged contract was made his intestate was insane, and incapable of entering into a contract, and that it was procured by the use of undue influence by the plaintiff. The court found that all the allegations of the complaint were true, except as to the capacity of Jarvis to contract; and that all the affirmative matters set up in the answer were true, except that plaintiff and P. B. Nagle did not, nor did either of them, coerce Jarvis otherwise than by taking advantage of his weak and unsound mind. The findings, therefore, plainly cover all the issues in the case, and the only question for our consideration is whether there is any evidence which could justify the conclusion. Upon this proposition there can be no doubt.

1. There was evidence tending to prove insanity generally, and not merely that he was insane on the subject of spiritualism. J. Miller, an intimate acquaintance, thought he was insane. To the same effect is the testimony of Mrs. A. Walker, J. W. Houston, S. B. Lusk, and Lee Stanley, and it is shown that plaintiff herself stated that she believed him insane. And then there is much testimony as to facts which would tend to show an unsound mind.

2. There is much testimony tending to prove that Jarvis was insane on the subject of spiritualism. That there is such evidence is not controverted, but counsel indulge in a long argument, and cite many authorities, to the point that a belief in spiritualism does not prove insanity. As an abstract proposition, no doubt this is so. The law pronounces no one insane for mere religious belief, no matter how unreasonable it may appear to the judge. But this does not meet the case made. A belief in the doctrines maintained by the Methodists, Presbyterians, or the Catholics would not establish insanity. Still one might be a monomaniac as to either form of religion, and so as to spiritualism. And that is precisely the effect of the great mass of testimony in this case.

3. There is much evidence tending to show undue influence. It is established that the relation between the parties was confidential, in consequence of her claim to power as a medium, through which she had great control over him. This being established, the burden was cast upon her of showing that there was no undue influence. The rule applies with peculiar force to the relation of one and his priest, confessor, clergyman, or spiritual adviser, and certainly with no less force to the relation between one who is a firm believer in, not to say a monomaniac upon, the subject of spiritualism, and the medium in whom he has confidence, and upon whom he habitually relies. The cases upon the subject are numerous, but the law, so far as necessary here, is crystallized in the Civil Code. Section 2219 provides that every one who voluntarily assumes a relation of personal confidence with another is a trustee, and section 2235 raises the presumption that all transactions between such persons, by which the person trusted obtains an advantage, are entered into under undue influence. It becomes important, then, to inquire whether the relation did exist.

Jarvis was 72 years old, feeble both mentally and physically. He was a widower, his wife having died in August, 1881, a few months before the contract questioned here was entered into. He had lived for a great many years at Folsom, a quiet life, with no family except his wife. They had had one child, a daughter, who married the defendant, and died 20 years ago, leaving two children. Jarvis had been a music-teacher, and had accumulated some property. He was for many years a firm believer in spiritualism. The belief had grown upon him until, in the opinion of the witnesses, it had become a monomania. His mind would drift to the subject upon all occasions. He relied upon supposed spiritual advice in his business transactions. When

warned against trusting certain persons, he said: "It will be all right in the next world; they are spiritualists." He sold a farm for \$2,000 to be paid for in installments of \$200 a year, without interest. He had been offered \$250 a year rent. He said the spirits told him he must sell; that he was governed entirely by the spirits. The purchaser was a spiritualist. He invested several thousand dollars in mines, under the supposed advice of spirits. Most of this money was lost. He offered a lady \$1,500 to attend seances, and become a medium. To another lady he offered to convey a piece of land if she would become a medium. He believed he could reform all the convicts if he could get them to read a spiritualistic paper. He said he had got the right idea of spiritualism, and was going to publish a work which would astonish the world. He admitted that he was controlled by mediums.

One witness said he was a mental wreck from the time he lost his daughter, and there is much evidence that he became still worse after the death of his wife. His conduct was very strange during her last illness. He did not believe in giving her medicine or nourishment. The medium said she would die, and the spirits would keep her until then. He did not wish a doctor, as the spirits would do nothing if he had one. He objected to cooking being done in the house, the smell would keep the spirits out. The doors and windows must be left open so they could come in. He was angry when they gave her stimulant, because if she were to die intoxicated she would remain so in the spirit land. He knew of one man who was killed while drunk, and who was still drunk, 15 years after his death.

In this condition of health, mental and physical, Jarvis met the plaintiff. She is said by her counsel to be an artist, who has a studio in San Francisco; a highly educated, refined, and accomplished lady. When Jarvis first made her acquaintance does not definitely appear, but it was evidently shortly after the death of his wife, when he went to consult her as a medium to find out how much money he should give his granddaughter to use. In February, after Mrs. Jarvis' death, plaintiff was giving seances at Folsom. Jarvis had induced her to go there to be developed as a medium, and gave her \$50 per month to come. She remained on these terms for some three months, giving seances, which were attended by Jarvis, and to which he invited his friends. The evidence shows that he had the most exalted opinion of her powers as a medium, and that he was much under her control. He said himself that she had great influence over him when she was around. There is evidence that plaintiff herself said that she believed that Jarvis was crazy, and a medium could do anything in the world with him.

We think this is sufficient to show that there was evidence upon which the court could find the existence of a relation of a peculiar trust and confidence between them, similar to that between a religious devotee and his spiritual adviser and the proof of which would throw upon the plaintiff the burden of showing fair dealing.

But the record contains evidence of undue influence and adverse pressure. Mrs. Walker testified: "Speaking of the time when the contract that is in suit here was executed, she said that they had had trouble and had words. She said that she wished him to settle something on her, and he asked her if she was afraid that he would not leave her anything, or would not leave her as well off as her other husband had left her, and she said that she locked the door, and kept him in the room for about two hours, and that she put the key in her pocket. * * * They talked about the matter in my presence, and they both told me that which I have stated. She said that they finally came to a settlement, and he agreed to settle something on her, and she opened the door, and got a boy, and sent him down to Nagle's office, and he came up and drew a draft of the contract that day, and the next day she told me that Jarvis came in, and she asked him if he would have a chair, and she said he acted queerly. Then she said that she told him he would not have time to

sit down if he was going down to keep his word, and sign that contract. He asked her what contract, and he said I have made no contract. * * * She said that at that time he acted as if he was either drugged or crazy, and that he did not act as if he knew what he was about, and did not seem to know that he had ever drawn up a contract. * * * She expressed herself as believing that he was an old fool, and did not know what he was about. She said at that time she believed that he was crazy."

There was evidence on the part of plaintiff contradicting some of this evidence, but this only creates a conflict. If we could consider the testimony, however, as a trial court, we could not say that the evidence does not sustain the finding.

Judgment and order affirmed.

We concur: MCKINSTRY, J.; PATERSON, J.

72 Cal. 562

ALLISON v. THOMAS and others. (No. 11,847.)

(*Supreme Court of California.* June 21, 1887.)

1. JUDGMENT—VALIDITY OF PROCEEDINGS—MISNOMER.

The designation in an action in a justice's court of the defendant, "John C. McDonald," as "John McDonald," does not affect the validity of those proceedings.

2. COURTS—JURISDICTION—AMENDMENT OF RECORD.

When the court had in fact jurisdiction of the defendant, but the return of the constable failed to show that fact, the record may be amended after judgment so as to show jurisdiction, if there are no intervening rights to be affected.

3. JUDGMENT—LIEN—PURCHASE FROM JUDGMENT DEBTOR.

The purchaser from the judgment debtor of all his right, title, and interest in the land attached in such action takes subject to the judgment rendered in such action.

Department 1. Appeal from superior court, San Bernardino county.

Appeal by defendants from a judgment of the superior court of San Bernardino county. Defendants claim title to the land in question by virtue of a sale under a judgment rendered in a justice's court in their favor against one John C. McDonald, on whom process was served, but who was designated in the proceedings as "John McDonald."

Harris & Allen, for appellants. *Curtis & Otis*, for respondents.

TEMPLE, J. The omission of the initial letter of the middle name of McDonald, in the proceedings in the justice's court, is a matter of no consequence, and does not in any way affect the validity of those proceedings. The rule undoubtedly is that the record in the justice's court must show affirmatively jurisdiction of the person, or the judgment will not be valid. Here there was in fact jurisdiction, but the return of the constable failed to show due service. After the judgment was entered, this record was amended, and as amended did show jurisdiction. In the mean time, however, the land attached had been sold. The judgment debtor had also conveyed to plaintiff all his right, title, and interest in the land. As against the judgment debtor there was no impropriety in allowing an amendment to the record according to the fact. The officer may always amend his return if there are no intervening rights which would be affected. And we think it plain there was no error in allowing it as to the purchaser. He purchased the right, title, and interest of the judgment debtor, and took subject to all equities and secret defects.

We do not overlook the case of *Graff v. Middleton*, 43 Cal. 341, in which it was held that under the twenty-sixth section of the recording act, then in force, a quitclaim deed received in good faith, and for a valuable consideration, would prevail over a prior unrecorded deed. That decision is made to turn upon the language of that statute defining the word "conveyance."

This ruling was followed in *Frey v. Clifford*, 44 Cal. 343, where the description of the estate conveyed was "all my right, title, and interest" of the grantor. Unless these cases are justified by the peculiar wording of the statute, they seem to be against the decisions elsewhere upon the subject. It has been uniformly held that a conveyance of the right, title, and interest of the grantor vests in the purchaser only what the grantor himself could claim, and the covenants in such deed, if there were any, were limited to the estate described. *Coe v. Persons Unknown*, 43 Me. 432; *Blanchard v. Brooks*, 12 Pick. 47; *Brown v. Jackson*, 3 Wheat. 449; *Adams v. Cuddy*, 13 Pick. 460; *Allen v. Holton*, 20 Pick. 458; *Sweet v. Brown*, 12 Metc. 175; *Pike v. Galvin*, 29 Me. 183.

This construction is in accord with the obvious meaning of the language. The grantee in such a deed necessarily takes only what the grantor then had, and subject to all defects and equities which could then have been asserted against the grantor. To this rule this court has made an exception founded upon the recording act, and still another has been recognized in reference to sales made by the sheriff under execution. There the statute provides that the purchaser acquires all the right, title, and interest of the judgment debtor. It has been held that such deed is good as against a prior unrecorded deed. *Roberts v. Bourne*, 23 Me. 165.

These are both exceptions to the general rule, founded upon special statutory provisions, and rather tend to confirm the rule than to overthrow it.

Judgment reversed, and cause remanded.

We concur: MCKINSTRY, J.; PATERSON, J.

WALLACE v. MAPLES. (No. 11,539.)

(Supreme Court of California. June 24, 1887.)

In bank. For the opinion in department 2, see *ante*, 19.

MCFARLAND, J., (*dissenting*.) I dissent from the order of a majority of the court denying appellant's petition for a hearing in bank. Although I wrote the opinion in department affirming the judgment, on reading the petition for hearing in bank, and upon a more thorough consideration of the case, I am dissatisfied with that opinion, and with the conclusion therein reached, and think that there should be a hearing of the case in bank.

72 Cal. 623

PEOPLE v. LEE SARE BO. (No. 20,256.)

(Supreme Court of California. June 28, 1887.)

1. EVIDENCE—DYING DECLARATION.

A declaration by a dying man as to the manner in which he came by his death, made within three or four minutes before his death, and about the same time as a statement by him that he was going to die, is admissible in evidence as a dying declaration, whether it was made before or after the statement that he knew he was going to die, as all the circumstances showed in him at the time a knowledge of impending death.¹

2. CRIMINAL PRACTICE—EVIDENCE—TESTIMONY AT CORONER'S INQUEST.

A paper purporting to contain the testimony of witnesses taken before the coroner, at the inquest upon the body of the murdered man, but not authenticated otherwise than by the statement of counsel, is properly rejected.

¹ Dying declarations are admissible in evidence in homicide cases, if made under a sense of impending death. *State v. Partlow*, (Mo.) 4 S. W. Rep. 14; *Cook v. State*, (Tex.) 3 S. W. Rep. 749; *State v. Mathes*, (Mo.) 2 S. W. Rep. 800; *Purveyer v. Com.*, (Va.) 1 S. E. Rep. 512; *State v. Johnson*, (S. C.) Id. 510; *Hill v. State*, (Miss.) 1 South. Rep. 494; *State v. Leeper*, (Iowa,) 30 N. W. Rep. 503; *State v. Saunders*, (Or.) 12 Pac. Rep. 441; *Stephenson v. State*, (Ind.) 11 N. E. Rep. 360.

8. SAME—INSTRUCTIONS—REASONABLE DOUBT.

Where the court, in instructing the jury as to the meaning of the words "reasonable doubt," used some expressions which were weak and ambiguous, but others so strong and clear that the jury could not possibly have been misled, an assignment of error, based on the ambiguous portion of the charge, should not be sustained.³

4. SAME—ALIBI—BURDEN OF PROOF.

The defendant, in a prosecution for murder, attempted to set up an *alibi*. *Held*, that such a defense, as in the case of every defense resting on extrinsic facts not arising out of the *res gestæ*, must be proved by a preponderance of evidence.³

5. JURY—PROVINCE—INSTRUCTION ON WEIGHT OF EVIDENCE.

In order to hold an instruction erroneous on the ground that it is a charge upon the weight of evidence, an invasion of the prerogative of the jury, and violative of the constitutional provision inhibiting charges with respect to matters of fact, it is necessary to show that there was a conflict of evidence upon the question on which the jury were instructed; and in a prosecution for murder the court, in charging the jury, may assume the fact of the killing by the defendant, if such fact as testified to is not contradicted.

6. SAME.

An instruction to the jury that, if they were satisfied that the defendant killed the deceased under the particular circumstances of that case, it would be murder in the first degree, and that if they desired that the defendant should suffer the death penalty they were so to return their verdict, was held not erroneous, as a charge upon matters of fact.

7. CRIMINAL PRACTICE—CONDUCT OF TRIAL—REMARKS OF JUDGE.

The court in instructing the jury remarked: "I do not desire to have any question in this case at all. There are some instructions asked for by the defendant which I will give in addition to those which I have already given." And again: "In this case, gentlemen, I do not deem it necessary to give the instructions which I usually give in homicide cases." *Held*, that although it is possible for the trial court by innuendo, facial expression, or vocal emphasis or slide, to indicate a prejudice against the defendant, yet in this case the expressions must have been merely apologetic, as the court had already given the substance of the instructions asked for by defendant, and more favorably than requested on his behalf.

In bank. Appeal from superior court, San Francisco county.

John D. Whaley, for appellant. *Atty. Gen. G. A. Johnson*, for respondent.

PATERSON, J. Defendant was convicted of murder, and sentenced to be hanged. His counsel presents for our consideration seven assignments of alleged error.

1. Gon Yen, widow of Ah Chuck, whom it is alleged defendant killed, was called as a witness by the prosecution, and testified, against the objection of defendant, to a declaration made by her husband immediately after the shooting, in which he stated that the defendant shot him. The prosecution claimed that the statement was made by Ah Chuck under a sense and belief of impending death, and without any hope of recovery, and was therefore admissible as a dying declaration. Counsel for defendant claimed that there was no foundation laid for its admissibility; that all the evidence shows is a bare fear of

³That the guilt of the prisoner must be established beyond a reasonable doubt, and as to what is such reasonable doubt, see *State v. Elsham*, (Iowa,) 31 N. W. Rep. 66; *Heldt v. State*, (Neb.) 30 N. W. Rep. 626; *People v. Steubenvoll*, (Mich.) 28 N. W. Rep. 890, and note; *State v. Thurman*, (Iowa,) 24 N. W. Rep. 511, and note; *Knarr's Appeal*, (Pa.) 9 Atl. Rep. 878; *State v. Meyer*, (Vt.) 3 Atl. Rep. 201, and note; *U. S. v. Jackson*, 29 Fed. Rep. 503; *U. S. v. Searcey*, 26 Fed. Rep. 442, and note; *Brown v. State*, (Ind.) 6 N. E. Rep. 905, and note; *Stitz v. State*, (Ind.) 4 N. E. Rep. 145, and note; *Com. v. Leonard*, (Mass.) Id. 96, and note; *State v. Roberts*, (Or.) 13 Pac. Rep. 896; *People v. Guidici*, (N. Y.) 3 N. E. Rep. 496; *U. S. v. Bassett*, (Utah,) 18 Pac. Rep. 237; *State v. Jones*, (Nev.) 11 Pac. Rep. 318, and note; *Clair v. People*, (Colo.) 10 Pac. Rep. 799; *Minich v. People*, (Colo.) 9 Pac. Rep. 4, and note; *Leonard v. Territory*, (Wash. T.) 7 Pac. Rep. 872, and note; *White v. State*, (Tex.) 3 S. W. Rep. 710; *State v. Payton*, (Mo.) 2 S. W. Rep. 394; *Humbree v. State*, (Ala.) 1 South. Rep. 548.

⁴An *alibi* must be established by a preponderance of evidence. *State v. Rowland*, (Iowa,) 33 N. W. Rep. 138; *State v. Red*, (Iowa,) 4 N. W. Rep. 831. As to other questions relating to evidence to establish an *alibi*, see *People v. Lee Gam*, (Cal.) 11 Pac. Rep. 184, and note. See, also, *State v. Fenlason*, (Me.) 7 Atl. Rep. 385.

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death; and, the declaration having been made before the statement that he would die, it is inadmissible.

There was no evidence concerning the condition of the declarant's mind other than that given by the witness, Gon Yen, who testified through an interpreter, in substance, that immediately after the shooting she ran to Ah Chuck, and had him carried into the house. "He died seven or eight minutes after he was brought in, and quit talking three or four minutes before he died. When he first came in he told me he thought he was dead, or would die. All I can remember is he told me he was afraid he was going to die; afraid of death. He said: 'I will die.' That is among the first things he said. No; first he said he wanted me to be sure to have Ah Po Qui Po,—that means dark-skinned Po,—the defendant there, arrested; that he was the man that shot him. After he had said a few words of that kind he said: 'I think I will die.'"

We think it quite apparent from this testimony that the wounded man felt that the finger of death was upon him, and, in view of the fact that all he said was uttered in the brief period of three or four minutes, it is immaterial whether the declaration was made before or after the statement that he was going to die. An express statement by the declarant that he believes he is about to die is not necessary at any time, provided the circumstances show in him at the time a sense of impending death. *People v. Taylor*, 59 Cal. 640; *People v. Gray*, 61 Cal. 164.

2. The court did not err in refusing to admit the paper in evidence which counsel for defendant claimed to be testimony of witnesses taken before the coroner at the inquest. Conceding that, if properly authenticated, it would have been admissible for the purpose claimed, it is sufficient to say that there was nothing to show that it was testimony taken before the coroner except the statement of counsel in offering it. Furthermore, there is nothing in the record to show what the paper contained.

3. In the charge to the jury the court, speaking on the subject of reasonable doubt, gave Mr. Chief Justice SHAW's definition thereof, which has been so often approved here, but, unfortunately, threw in this meaningless expression: "But mere probabilities of innocence or doubts, however reasonable, which beset some minds on all occasions should not prevent such a verdict." What the court meant by mere probabilities of innocence or doubts *which beset some minds on all occasions*, in view of the correct and unambiguous language of the charge upon the same matter before and after this expression it is difficult to conjecture; but from the language following it would appear that the court desired to say to the jury that mere chimerical or fanciful doubts should not prevent a verdict if they were satisfied to a moral certainty of the guilt of the defendant. The court went on to say: "In other words, gentlemen, a reasonable doubt, in a legal sense, is a doubt which has some reason for its basis; it is not a doubt arising from mere caprice or groundless conjecture, but it must arise from the facts proven in the case. You have no right to go outside of the evidence to hunt for doubts, nor should you entertain those which are merely chimerical, or based on groundless conjectures. It is that state of the case which, after an entire consideration and comparison of all the evidence, leaves your minds in that condition that you cannot say you feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * The hypothesis contended for by the people must be established to an absolute certainty, to the entire exclusion of any rational probability of any other hypothesis being true, and, if a reasonable doubt is entertained by the jury on any material fact in the case, they should acquit." The language of the sentence to which this objection is addressed is so ambiguous, and the charge in other portions so strong and clear on the question of reasonable doubt, we think the jury could not have been misled.

4. Defendant claims that the court erred in saying to the jury: "If you be-

lieve beyond a reasonable doubt that the party was killed as alleged in the information, at the time and place specified therein,—upon that you will have very little difficulty,—I assume; will be satisfied beyond a reasonable doubt, then the next question for you to determine is whether it was done by the defendant or not.” It is said that this is a charge upon the weight of evidence, an invasion of the prerogative of the jury, and violative of the constitutional provision inhibiting charges with respect to matters of fact. So far as the transcript shows, there was no controversy with respect to the killing and death of Ah Chuck. It is stated that there was evidence “tending to show that defendant, on the fifth day of October, 1882, in the city and county of San Francisco, shot the deceased, Ah Chuck, who, in about seven or eight minutes thereafter, died from the effects thereof. Gon Yen testified to the shooting and death of Ah Chuck, and there is no evidence to the contrary. Conceding that the instruction assumes a fact or expresses an opinion on the weight of evidence, in order to hold that it was erroneous we should have to assume that there was a conflict of evidence upon the question of the killing. This we cannot do. There is positive evidence in the bill of exceptions that Ah Chuck was killed at the time and place alleged, and if there was any evidence to the contrary the fact should be stated, or the evidence should be given in the transcript.

5. The court further said: “If I understand the testimony for the defendant, it is simply that he was not there, and did not know anything about it, and, of course, had nothing to do with it; that is what in law is called an *alibi*, and he is not required to establish that beyond a reasonable doubt, but may establish it by a preponderance of testimony; and in this matter, gentlemen, before you can find a verdict against the defendant, of course you must be satisfied beyond a reasonable doubt that he was at the time there.” Appellant quotes the first clause of this sentence, and upon that bases an assignment of error upon the ground that it casts upon the defendant the burden of proving his innocence by a preponderance of evidence. The court had told the jury many times that the burden of proof rested upon the prosecution that every material fact must be established by the prosecution to the satisfaction of the jury, beyond a reasonable doubt. The first clause in the sentence quoted was intended to meet circumstances like those referred to in the defendant’s instruction No. 4.

At the request of defendant the court instructed the jury, among other matters, as follows: “(4) The policy of the law, as evidenced by the presumption of innocence and the doctrine of reasonable doubt, would require the public prosecutor to introduce such proof as will give a fair account of the transaction. This being done, the defendant may produce in evidence his defense, and he is not required to prove the circumstances thereof beyond a reasonable doubt, or to the extent of satisfactorily establishing his defense. He is only required to prove the same as any other facts are required to be proved, and, if the matters relied on be supported by such proof as would produce a reasonable doubt in the minds of the jury as to the guilt of the defendant, when the whole evidence concerning the transaction comes to be considered by the jury, the rule of law is that there must be an acquittal. But if a defendant enters upon an independent defense, and attempts to prove extrinsic facts, not arising out of the *res gesta*, the rule is that when the defense set up is, in itself, purely extrinsic, the allegations of the information not being denied, it is necessary that such defense be sustained by a preponderance of proof. (5) It must be established beyond a reasonable doubt that the defendant was present, and committed or participated in the commission of the offense, and, if the proof leaves it doubtful in the minds of the jury whether the defendant was present at or absent from the place at the time the crime was committed, he must be acquitted.”

6. Defendant excepted to the following instruction on the ground that it

is a charge as to matter of fact: "If you are satisfied beyond a reasonable doubt that the defendant, at the time and place specified in the information, killed the party alleged to have been killed, under such circumstances as under the testimony as given before you and the law that I have given you, it would be murder in the first degree, and you desire that he shall suffer the death penalty, the form of your verdict will be: 'We, the jury, find the defendant guilty of murder in the first degree.'" While the instruction is artificially drawn, it would require a most astute philologist to show wherein the language, with its punctuations, asserts that the killing, if it occurred at the time and place specified, would, under the testimony and the law, be murder in the first degree.

7. The last assignment of error is that the court erred in remarking, while engaged in charging the jury: "I do not desire to have any question in this case at all. There are some instructions asked by the defendant which I will give in addition to those which I have already given." And again in saying: "In this case, gentlemen, I do not deem it necessary to give the instructions which I usually give in homicide cases." The court had already given in its oral charge the substance of the instructions asked by defendant, and the first statement quoted was doubtless apologetic for the repetition. It cannot be fairly assumed that the court intended to prejudice the jury against the defendant by an intimation such as appellant draws from the language used, *i. e.*, that the case was one of unusual enormity, and the instructions favorable to the defendant omitted or given under protest. Of course it is possible for the trial court by innuendo, facial expression, or vocal emphasis or slide, to indicate a prejudice against the defendant on trial for crime, and thus grievously injure his case; but there is nothing in this case to indicate any such feeling or disposition on the part of the judge who presided at the trial. On the contrary, the instructions given by the court of its own motion are replete with expressions more favorable to defendant than any found in those which were asked on his own behalf. We have examined the affidavits used on motion for a new trial, and think the court below correctly held that they were insufficient.

Every point made has been considered, and we find no error.
Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

2 Cal. Unrep. 770

GRANT v. DE LAMORI and others. (No. 11,712.)

(*Supreme Court of California.* June 30, 1887.)

DEED—TITLE CONVEYED—LIMITATIONS.

The alienating force of a deed, which by plain terms purports to pass the grantor's entire interest, is not restricted by the fact that it contains an allusion to an executory contract which the grantor has with a third party respecting the land, and from whom he is to get a quitclaim deed, when the allusion is made simply for the purpose of describing more particularly the premises conveyed.

Department 2. Appeal from superior court, Los Angeles county.

Suit by John Grant, respondent, to quiet title in himself to a tract of land, against the administratrix and children of Louis Lamori, deceased. The plaintiff claimed title under a deed to him from Francisca Urquidez de Lamori, the widow of Louis, and a deed made to her by her husband in his life-time. The defendant and appellant Mrs. Plummer claimed title as one of the heirs at law of Louis Lamori. The complaint is as follows:

"That the said plaintiff is the owner in fee-simple of all that certain piece or parcel of land situate in the county of Los Angeles, state of California, forming part of the Rancho Los Feliz, and bounded and more particularly de-

scribed as follows, [describing it:] that the said defendants, Francisca Urquidez de Lamori, administratrix of the estate of Louis Lamori, deceased, Juan Lamori, Miguel Lamori, Alfredo Lamori, Domingo Lamori, Fabio Lamori, Solomon Lamori, Antonio Lamori, Umpara Lamori de Plummer, and Louisa Lamori de Urquidez, claim an interest or interests in said land and premises adverse to the plaintiff; but said claims of said defendants are without any right whatsoever, and that the defendants have not, nor has either of them, any estate, right, title, or interest of, in, or to said land and premises, or any part thereof; that the said Louis Lamori died in the said county of Los Angeles on the eighth day of January, 1881, being at the time of his death a resident of said county; that by an order of the superior court of said county, duly made and given on the seventh day of July, 1881, the said Francisca Urquidez de Lamori was appointed administratrix of the estate of said Louis Lamori, deceased, and thereupon said Francisca Urquidez de Lamori duly qualified as such administratrix, and letters of administration upon said estate were duly issued to her by the clerk of said court, under the seal thereof, which letters have not been revoked; and that said Francisca Urquidez de Lamori thereupon entered upon the discharge of the duties of her trust, and ever since has been, and still is, administratrix of the estate of said Louis Lamori, deceased; that the said Louis Lamori left him surviving, as his sole heirs at law, his widow, the said Francisca Urquidez de Lamori, and his children, [naming them;] that the said Francisca Urquidez de Lamori, as administratrix of the estate of the said Louis Lamori, deceased, and the said surviving children of said deceased, claim that the land and premises above described were owned in fee-simple by the said Louis Lamori at the time of his death, and that the said land and premises now form and are a part of the estate of said deceased, which said claims are without any right whatever, and said land and premises were not, nor was any part thereof, or interest therein, owned by said Louis Lamori at the time of his death, nor do said land and premises, or any part thereof or interest therein, form any part of the estate of said deceased.

"Wherefore plaintiff prays judgment that said defendants claiming interests in said land and premises as aforesaid may be required to set forth the nature of their several claims, and that all adverse claims of the said defendants, or either of them, may be determined by a decree of this court; and that by said decree or judgment it be declared and adjudged that said plaintiff is the owner in fee-simple of said land and premises, and that said defendants claiming interests therein, as aforesaid, have not, nor has either of them, any right, title, interest, or estate whatsoever, of, in, or to the said land and premises, or any part thereof; and also that said defendants, claiming interests therein as aforesaid, and each of them, be forever debarred from asserting any claim whatever in or to said land and premises, or any part thereof, adverse to the plaintiff; and that by said decree it be declared and adjudged that neither the said land and premises, nor any part thereof, nor any interest therein, form any part of the estate of said Louis Lamori, deceased; and also that said estate has no interest in said land and premises, or any part thereof; and for such other and further relief as to equity shall seem meet."

The following was put in evidence by the plaintiff:

"LOS ANGELES COUNTY Tuesday May 31, 1881. Know all men in this presence that I Luis Lamorez of the county of Los Angeles state of California I party of the first part confirm to and give all my interest and right which I may have or can have in a right of 22 acres of land being located and situated in the ranch of Lick or Los Feliz *ranch* a right to Francisca Lamorez party of the second part of the same county and state being all my interest and right Thomas Rowan the representative and agent to arrange and deliver the title at the end of the settlement of the Rancho of Lick in the bargain which I confirm and certainly give to Francisca Lamorez party of

the second part. Our terms are in the certificate or paper security in this paper are stipulated the location and courses for said piece of land above mentioned I say I assign and confirm to and give all right to Francisca Lamorez

his
"LUIS X LAMOREZ.
mark.

"In the presence of the "HENRY B. KATZ.

his
"PEDRO D. X LOPEZ.
mark
"E. R. PLUMMER."

The arrangement referred to with Thomas Rowan was as follows:

"T. E. Rowan & Co., Real Estate and Commission Agents. Office, 75
Downey Block, Los Angeles, Cal.

"DECEMBER 20, 1880.

"In consideration of Louis Lamoreux giving to the James Lick trustees a deed to all his right, title, and interest in the Lick tract of the Los Feliz rancho, except 20 acres as reserved by said Lamoreux in said Lick tract of the Los Feliz ranch by said deed, I agree, on the arrival of R. S. Floyd, of the Lick trust, in San Francisco, to get a deed from the Lick trustees to Louis Lamoreux of the 20 acres as reserved by him in his deed to the Lick trustees.

THOS. E. FRAZER, Agent for the Lick Trustees."

The deed from the widow to the plaintiff was also put in evidence. The defendant offered in evidence a deed from one Ramon Vejar to Louis Lamori, as tending to prove that Louis Lamori's estate, of which he was so seized in fee-simple on the said thirty-first day of May, 1881, was by a title other than that which was expected to accrue from the Rowan executory contract; and that, although Louis Lamori at that time assigned to his wife all the estate or interest which might accrue from that contract, still the estate or interest which he had *prior* to that time by *another* title remained to him, notwithstanding his assignment of that contract to his wife on the said thirty-first of May; and that he died seized of that prior estate in fee on the following eighth day of June, as alleged in the answer.

The court found that on May 31, 1881, "Louis Lamori, by deed of conveyance, duly conveyed all of said tract of land to the defendant Francisca Urquidez de Lamori, who thereafter, and prior to the commencement of this action, by deed of conveyance, duly conveyed all of said tract of land to the plaintiff, John Grant."

H. Allen, for appellants. *Howard & Scott*, for respondent.

SHARPSTEIN, J. Tested by what we conceive to be now the well-settled rule in this state, the complaint states facts sufficient to constitute a cause of action. The demurrer to it was properly overruled.

As we construe the deed of Louis Lamori, it conveys all his interest in the land to his wife. The contract with the trustees of the Lick estate is clearly referred to in the deed for the purpose of describing more definitely the premises conveyed, and it makes no difference what its legal effect might be. No one connected with this action claims anything under it. The objection to its introduction in evidence was properly overruled. The deed of Louis Lamori to Vejar, of a date subsequent to that made to Mrs. Lamori, was wholly immaterial, and the objection to its introduction in evidence was properly sustained.

We discover no error in the record. Judgment and order affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

16 Colo. 133

WELSH and others v. NOYES and others.

(*Supreme Court of Colorado. June 15, 1887.*)

1. GARNISHMENT—JUSTICE OF THE PEACE—JURISDICTION.

A justice of the peace has, under the Colorado statute, jurisdiction to try the issue raised by an answer in garnishee process setting forth that the garnishees held property by virtue of a chattel mortgage to them, to which a traverse is made alleging fraud and delaying creditors, and charging the garnishees with knowledge and participation in the fraud.

2. SAME—APPEAL—JURISDICTION.

Under statutes, the superior court of Denver has jurisdiction in appeals from decisions of justices of the peace in garnishment causes.

3. TRIAL—STIPULATIONS.

A stipulation in a case by both parties, made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises, and injurious to their client, may be relieved against; but to strike out a portion of a stipulation on the suggestion of one party is error if such part be material. The entire stipulation should be canceled.

Error to superior court, City of Denver.

Plaintiffs commenced this action against Henry Lloyd before GEORGE L. SORRIS, justice of the peace, for a demand for rent due in the sum of \$172, and garnishee process issued, and defendants in error here, Noyes, Stark & Cross, were garnished by service of the garnishee summons. They answered the garnishee process as follows: "(1) Are you in any manner indebted to the defendant Henry Lloyd, either property or money, and is the same now due? If not, when is the same to become due? State fully all particulars. *Answer.* We are not indebted to the defendant, but the defendant is indebted to us. We have in our possession property of the defendant which we hold, in connection with the Colorado Boot & Shoe Manufacturing Company, under a chattel mortgage given to us and the Colorado Boot & Shoe Manufacturing Company by the defendant to secure indebtedness from said defendant to us and the said Colorado Boot & Shoe Manufacturing Company, which indebtedness has not been paid. (2) Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits, or choses in action of said defendant, or in which he is interested? If so, state what is the value of the same, and state fully all the particulars. *A.* We have some goods and merchandise of the defendants in our charge and under our control, as stated in answer to the last interrogatory, but of what value the same is we cannot tell. It inventories nearly \$500, and is held to secure an indebtedness of a little over \$300, and we believe at forced sale the said goods and merchandise would not sell for enough to pay said indebtedness. We have no other property, effects, goods, chattels, rights, credits, or choses in action of said defendants in our possession or under our control. (3) Do you know of any debts owing to said defendant, whether due or not due, or any property, effects, goods, chattels, rights, credits, or choses in action belonging to him, or in which he is interested, and now in the possession or under the control of others? If so state the particulars. *A.* We do not."

To which the plaintiffs filed a traverse as follows:

"A. L. Welsh, of lawful age, being first duly sworn, says that he is one of the plaintiffs in the above-entitled action, which is pending before GEORGE L. SORRIS, Esq., a justice of the peace in and for said county and state; that he has heard read the garnishee's answer herein, and knows the contents thereof; that he was, at the time referred to in such answer, and at the commencement of this action, and is now, acquainted with the said garnishees and the defendant Henry Lloyd; that, at the time of giving the chattel mortgage, referred to in said answer, a copy of 'which mortgage' is attached thereto, by the defendant to the mortgagee therein named (the Colorado Boot & Shoe Company and Noyes, Stark & Cross,) the said defendant was justly indebted to the plaintiffs in the sum of \$172, balance due them from him [de-

fendant] for rent of store building, where the goods and chattels mentioned in said mortgage were at the time it was given; that such demand for rent is the basis for their cause of action in this suit; that affiant believes that the said mortgagees knew of the existence of said demand at the time of the making of such mortgage, and alleges the fact so to be; that said mortgage is void, as to plaintiff's said demand, for the following, among other, reasons: *First.* The description of the property purported to be covered by such instrument is vague, indefinite, and uncertain, and the same is therefore void. *Second.* That it appears on the face of such mortgage that a secret trust was reserved to the defendant Henry Lloyd, mortgagee, with reference to the property therein mentioned; that he was permitted to retain the possession thereof till he should make default in the conditions of such instrument, and to use and enjoy such property, which will more fully appear by reference to said mortgage, which is made a part thereof as fully as if the same was copied herein at length; that from the very nature of such property no such trust could have been or could be reserved to said defendant in such instrument without rendering the same void as to plaintiffs and other creditors. *Third.* That at the date of such mortgage, and for some time thereafter, the said mortgagee, by himself or servants, continued to sell and dispose of large portions of said property with the knowledge and consent of the said mortgagees, as affiant believes; that as to the amount of such sale this affiant is unable to state. *Fourth.* Affiant alleges, upon information and belief, that said mortgage was not taken by the aforesaid mortgagees for the sole purpose of securing their *bona fide* debts, respectively, against said defendant, but for the purpose and with the intent (which purposes and intent were shared in by the said defendant mortgagees) of keeping the property mentioned in the said instrument out of the reach of plaintiffs and other creditors of said defendant, and to hinder and delay them in the collection of their just debts by process of law, and to keep the same intact from any such process for the uses, benefit, and enjoyment of said defendant. *Fifth.* That said chattel mortgage is absolutely void as to plaintiff's said claim. That this affidavit is made by way of traverse of said garnishee's answer, and further affiant saith not.

[Signed] A. L. WELSH."

The chattel mortgage referred to was in the usual form; the description of the property being as follows: "All the stock of boots and shoes, of every kind and make, all the fixtures, and all and singular the personal property of every description belonging to and owned by the said party of the first part now situated in the premises known and numbered as 345, 16th street, in the city of Denver, in the county of Arapahoe and state of Colorado." And the debt was described therein as follows: "The just and full sum of \$301.05, on or before the first day of April, 1883, with interest thereon according to the tenor and effect of two certain promissory notes given by the said party of the first part to the said parties of the second part, as follows: One of said notes, for \$180.30, dated February 13, 1883, due April 1st, after date, to the Colorado Boot & Shoe Company; and one for \$125.75, dated February 13, 1883, due April 1st, after date, to the order of Noyes, Stark & Cross; and each of said notes signed by the party of the first part under the name and style of Henry Lloyd,—then these presents to be void, otherwise to remain in full force and virtue."

The plaintiffs recovered judgment for the \$172 against the defendant Lloyd, and the issue between the plaintiffs and the garnishees, Noyes, Stark & Cross, was submitted to the justice on the following stipulation:

"A. L. Welsh & Co. vs. Henry Lloyd.

"Before Justice SOPSIS.

"The right of the plaintiff to recover of Noyes, Stark & Cross, garnishees herein, is submitted to the court on the following agreed state of facts, which are to be considered in connection with the law in the case: (1) The chattel

mortgage hereto attached, and marked 'A,' is admitted to be a correct copy of the chattel mortgage which was executed by defendant in favor of garnishees *et al.*, and duly recorded; (2) that Niez & Co., the next day after such record, attached a part of the stock covered by such chattel mortgage; (3) that, the next day thereafter, mortgagees [garnishees] took possession of the stock in the store of defendant under their claim of right by virtue of such chattel mortgage; (4) that A. L. Welsh & Co. sued defendant Lloyd by attachment, as will appear from the summons hereto attached, and marked 'B,' and from files of the case, and garnished Noyes, Stark & Cross; (5) that garnishees answered, as is shown by their answer hereto attached, and marked 'C,' (6) that A. L. Welsh & Co. traversed garnishee's answer, as will be seen by reference to paper 'D,' herewith filed. No legal proposition stated in garnishee's answer, or plaintiffs' traverse thereof, are admitted. All matters of fact therein stated are admitted to be substantially true. That garnishees have said, since garnishment, that they have the stock of goods taken under said chattel mortgage now in their cellar intact, and that should the defendant Lloyd return to the city, and pay off their claim, and that of the Colorado Boot & Shoe Company, they [garnishees] will return him [said Lloyd] the said stock of goods. Plaintiffs do not admit the said chattel mortgage is sufficient in law to relieve the garnishees from liability to plaintiffs, [garnishors] while the garnishees claim their answer fully and completely establishes their legal right to hold said stock of goods under said chattel mortgage, and release them from any liability to garnishors, plaintiffs under the garnishment proceedings therein. Under the facts and the law this case is now submitted.

"*Denver, Colorado, March 19, 1883.*

[Signed]

"A. L. WELSH & Co., by their Attorneys.

"NOYES, STARK & CROSS, by their Attorneys."

Whereupon the justice gave judgment for the garnishees, and ordered their discharge, from which judgment the plaintiffs appealed to the superior court of Denver, and the same was submitted to that court upon the following stipulation:

"IN THE SUPERIOR COURT OF THE CITY OF DENVER, COUNTY OF ARAPAHOE,
STATE OF COLORADO.

"*A. L. Welsh & Co., Plaintiff, vs. Noyes, Stark & Cross, as Garnishees of Henry Lloyd, Defendants.*—In the Matter of the Garnishment of said Noyes, Stark & Cross.

"STIPULATION.

"This cause having been appealed from the decision and judgment rendered by G. L. SOPRIS, Esq., a J. P. in and for said county, in said matter of garnishment, to this court, now, therefore, it is mutually stipulated by and between said A. L. Welsh & Co., plaintiffs, and said garnishees, Noyes, Stark & Cross, and their attorneys, respectively (1) that said matter, as to garnishee's liability herein, shall be submitted and determined in this court upon the same agreed statement of facts entered into between said parties in writing filed with such justice, and returned by him to the clerk of this court, as the evidence herein; (2) that the clerk of this court is authorized to file this stipulation, and attach the same to such agreed statement of facts; (3) this stipulation, and such agreed statement of facts, after a decision in said matter, on application of either party, shall form and constitute the grounds for a bill of exceptions herein, and shall be signed, sealed, and allowed by said court, or the judge thereof, as such bill of exceptions.

"*Dated Denver, May 4, 1883.*"

Signed by plaintiffs' and garnishees' attorneys, June 21, 1883.

The plaintiffs and garnishees filed in said court a certain other stipulation in writing in said cause, which is in the following words and figures, to-wit:

“[Title of Cause.]

“It is hereby mutually agreed and stipulated by and between the said plaintiffs and the said garnishees—*First*, that the only point in controversy between the said plaintiffs and garnishees is as to the validity of such chattel mortgage as against creditors of said defendant Henry Lloyd under the agreed state of facts herein,—plaintiffs taking negative, and garnishees the affirmative; *second*, that this stipulation shall be attached to the last stipulation filed in this cause, which shall then and there become a part thereof, and of the record herein.

“*Dated June 21, 1883.*”

Signed by plaintiffs' and garnishees' attorneys.

Afterwards, on the twenty-fourth day of November, 1883, the following motion and affidavit were filed:

“Now come the garnishees above named, and move the court either to order that the stipulation now filed in this court in this cause be withdrawn, and taken from the files of the court, or that the said stipulations be amended by striking out of the stipulations filed in this cause in the court of GEORGE L. SOPRIS, a justice of the peace within and for the county of Arapahoe, on the fifteenth day of March, A. D. 1883, the clause which reads as follows: ‘All matters of fact therein stated are admitted to be substantially true.’ And for grounds of motion say: (1) That, when the said stipulation was made and entered into between the parties thereto, the several reasons set forth in the affidavit of A. L. Welsh, purporting to traverse the above-named garnishees' answer filed therein, why the garnishees' mortgage is void, which reasons are embraced in five paragraphs of said affidavit, numbered from one to five, inclusive, were not understood and intended by the parties thereto to be matters of fact which were admitted to be true, but were, by the parties to said stipulation, expressly understood and intended to be legal propositions which were not admitted. (2) That the said clause was inserted in said stipulation by mistake as to the scope and meaning thereof; counsel for the garnishees then believing and understanding that it did not, and was not to be taken to, admit as true any of the reasons contained in the affidavit of A. L. Welsh, purporting to traverse the answer of the above-named garnishees why the mortgage of the garnishees was void, said reasons being embraced in five paragraphs of the said affidavit, but believing and understanding that said reasons were legal propositions which the said clause did not cover. (3) That to allow said clause to remain in said stipulation would prevent a trial of the matters in issue in this cause, and cause a miscarriage of justice. And upon said motion, and in support thereof, the said garnishees will read the affidavits of GEORGE L. SOPRIS and P. L. Palmer, Esq., which affidavits are filed herewith.

J. W. HORNER, Atty. for Garnishees.

“GEORGE L. SOPRIS' AFFIDAVIT.

“Geo. L. SOPRIS, of lawful age, being first duly sworn, deposes and says that he is a justice of the peace within and for the county of Arapahoe, in the state of Colorado; that he was such when the above-entitled cause was commenced before him, and continued to be such until this cause was removed from his court to the superior court of the city of Denver; that, as such justice, he had jurisdiction over the matters in this cause; that on the fifteenth day of March, A. D. 1883, A. J. Sampson, Esq., acting as counsel for the plaintiffs, and J. W. Horner, who was represented by P. L. Palmer, acting as counsel for the above-named garnishees, filed in his court a stipulation as to the facts mutually admitted by both of said counsel, and this cause was submitted to him upon said statement of facts, and said counsel afterwards filed

in his court their briefs upon the matters of law involved in this cause; that, when the said stipulation was filed in his court, he clearly understood that the reasons stated and set forth in the affidavit of A. L. Welsh, which are embraced in five paragraphs, why the chattel mortgage of the said garnishees was void, were considered and intended by the counsel for said parties to be propositions of law, and not matters of fact admitted by said counsel as true; that said understanding was gained from the conversation he heard between said counsel when said stipulation was agreed upon; that the counsel for the plaintiffs never contended in affiant's court that the said reasons were matters of fact admitted to be true, but, on the contrary, his position was that they were legal propositions; that the said counsel for the plaintiffs submitted his brief in this cause, and therein discussed these very reasons as legal propositions, not therein contended that they were matters of fact admitted by the garnishees, and in no way relying upon them; that he acted upon the meaning, intention, and interpretation of the said counsel of said stipulation; and, after advising himself upon the facts, and considering the arguments adduced *pro* and *con* by said counsel, he gave judgment against the plaintiffs, and in favor of the garnishees. [Signed] GEO. L. SOPRIS.

"Subscribed and sworn to before me this twenty-second day of November, A. D. 1883.

"CHARLES D. MAY, Notary Public. [Seal.]

"P. L. PALMER'S AFFIDAVIT.

"P. L. Palmer, of lawful age, being first duly sworn, deposes and says that he was, at the dates when the stipulations herein were entered into and filed, an attorney and counselor at law duly authorized to practice in the courts of record in the state of Colorado; that he was at that time in the employment of J. W. Horner, who appears as attorney of record in this cause; that the conduct of this case was intrusted to him by said J. W. Horner, and that he had the sole charge and conduct of this case when the same was tried in the justice's court of GEORGE L. SOPRIS, Esq., a justice of the peace in and for the county of Arapahoe; that, when this cause came up for hearing in said justice's court, it was mutually agreed by and between A. J. Sampson, who was then and still is counsel for the plaintiffs, and this deponent, that the case should be heard and tried upon facts to be agreed upon and submitted to the said justice, and that thereupon the stipulations filed in said justice's court were drawn up and filed,—said stipulation being the same as is now filed in this court; that, before and at the time said stipulations were drawn up and signed, this deponent expressly called the attention of said counsel for the plaintiffs to the reasons set forth in the affidavit of A. L. Welsh,—said affidavit purporting to traverse the answer of the said garnishees filed in this cause, and said reasons being contained in five paragraphs of said affidavit, and numbered from one to five, inclusive, why the chattel mortgage of the garnishees was void,—and then and there it was expressly understood between this deponent and said counsel that said five reasons were propositions of law which were not admitted, and not matters of fact admitted to be true; that, upon that express understanding, the said counsel, or his partner, Nelson Millett, and this deponent, argued this cause before the said justice, and said counsel never pretended then, nor did he then take the position, that said reasons mentioned in said affidavit were matters of fact, but discussed said reasons then as matters of law, arguing the case upon its merits, and in no way relying upon the matters stated in said affidavit as admitted; that this deponent believed, when said stipulation was entered into, that said reasons were legal propositions, and would not have entered into or signed said stipulation upon any other understanding or intention than that said reasons were legal propositions, which were not admitted, and not matters of fact admitted to be true. [Signed] P. L. PALMER.

"Subscribed and sworn before me this twenty-second day of November, A. D. 1883.

"CHARLES D. MAY, Notary Public." [Seal.]

On the same day the court granted the motion in the matter, to the extent of striking out the fourth paragraph of the plaintiffs' traverse, to which exceptions were duly reserved by plaintiffs. On the fourth day of February, 1884, the court adjudged that it was without jurisdiction in the case, and accordingly ordered the discharge of the garnishees. Exceptions reserved, and the case brought here on error. The errors assigned and argued by counsel are that the superior court erred in adjudging that it had no jurisdiction in the case, and the modification of the stipulations of counsel by striking out part of the traverse of plaintiffs to answer of garnishees, and for discharging the garnishees.

Sampson & Millet, for plaintiffs in error. *John W. Horner*, for defendants in error.

STALLOUP, C. The first question presented is, had the superior court jurisdiction in the case? In the argument of this question here, counsel have ignored the statutes for this proceeding before a justice of the peace, and have discussed the question on the assumption that the issue involved a matter of equity jurisdiction, and for that reason the justice was without jurisdiction, and consequently the superior court without jurisdiction. The issue made and tried before the justice was upon the traverse of plaintiffs to the answer of the garnishees. The garnishees in their answer disclosed the chattel mortgage of defendant to them, and that they held a stock of goods by virtue of such chattel mortgage. In the traverse, among other things, it was alleged that the chattel mortgage was given by the defendant to the garnishees with intent and for the purpose of hindering and delaying creditors, and also charging the garnishees with the knowledge of and participation in such fraud. The justice had jurisdiction to hear and determine such issue.

Section 1553, p. 517, Gen. St., provides for the garnishee summons issued in the case. Section 1554 provides for the interrogatories and answers in the case. Section 1557 provides for the traverse of such answer by the plaintiffs, and for the issuing of the *scire facias* requiring the garnishees to appear before the justice on the date named therein to try the issue so made, as was done in this case. Section 1563 provides that judgment by the justice against such garnishee shall acquit the garnishee from all demands of the defendant; for all goods, effects, and credits paid, delivered, or accounted for by the garnishee by force of such judgment. Section 1526 provides that every conveyance or assignment in writing or otherwise of any estate or interest in lands or goods, and every charge on lands or goods, with intent to hinder, delay, or defraud creditors of their lawful demands, shall be void as against such creditors. Section 1529 provides that the question of fraudulent intent in such cases shall be deemed a question of fact, and not of law. Section 1530 provides that the purchasers in such cases are implicated in such fraud by previous notice. From these provisions it is apparent that the justice had jurisdiction to hear and determine the issue so made between the plaintiffs and the garnishees. Had the superior court like jurisdiction on appeal from this judgment?

Section 1573 especially provides for appeals from such judgments of the justice, and section 3222 of the same General Statutes vests the superior court with such appellate jurisdiction. The superior court erred in adjudging that it had no jurisdiction in the case.

The next question is, did the superior court err in ordering the modification of the stipulations of counsel in the case, by striking out the fourth paragraph of plaintiffs' traverse to the answer of the garnishees? Agreements of

This kind are unlike ordinary contracts between parties not in court. In a stipulation by counsel for convenience or expedition in the trial of a case, if counsel, inadvertently or otherwise, admit or state a fact not in accord with the premises, entirely against the manifest purpose and intention of the parties, and the nature of the controversy, and to the irreparable injury of the client they represent, as this seems to be, the court wherein such cause is pending has the power, and rightfully exercises it, to relieve the party from such stipulation. *Richardson v. Musser*, 54 Cal. 196; *Becker v. Lamont*, 13 How. Pr. 23. But such relief cannot be granted in the way it was done in this instance. The paragraph struck out was a material portion of the traverse; and, if true, vitiated the chattel mortgage, and made the goods subject to the payment of the debt of plaintiffs. So that the rights of the plaintiffs were thereby materially affected. The court erred in making such order. The proper way to relieve the party from such stipulation is to cancel the stipulation. It follows that the discharge of the garnishees in the premises was error. The judgment should be reversed, and the case remanded.

MACON and RISING, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed, and the case remanded.

10 Colo. 208

REDUS v. PEOPLE.

(Supreme Court of Colorado. June 15, 1887.)

1. HOMICIDE—INDICTMENT—DEGREES—VERDICT.

Where one is tried on the theory that under the indictment he may be found guilty of murder in the first degree, the fact that the jury find a verdict of murder in the second degree does not cure an error, if any, that the indictment does not properly describe the offense to constitute murder in the first degree.

2. SAME—INDICTMENT—MURDER IN FIRST DEGREE.

An indictment for murder, charging that defendant "unlawfully, feloniously, willfully, purposely, and of his malice aforethought, did kill and murder" the deceased, is sufficient to sustain a conviction of murder in the first degree under the Colorado statutes.

3. SAME.

In an indictment for murder in the first degree, the expression "feloniously, willfully, and of his malice aforethought," fairly includes the statutory idea of deliberation and premeditation.

4. SAME—INTOXICATION.

In a murder trial, an instruction that the testimony tending to show that deceased, when intoxicated, was a quarrelsome and dangerous man, was immaterial in determining the intent with which defendant acted, unless it appeared that he had, at the time of the homicide, knowledge of the deceased's character in this respect, is proper.

Error to district court, Montrose county

Redus was tried in the court below upon an indictment charging murder. He was convicted of murder in the second degree, and sentenced to 14 years in the penitentiary. To reverse this judgment the present writ of error was sued out.

The statutes of 1870 and 1883, referred to in the opinion, read as follows, (act of 1870:)

"Section 1. That section twenty of said chapter twenty-two of the Revised Statutes of Colorado Territory shall be hereafter construed so that the death penalty for the crime of murder shall not be ordered to be inflicted by the courts of the territory unless the jury trying the case shall, in their verdict of guilty,

also indicate that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony.

"Sec. 2. Any person hereafter found guilty of the crime of murder by the verdict of a jury, without any indication in such verdict whether the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, shall be sentenced to confinement in the penitentiary for and during such person's natural life, which confinement may be with or without hard labor, or both, at the discretion of the court."

"Gen. St. 1883, § 709. * * * All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, or perpetrated from a deliberate and premeditated design, unlawfully and maliciously to effect the death of any human being other than him who is killed, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first or second degree. Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the penitentiary for a term not less than ten years, and which may extend to life. If any person indicted for murder shall plead guilty to the indictment, the court shall thereupon inpanel a jury, as in other cases, to whom shall be submitted, as the sole issue in the case, the question whether the killing was murder in the first or second degree. The jury in every such case shall find the degree thereof, and the court shall thereupon give sentence accordingly."

All other matters material to the decision are sufficiently stated in the opinion.

Stirman & Carpenter, for plaintiff in error. *Alvin Marsh*, Atty. Gen., for defendant in error.

HELM, J. The indictment in this case charges that defendant unlawfully, feloniously, willfully, purposely, and of his malice aforethought, did kill and murder the deceased. Under this indictment defendant was tried upon the theory that he might be convicted of murder in the first degree. Such proceeding, his counsel assert, was a fatal error. They claim that the words used are wholly insufficient to warrant the jury in finding that the killing was done with *deliberation* and *premeditation*,—a finding necessary in this case to such a conviction as would authorize the death penalty. They contend that, to sustain such a finding the indictment itself must, under section 709 of the General Statutes, adopted in 1883, aver that the killing was done with deliberation and premeditation, using these or equivalent words; and that, failing so to do, its averments are not broad enough to charge the offense for which defendant was put upon trial.

It cannot be said that, since defendant was only convicted of murder in the second degree, he could not have been prejudiced through the error committed by putting him upon trial for his life, if error there was in so doing.

Under statutes substantially similar to the one upon which counsel rely, two views relating to the subject in hand have been taken. Mr. Bishop, in a lengthy and able argument, affirms the proposition above stated and urged upon us. Supporting him are the decisions of courts of last resort in Iowa, Ohio, and Kansas, together with strong dissenting opinions in Wisconsin and other states. 2 Bish. Crim. Proc. (2d Ed.) §§ 562-609, and note. On the other hand, Mr. Wharton declares that, "according to the great weight of authority, a common-law indictment for murder is sufficient to support, un-

der the statutes, murder in either first or second degree." 2 Whart. Crim. Law, § 1115, and cases cited. It is scarcely necessary to state that common-law indictments do not, as a rule, use the words "deliberation and premeditation," and that the indictment before us sufficiently charges the offense at common law.

We deem it unnecessary to discuss at length the relative merits of the two positions thus taken in this legal controversy, because—

First, it is hardly, in this state, an open question. In the year 1870 an amendment to the Criminal Code was adopted, the first and second sections of which provided that when, upon a trial for murder, the jury convicted, and stated in their verdict that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, the punishment should be death; but if the jury returned a verdict of guilty, without declaring that the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, the penalty to be imposed by the court was imprisonment for life. Sess. Laws 1870, p. 70; Gen. Laws 1877, §§ 868, 869. So far as the question now presented is concerned, there is no difference in principle between the act of 1870, and that of 1883, which more closely resembles in form the "parent statute" of 1749 in Pennsylvania. Both acts distinguish between grades of punishment, but the latter uses, with reference to such distinction, the terms "first degree" and "second degree" not found in the former. It also ameliorates the penalty provided by the former, where the conviction is of murder in the second degree, by giving the court discretionary power to impose a sentence ranging downward from imprisonment for life to 10 years in the penitentiary. The remaining changes effected by the act of 1883, including the substitution of the conjunction "and" for the conjunction "or" between the words "deliberate" and "premeditated" are of no significance in the present inquiry. If an indictment, in a case like the one at bar, framed under the act of 1870, which did not charge that the offense was committed with deliberation or premeditation, was sufficient to put the accused upon trial for his life, such an indictment is most certainly sufficient, under the present statute, to sustain a conviction of murder in the first degree.

In *Hill v. People*, 1 Colo. 436, the identical question now presented was submitted and passed upon by the court under the act of 1870. The indictment in that case, like the indictment in this, failed to aver that the killing was done with deliberation or premeditation; yet the court held it sufficient, although the accused was found guilty of premeditated murder, and sentenced to death. The learned judge who wrote the opinion rested his argument mainly upon the proposition that the expression "malice aforethought" is co-extensive in meaning with the words "deliberation" and "premeditation." He says, in discussing this expression, that its primary and popular significance is "rather more comprehensive than 'deliberation' and 'premeditation,' inasmuch as the latter words do not necessarily imply wickedness of purpose or evil design. Said Lord Coke (3 Inst. 51:) 'Malice prepensed is when one compasseth to kill, wound, or beat another, and doth it *sedato animo*. This is said in law to be malice aforethought, prepensed, *malitia precogitata*.' The [technical legal] meaning of these words has been greatly amplified since the days of Lord Coke. * * * Before the statute of 1870 it was never doubted that a formed design and deliberate purpose to kill was provable under the averment of malice aforethought, and there is nothing in the statute to change the rule on this subject." But, as we have already intimated, if there is nothing in the statute of 1870 "to change the rule on this subject," the rule remains unchanged under the statute of 1883.

No doctrine of the criminal law is more axiomatic than that the indictment must fully and fairly charge the offense for which the accused is put upon trial; and, if the language of the Redus indictment does not comply with

this essential requirement, no reasoning, however ingenious, will avoid the force of Mr. Bishop's argument, or the application of his conclusion. But we believe that the language of this indictment is sufficient. The expression "feloniously, willfully, and of his malice aforethought, did kill and murder," states the *quo animo* of the slayer, as well as the fact of the homicide. It charges, not only the specific intent of the slayer to take life, but also (accepting Lord Coke's definition, above given) that the intent, together with the malevolence, was premeditation,—aforethought. This malevolent design to kill may have been formed at the instant of the homicide, or it may have existed in the mind of the slayer for a considerable period before it was put into execution.

Secondly. Neither of the acts under consideration creates or recognizes a new offense. They both assume that the offense already exists, and merely provide different grades of punishment, according to the circumstances or the condition of mind under which the crime is committed. The crime, as defined and understood at common law, has always existed in Colorado. The territorial legislature of 1861 expressly affirmed its existence by adopting a statute, in which there has since been no substantial alteration, giving the common-law definition. Gen. St. § 707. Moreover, the legislature, in 1879, as if to anticipate the very question we are now discussing and put it at rest, enacted a section which contains the following declaration: "It shall be sufficient, in every indictment for murder, to charge that the defendant did feloniously, willfully, and of his malice aforethought, kill and murder the deceased." Gen. St. § 926. In view of the conclusion above expressed, viz., that the phrase "feloniously, willfully, and of his malice aforethought," fairly includes the idea of deliberation and premeditation, this provision cannot be assailed upon constitutional grounds. It is still in force, and we must hold that an indictment containing the language used therein by the legislature will sustain, upon proper evidence, a conviction of murder in the first degree.

Passing from the indictment, a further objection is urged. It relates to the sixth instruction given by the court below. This part of the charge informed the jury that the testimony admitted, tending to show that deceased, when intoxicated, was a quarrelsome and dangerous man, was not material in determining the intent with which defendant acted, unless it appeared that he had, at the time of the homicide, knowledge of the deceased's character in this respect. It is contended that evidence of this kind is admissible, and is to be considered by the jury, even if the defendant possessed no such information or knowledge. We shall enter into no lengthy discussion of this subject. There are isolated expressions, both in decisions and text-books, which seem, at first glance, to warrant the position of counsel. Upon careful examination, however, it is found that such evidence is only admissible—*First*, when the accused is attacked, and claims to have been acting in self-defense; and, *secondly*, when his belief of actual danger at the time of the homicide is the specific point of inquiry. But it is submitted that, without some knowledge thereof, deceased's general character as a quarrelsome and dangerous man could not affect defendant's belief as to his own impending danger.

The true doctrine is thus stated by Mr. Wharton: "Suppose the defendant should simply ask to prove that the deceased was ferocious and desperate as a ground of justification, the answer would be: 'No man has a right to take the law in his own hands, and act as a sort of vigilance committee to clear society of dangerous persons.' But, on the other hand, suppose the offer to be, not justification, but excuse on the ground of self-defense, or mitigation of the grade of guilt. If, in such case, it be proved that the defendant was actually attacked, and if evidence should be then tendered that the deceased was a man of ferocious temper or malignant passions, and of overpowering strength, *and if it be, in addition, offered to be proved that the defendant had notice of these characteristics of the deceased*, then the better opinion is that the evi-

dence is admissible." 1 Whart. Crim. Law, (7th Ed.) § 641; *State v. Turpin*, 77 N. C. 473; *State v. Graham*, 61 Iowa, 608, 16 N. W. Rep. 743; *State v. Riddle*, 20 Kan. 711.

Nor does the foregoing view conflict with the position announced by this court in *Davidson v. People*, 4 Colo. 145. By carefully reading the whole opinion, counsel will discover that they have misunderstood its purport. They will see that the prisoner's knowledge of the deceased's quarrelsome and dangerous character is specifically mentioned as an element bearing upon the consideration of evidence relating to such character.

The remaining objection presented is that the verdict was contrary to the evidence. The record shows a number of circumstances somewhat palliating the offense. Deceased was a powerful man. He was evidently, when in liquor, quarrelsome. He began the affray by using abusive language, and following it up with blows from the open hand. But he was intoxicated, while defendant was sober. Defendant could have left the room, as he was advised to do, after deceased began his insulting remarks and his assaults, and thus have avoided further trouble. That the jury gave defendant the benefit of the extenuating circumstances is shown by the fact that they not only found him guilty of murder in the second degree, but also, in their verdict, recommended him to the mercy of the court. Upon a careful consideration of the evidence we cannot say that it did not warrant the verdict returned.

The judgment of the court below will be affirmed.

10 Colo. 216

MORSE and others v. CLARK, Adm'r.

(Supreme Court of Colorado. June 15, 1887.)

EXECUTORS—CLAIM AGAINST ESTATE—LIMITATIONS.

A statute (Gen. Laws Colo. §§ 2914, 2915, 2918) prescribed the manner of presenting claims against the estates of deceased persons, providing a summary method of establishing such claims upon notice at any term of the court subsequent to the issuing of letters testamentary of administration. Plaintiffs filed their claim against the estate of defendant's intestate November 17, 1879, on a cause of action which had accrued January 20, 1877. Prior thereto, on February 4, 1878, plaintiffs had filed the claim, but withdrew it March 30, 1878. *Held*, that the claim was barred by the statute of limitations as not having been filed within two years after the cause of action accrued. The filing and withdrawal of the claim did not constitute the commencement of an action to prevent the statute of limitations from running.

Appeal from district court, Arapahoe county.

This case was tried in the district court upon appeal from the judgment of the county court, allowing the claim on behalf of the appellants, and against the estate of the appellee's intestate. The claim was for contribution in respect to moneys alleged to have been paid by the plaintiffs to discharge a promissory note on which they, the defendant's intestate, and others were alleged to have been sureties. For a second answer, defendant averred that the cause of action accrued without the state of Colorado, upon a simple contract, more than two years before the institution of plaintiffs' action. Judgment was given in the district court for the defendant. The plaintiffs appeal to the supreme court.

Statutes referred to:

"Sec. 2914. All persons having claims against the estate may present the same on the day named in such notice, and the court may proceed to hear and determine the same, or, if objection be made thereto by the executor, administrator, or any party interested in the estate, or if cause be shown by the party presenting such claim, may continue the hearing thereof; if no objection be made to any such claim by the administrator, widow, guardian, heirs, or others interested in said estate, the claimant shall be permitted to swear that such claim is just and unpaid, after allowing all just credits; and, if objections be made to such claim, the account shall be adjudicated as is required in other

cases, provided, that estate shall be answerable for the costs on the claims filed at or before said term, but not after.

"Sec. 2915. All persons having claims against estates, upon giving the executor or administrator ten days' notice of the time they intend to present the same, with a copy of the account, or instrument of writing whereon such claim is founded, may exhibit such claims against the estate at any term of the court subsequent to the issuing of letters testamentary or of administration."

"Sec. 2918. The manner of exhibiting claims against estates shall be by filing in the county court the account or instrument of writing, or an exemplification of the record whereon such claim is founded. Formal pleading shall in no case be required, but the issue shall be formed, heard, and determined in the same manner as in actions before justices of the peace."

M. B. Carpenter, for appellants. *Wells, Macon & McNeal*, for appellee.

ELBERT, J. The plaintiffs filed their claim against the estate of the defendant's intestate on the seventeenth day of November, 1879, having given notice under the provisions of section 2915, Gen. Laws, 972. The defendant, in obedience to the notice, appeared and contested the claim. Hence this suit. The plea of the statute of limitations, (Rev. St. c. 55, § 16,) interposed by the defendant, was good. The cause of action accrued January 20, 1877, the date of the last payment claimed to have been made by the plaintiffs. The filing of the claim, which must be regarded as the commencement of the suit, was not within the two-years limit fixed by the statute. It appears that therefore, on the fourth day of February, 1878, the plaintiffs had filed the same claim in the probate court, and subsequently, on March 30, 1878, withdrew it. It is claimed that this must be treated as the commencement of the action. However this might be, had the claim not been withdrawn, the proposition is inadmissible in face of that fact. *Reitzell v. Miller*, 25 Ill. 69. The manner of exhibiting such claims against an estate as prescribed in section 131 and elsewhere, in the act of the Revised Statutes referred to, does not constitute the presentation of such claims for allowance actions or suits at law, in the ordinary sense of these terms, although, when the allowance of such claims is contested, it may ripen into or become the basis of a suit proper. *Corning v. Ryan*, 3 Colo. 528.

It is further contended by counsel for the appellants that the filing of the claim, February 4, 1878, in accordance with the provisions of section 2918, Gen. Laws, 972, stopped the general statute of limitations from running. A like question, under a similar statute, was made in the case of *Reitzell v. Miller*, 25 Ill. 69. The court say: "It was not the design of the general assembly that the filing of a claim should arrest the general statute of limitations which had previously begun to run, nor to prevent it from afterwards running upon a claim not due at the time of its presentation. The object of this section is to facilitate and produce speedy settlement of estates of deceased persons, and it could not have been designed to give creditors an unlimited period of time within which to establish the justice of their claim after they had been exhibited in the probate court. Such a construction would defeat the manifest intention of the enactment." We think this view correct.

The filing of the claim, February 4, 1878, and its subsequent withdrawal on March 30, 1878, and its refiling November 17, 1879, in the county court, are facts which appear from the claimants' own showing. It is therefore unnecessary to go into the question touching the admissibility of the copy of the petition which the defendant offered and the court received in evidence.

The judgment of the court below is affirmed.

HELM, J., did not sit in this case.

10 Colo. 178

BURLINGTON & C. R. CO. v. SCHWEIKART.

(*Supreme Court of Colorado.* June 15, 1887.)

1. DEDICATION—ACCEPTANCE.

In a proceeding to set aside a report of commissioners awarding compensation and damages in a proceeding condemning lands for railroad purposes, it was alleged that an agreement granting a right of way over certain adjoining land, procured by the railroad company for the benefit of the owners injured, thereby connecting and improving the lands sought to be condemned, had not been taken in consideration by the commissioners in making their report. *Held*, that as such agreement was only a few months old, had not been recorded, nor in any way brought to the attention of the public, and there had been no use of the way by the public, it was of no effect as a dedication such as could benefit the owner.¹

2. EASEMENT—ATTEMPTED DEDICATION.

Nor could such an agreement result in the creation of an easement in favor of the land sought to be condemned.

3. RAILROAD COMPANIES—EMINENT DOMAIN—DAMAGES.

The constitution of Colorado, (article 2, § 15) and the eminent domain act (Code Civil Proc. 74) contemplate a compensation in money to one whose lands are condemned for railroad purposes, and therefore, being inadmissible to reduce his compensation, the commissioners had no power to consider the agreement. The acceptance of such privilege cannot be compelled, but depends on the consent of the parties.

Appeal from district court, Arapahoe county.

This is an appeal from a decree made December 9, 1882, by the district court of the Second judicial district sitting within and for the county of Arapahoe in a proceeding instituted by appellant to condemn the lands of appellee for railroad purposes. The appellant is a body corporate created for the purpose of constructing and operating a railroad from Denver to the boundary line between the states of Colorado and Nebraska. The appellee is the owner of a tract of land containing about 13 acres lying northerly of appellant's main line, and east and just beyond that portion of the city of Denver known as Elyria. Upon these premises appellee has a house and some other buildings. Near and in the vicinity of the house there is a small park and two natural lakes, and it is claimed that these and other attractions make the property valuable as a place of public resort. Before this proceeding was begun there was no access to this tract of land from any public highway or street. The adjoining lands were either a part of the public domain, or the fee was vested in individual proprietors subject to no way or easement for appellee's benefit. To obviate this difficulty, appellee had purchased a strip of land 1,300 feet or more in length, and about 20 feet in width. This strip of land ran along or near the southerly line of the S. E. $\frac{1}{4}$ of section 14, township 3 S., of range 68 W. of the sixth principal meridian, to the corner of said section 14; and thence at right angles along the westerly line of said quarter section to a county road. By means of this strip, appellee had access from his premises to a highway. Appellant's main line crosses this strip about 1,000 feet from appellee's premises, and this proceeding was instituted to condemn the small fraction of an acre (sixty-five thousandths) thus taken. At the point of intersection between the railroad and this strip of land there is a cut about 12

¹ Acceptance of a highway by the public is necessary to complete its dedication. *Shellhouse v. State*, (Ind.) 11 N. E. Rep. 484; *Pavonia Land Ass'n v. Temfer*, (N. J.) 7 Atl. Rep. 423, and note.

As to what will constitute or prove an acceptance by the public, see *Morse v. Zeize*, (Minn.) 24 N. W. Rep. 287; *Laughlin v. City of Washington*, (Iowa,) 19 N. W. Rep. 819; *Brakken v. Minneapolis & St. L. R. Co.*, (Minn.) 11 N. W. Rep. 124; *Town of Lake View v. Lebahn*, (Ill.) 9 N. E. Rep. 269; *Maywood Co. v. Village of Maywood*, (Ill.) 6 N. E. Rep. 886; *People v. Lohflem*, (N. Y.) 5 N. E. Rep. 784; *Hoadley v. City and County of San Francisco*, (Cal.) 12 Pac. Rep. 125; *Town of San Leandro v. Le Breton*, (Cal.) 13 Pac. Rep. 405; *State v. Proctor*, (Mo.) 2 S. W. Rep. 472; *Kennedy v. Mayor, etc.*, of Cumberland, (Md.) 9 Atl. Rep. 234.

feet in depth. To use the strip as a way would require a considerable outlay, as it would be necessary either to construct a bridge, or, by excavating, to cross appellant's road-bed at grade.

It was claimed that, for the purpose of providing appellee a means of access to his premises, and thereby removing any inconvenience suffered by him by crossing his intended way, appellant had obtained a grant of a strip of land 50 feet in width, which ran from the entrance to appellee's premises, in a straight line, to a public and traveled street of the city of Denver, and that the means of ingress and egress thus provided to appellee was preferable to the narrow way which he had purchased, for the reasons that it was 30 feet wider, shorter by several hundred feet, and connected with a public street at a point very much nearer the city.

The alleged grant is as follows:

"That the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned to be done, kept and performed by the said party of the second part, hereby grants, with said party of the second part, his successors and assigns, a right of way, for the use of the party of the first part, any and all persons, as a public highway," the following-described parcels of land: Beginning, etc., (description of land,)—to have and to hold the same for the uses and purposes aforesaid. "And the said the Burlington & Colorado Railroad Company hereby agrees to and with said first party to grade said parcels as a highway, so that there shall be a gradual slope from the one hundred feet strip in width upon the line of the Burlington & Colorado Railroad, either way, to the extremities of the parcels aforesaid, and to make a good and sufficient roadway across said one hundred feet strip.

"In witness whereof," etc.

"JOHN A. CLOUGH. [Seal.]
"J. B. WESTON, [Seal.]

"Special Agent of the Burlington & Colorado Railroad Company."

This instrument was introduced by appellant, and read in evidence before the commissioners, to be by them considered in determining the question whether appellee's premises were injured by crossing his proposed private way.

The commissioners reported (1) that the land above described to be taken by plaintiff as aforesaid, and which was owned by defendant, is of the value of \$31.50; (2) that the damage which results from the construction of said road, and the taking of said parcel of land by plaintiff to the residue of the land of the defendant from which said parcel is taken, is \$919.50; (3) that there is no benefit to the defendant in the premises, and we therefore report none.

Upon the coming in of this report a motion was filed in behalf of the appellant to set the same aside for the following among other reasons: (1) That said certificate of ascertainment and assessment was made by the commissioners aforesaid under a misapprehension of the law and the facts, in this, to-wit: that the said commissioners, and each of them, supposed, at the time when they were deciding on the award to be made in the proceedings herein, that the roadway which it had been testified the petitioner had offered to defendant was not one which defendant could freely use, when in truth and in fact said roadway had been deeded by one John A. Clough to petitioner and its assigns for the use of the public as a highway, and the fact that it had been so deeded was in evidence before said commissioners, and when it was further in evidence that defendant knew of such conveyance long before the beginning of these proceedings.

The report of the commissioners was accompanied by the evidence taken upon the hearing before them. Upon the hearing of the motion to set aside the report the evidence in the cause was presented to the court, and petitioner, by its counsel, offered the testimony of George C. Roberts and George D. Norton, Jr., being two of the commissioners who made the same, to prove

that the said board of commissioners had, through and by error and mistake, proceeded upon erroneous and illegal principles in making their said report and the award therein contained, in this, to-wit: that said commissioners did not consider, in making their said award and certificate, the agreement to convey to petitioner a strip of land to be taken, which said agreement was entered into between said petitioner and one John A. Clough, and is attached to the testimony, as hereinbefore appears, nor the offer made by petitioner to defendant of the use of said strip, but that the said commissioners rejected the same, and did not consider either said agreement or said offer in making their said award; and that said commissioners did not consider, in determining upon the amount of their said award, the fact that, by the terms of the agreement aforesaid, there was provided for defendant a road which would render unnecessary any expenditure by defendant in making any excavations as set out in the evidence of defendant hereinbefore fully set forth; and to further prove, by the testimony of said Roberts and Norton, that the award in said certificate contained was for an amount much larger than the said commissioners would have agreed upon had they proceeded upon correct and legal principles in their determination of the matters to them presented, to-wit, the damages to be sustained by defendant by reason of the taking of the lands in the petition herein described. Objection was interposed to the introduction of this testimony by appellee's counsel, and objection was sustained, and evidence excluded.

Edward O. Wolcott, for appellant. *H. E. Luthé*, for appellees.

ELBERT, J. Whether the existence of a public highway, affording ingress and egress to and from the premises of the defendant, would have been a fact to be considered by the commissioners in estimating the defendant's damages resulting from the destruction of his private way by the appellant company, is an inquiry we need not enter upon. We are of the opinion that no such public way existed. It is not claimed that the agreement between Clough and the appellant company resulted in the establishment of a public way under the statute concerning highways in force at the date of the agreement. Gen. Laws, § 2375. This statute deals only with highways established in accordance with law. Nor can it be said that the agreement in question resulted in the establishment of a public way by dedication. In such case, acceptance by the public is as essential as appropriation by the owner of the fee. Ang. Highw. § 157. The agreement bears date January 20, 1882, and was offered in evidence before the commissioners June 29, 1882. It does not appear to have been recorded, or in any other way brought to the attention or knowledge of the public, nor had there been any use of the premises as a way by the public. So far as the public at large was concerned, it was an unknown and unaccepted appropriation. The agreement appears to have remained in the possession and under the control of the appellant company, and was subject to surrender and cancellation by the parties thereto. Washb. Easem. 139, and cases cited. Nor can it be said that, by virtue of the agreement, an easement attached as appurtenant to the estate of the appellee. Such an easement lies only in grant, or by implication of grant, or by prescription which supposes a grant by the owner of a servient estate, upon which the obligation rests, to the owner of a dominant estate, to which the right belongs. A parol license is insufficient. Washb. Easem. pp. 3, 6, 18, 28. The offer of the appellant company, through its agent McCullough, to allow the defendant a right of way over the premises mentioned in the Clough agreement, was a mere verbal license, revokable at will. Washb. Easem. 5, 19.

It is claimed, however, that had this right of way offered to the defendant by the appellant company been considered by the commissioners in estimating and determining the damages to which the defendant was entitled, that

the defendant would thereby have acquired a right of way over the premises mentioned in the agreement by estoppel. It is unnecessary to go into the question of estoppel. Upon the part of the appellant company this was substantially a proposition to compensate the defendant, either in whole or in part, his damages for the destruction of his private way, by giving him another way which it claimed would equally serve his purpose. It is sufficient answer to say that the constitution, (section 15, art. 2,) and the eminent domain act (Code Civil Proc. 74) clearly contemplate compensation in money. It follows that the right of way over other premises offered by the appellant company was not an admissible compensation, either in whole or in part, under the constitution or the statute. In the absence of the assent of the parties, the commissioners had no power to consider the offer, or allow for it in their assessment of damages. As said in the case of *Hill v. Mohawk & H. R. Co.*, 7 N. Y. 157: "Privileges of this kind must depend upon the agreement of the parties. The appraisers had no authority in the premises. They could neither compel the corporation to make the agreement, nor the owner to accept it." *Chicago, M. & St. P. R. Co. v. Melville*, 66 Ill. 329; *Chesapeake & O. Ry. Co. v. Patton*, 6 W. Va. 147; *Railroad Co. v. Halstead*, 7 W. Va. 301; *In re Morse*, 18 Pick. 443; *Central O. R. Co. v. Holler*, 7 Ohio St. 222.

The court did not err in refusing to set aside the report of the commissioners on the ground assigned. The judgment of the court below is affirmed.

PEOPLE v. PEACOCK, impleaded, etc.

(*Supreme Court of Utah*. June 29, 1887.)

1. APPEAL—EVIDENCE—SUFFICIENCY.

A conviction of assault before a justice of the peace will not be set aside as not supported by the evidence, when there is nothing upon the face of the record to show that some of the witnesses were more reliable than others.

2. SAME—OBJECTIONS NOT RAISED BELOW.

Objections that the costs-bill in a prosecution before a justice of the peace for an assault was not filed in time, and that it contains improper items, will not be considered when made for the first time on appeal.

3. COSTS—APPEAL—RECORD.

A judgment of conviction in justice's court for an assault, taxing the costs against the accused, will not be set aside because the costs-bill does not show that the witnesses appeared before the clerk and claimed their fees, or because it does not appear from the bill whether the county or the district attorney is to get the attorney's fee charged therein.

4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

A new trial will not be granted when the newly-discovered evidence upon which the motion is based is purely cumulative, and no valid reason is shown for the failure to produce it on the trial.

Richards & Moyle, for the People. *T. Maloney*, for appellant.

BOREMAN, J. This purports to be an appeal from a judgment of conviction for assault, rendered in the district court on appeal from a justice of the peace.

1. The appellant claims that the evidence does not support the findings of the court, but that "the large preponderance of the more reliable testimony shows that defendant, Peacock, is not guilty of assaulting said householder outside of the saloon door." There is nothing upon the face of the record to show that some of the witnesses were more reliable than the others. The court, sitting as a jury, heard this case, and as such was required to weigh the evidence, and to judge of the reliability of the witnesses. Nothing is made to appear that would tend in the least degree to show that the judgment of the court as to the reliability of the witnesses was at all incorrect; and from a careful reading of the testimony it is manifest that the court was fully sustained in the finding of the defendant guilty. The whole transaction, so

far as the assault was concerned, was outside of the saloon, and was an unwarranted and unjustifiable assault.

2. The affidavits for a new trial do not show any grounds for granting the motion. That which purports to be new evidence is purely cumulative, and there is no valid reason offered for the failure to produce it on the trial. The witnesses had been talking with the defendant on business both immediately before and immediately after the occurrence, and were at his side during it. He did not show any diligence in the matter.

3. We see no error in the memorandum of costs. The defendant was justly chargeable with the attorney's fee, and it was proper to allow it. Whether it should go to the county attorney or to the district attorney is a question between themselves, and about which the defendant has no concern. We are, however, inclined to think that the fee-bill was intended to allow the attorney's fee to the attorney having charge of the case, without regard as to whether it was the county attorney or the district attorney.

4. It is claimed by the appellant that none of the witnesses for the prosecution are shown to have appeared before the clerk within the two days after the trial, and claimed their fees, as required by statute. It is not necessary that the cost-bill should show this fact. If, on the face of the memorandum of costs, the names of the witnesses, the number of days claimed, and the amounts, appear, the court will, in the absence of any contrary showing, presume that the witnesses appeared within the statutory time and claimed their fees. The costs-bill, in the present case, shows all that is necessary.

The record is very imperfect, but shows that the trial began and was proceeded with some time in September, 1886, but it does not appear when it ended. The judgment seems to have been rendered on the fifteenth of December, 1886. The motion for a new trial is stated to have been made on the same day. But one of the affidavits for a new trial was sworn to on the first of December, and filed on the third of December; another was sworn to and filed on the third of December; and the other one was sworn to on the ninth December, but does not appear to have ever been filed. The memorandum of costs was filed on the twenty-ninth of November. From the confusion of dates it is impossible for this court to say whether the cost-bill was filed in time or not. But this objection to the cost-bill cannot be raised in this court for the first time in the case. It must be raised in the court below; but this was not done.

The other objection to the cost-bill, that the prosecution witnesses were in attendance in two cases at the same time, and were allowed attendance fees in both, is not tenable. The motion to retax costs contains no such objection. It is too late to raise it in this court for the first time. It should have been raised in the court below.

There was no error in taxing the whole costs against the defendant. The fact that *Thompson* was tried with him on the same charge, and was acquitted, will not affect the responsibility of the defendant. The costs against him would have been no more, nor would it have been any less, if he had been charged alone and tried alone.

It is due to the court and to the counsel that we should say that the careless style of throwing the record together, as is shown in this case, greatly increases the labors of the court, and ought not to be indulged in. It is proper, also, that we should call attention to the fact that, when the statute provides that the judgment and some orders are parts of the judgment roll, it was not intended that this provision should be extended to include whatever counsel may choose to insert in place of these.

We do not perceive that there was any error in the action of the district court. The judgment and order are therefore affirmed.

ZANE, C. J., and HENDERSON, J., concur.

(5 Utah, 240)

PEOPLE v. PEACOCK

(Supreme Court of Utah. June 29, 1887.)

Richards & Moyle, for the People. *T. Maloney*, for appellant.

BOREMAN, J. The record in this case is very meager and imperfect, and the points sought to be raised have reference solely to the memorandum of costs, and are the same as were raised in the case of *People, etc., v. Peacock, ante*, 332, (heretofore decided at the present term.) For our views on the points raised we refer to the opinion delivered in that case.

The order and judgment of the court below are affirmed.

ZANE, C. J., and HENDERSON, J., concur.

(5 Utah, 216)

DURNELL v. SOWDEN.

(Supreme Court of Utah. June 29, 1887.)

1. EVIDENCE—EXPERTS—HANDWRITING.

In an action against the indorser on a promissory note, testimony of experts who, since the commencement of the suit, have been given letters (admitted to have been written by the indorser) to examine, to the effect that the signature to the letters is the same as that on the note, is admissible.

2. NEGOTIABLE INSTRUMENTS—PRESENTMENT—DELAY.

LAWS Utah 1882, p. 62, § 87, and Id. p. 65, § 109, provide that mere delay in presenting a promissory note payable on demand shall not exonerate any party thereto. *Held*, in an action on a note taken by the plaintiff, after maturity, against the indorser, that the question of the reasonableness of the delay in giving notice to the defendant of its non-payment was a question for the court.

Sheeks & Rawlins, for Durnell, respondent. *C. S. Varian and F. Pierce*, for Sowden, appellant.

BOREMAN, J. The respondent, Eliza Durnell, brought her action against the appellant, Joseph Sowden, upon a certain promissory note alleged to have been indorsed to her by him after maturity. Verdict and judgment were rendered against Sowden, and thereupon he appealed the case to this court.

1. It is alleged that the court erred in refusing to exclude all evidence under the complaint; that the complaint did not state facts sufficient to constitute a cause of action, for that there were delay and negligence in presenting the note for payment, and no excuse therefor was stated. In regard to the alleged delay, the appellant asked the court, at the close of the testimony, to charge the jury that if they believed the delay in presenting the note for payment to have been unreasonable, and that, under all the circumstances, the respondent was negligent, etc., they should find against her; but the court refused to so charge. We do not see that it was necessary for the complaint to state any excuse for the delay. It stated the facts as to the time of presentation and the date of the indorsement. From these facts the court was to judge whether there had been unreasonable delay or not. It would not have been proper for the court to have instructed the jury upon the question of the reasonableness or unreasonableness of the delay. That was a question for the court, and not for the jury; and the court, in passing upon the sufficiency of the complaint, passed upon the question. When the facts are ascertained, the question is one of law for the court. The appellant cites authorities which support this view. *Daniel, Neg. Inst.* § 612; *School-Dist. v. Com.*, 84 Pa. St. 471; *Poorman v. Mills*, 39 Cal. 345; *Himmelman v. Hotelling*, 40 Cal. 111; *Wallace v. Agry*, 4 Mason, 336; *Par. Notes & B.* 340; *Wyman v. Adams*, 12 Cush. 210.

In the complaint the facts are all stated,—all ascertained. The delay in presenting the note to the maker for payment was not unreasonable. *Van Alstyne v. Van Hoesen*, 3 Wend. 75. A note indorsed, when overdue, is con-

sidered equivalent to a note or bill on demand. 1 Pars. Notes & B. 519, 381. Our statute declares that mere delay in presenting a bill of exchange or promissory note, payable, with interest, at sight or on demand, does not exonerate any party thereto. Laws 1882, p. 62, § 87; Id. p. 65, § 109.

2. It is assigned for error that the court admitted in evidence certain letters of the appellant, and permitted witnesses to testify from a comparison of the same with the signature of the appellant in dispute. The respondent, as witness in her own behalf, testified that she saw the appellant indorse his name on the note in question. Thereupon, as additional testimony in regard to the genuineness of the signature of the appellant, the appellant himself was called to the witness stand, and testified that these letters were in his own handwriting. They were then introduced in evidence, over the objection of the appellant.

The former English rule was that evidence of the genuineness of a signature could not be proven by witnesses testifying as to their opinion arising from comparison of the handwriting with other handwritings shown or admitted to be genuine. This was not settled in England, however, as the common-law doctrine, until 1827, and by a divided court, in the case of *Mudd v. Suckermore*, 2 Nev. & P. 18. Thereafter parliament adopted the views of the minority of the court, and enacted a statute allowing such evidence to be admitted.

In this country the courts of the different states have taken different views of the question, some admitting and others rejecting such evidence, before it was settled in England. The supreme court of the United States leaned towards the view as afterwards settled in England in *Mudd v. Suckermore*, but made no direct decision upon the question.

The first case in that court to which our attention has been called is that of *Strother v. Lucas*, 6 Pet. 767, 768, but it was a case where the handwriting (a signature to a deed) was sought to be proven by comparison with the handwriting or entries made in a certain register of marriages and interments alleged to have been made by the witness, of which, however, there was no direct evidence, and "there were living witnesses examined as to the handwriting; and, besides, the deed was received and read in evidence, and the plaintiff had the full benefit of it." The general rule, as recognized, was mere *dicta*, and not a decision upon the point, and the case was not at all like the present one.

In the next case, that of *Rogers v. Ritter*, 12 Wall. 320, the court said that it was "not necessary, for the purposes of this case, to discuss the subject in all its bearings, nor to depart from the rule laid down by the court in *Strother v. Lucas*, that the evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands." The court then proceeded to approve the admission of the evidence where the witnesses had never seen the party write, nor had they had any correspondence with him, but their knowledge had been obtained entirely from having seen his name signed to papers, and no question had been raised as to the genuineness of his signature to them. The facts in the present case are very similar to those in that case. Here two of the witnesses obtained their knowledge of the appellant's handwriting by having seen the letters referred to before being called as witnesses, but not before the commencement of the action. That is the only difference, except that in one respect the case at bar is the stronger. In the case at bar the party (appellant) whose signature to the note is in dispute testifies that the exhibits examined by the witnesses were written by him.

The supreme court of the United States, in the case of *Rogers v. Ritter*, said: "The witnesses in this case were conversant with the signature of Sanchez, and swore to their belief, not by comparing a disputed with an acknowledged signature, but from the knowledge they had previously acquired

on the subject. The text writers all agree that a witness is qualified to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it shall be acquired. It is settled everywhere that, if a person has seen another write his name but once, he can testify, and that he is equally competent if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not, for in the varied affairs of life there are *many modes in which one person can become acquainted with the handwriting of another* besides having seen him write or corresponded with him. There is no good reason for excluding any of these modes of getting information; and if the court, on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion of the subject."

This would appear to have been the situation in the case at bar. The court evidently saw that all three of the witnesses who testified to the signature of the appellant, from examination of the letters shown in evidence, had that degree of knowledge that would enable them to judge of the genuineness of the appellant's signature. Opinion evidence is generally weak; yet that fact does not make it incompetent. And this case of *Rogers v. Ritter* also lays down the doctrine that it was proper for the witnesses to give their opinion to the jury. This is in accord with the general doctrine that it is proper for such evidence to go to the jury, rather than that the jury should compare the writings themselves.

The only other case decided by the supreme court of the United States, and to which our attention has been called, is that of *Moore v. U. S.*, 91 U. S. 270. It was a case wherein the court of claims, sitting as a jury, had compared the disputed signature with a genuine signature to a paper already in evidence for another purpose. The court, referring to the general rule spoken of as the common-law rule, said that that case was an exception to the general rule, and said the comparison was proper. It decided nothing further on the subject.

It would seem from all these cases that the interpretation placed upon the rule by the supreme court of the United States confines it to cases where the witness has no knowledge on the subject until called to the witness stand, and then the disputed signature and also the genuine signatures are for the first time presented to him for his examination and opinion. That narrows the rule down to very limited boundaries, and in our view does not include the case at bar; but it is an exception thereto, similar to the case of *Rogers v. Ritter*, *supra*, even if the rule be recognized to exist at all. In very many of the states that rule has never been recognized. At the time of the first settlement of the older states, or at the time of our national independence, the rule had not been settled in England, and the rule as subsequently settled in England was not, therefore, accepted as part of the common law by those states. The reasons upon which the rule of exclusion was recognized in England do not exist in the case at bar, and the rule is not approved as a wise one by the text writers generally. All of these things together lead us to the conclusion that the lower court did not err in admitting the evidence of the experts as to the genuineness of the appellant's signature upon the note.

We see no error in the court below. The judgment and order of that court are affirmed.

ZANE, C. J., and HENDERSON, J., concur.

PEOPLE v. PETTIT, impleaded, etc.

(Supreme Court of Utah. June 29, 1887.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

Under the laws of the territory of Utah, where, upon an appeal in a criminal case, it appeared that no statement on motion for a new trial was made, that no bill of exceptions had been preserved, and that the record disclosed no written requests to charge, but it appeared that the defendant relied upon alleged defects in a general charge of the court delivered orally, and taken by the stenographer, which was not made part of the record by bill of exceptions or statement settled and signed by the trial judge, it was held that the charge was not before the appellate court, and that the judgment and order overruling the motion for a new trial, appealed from, should be affirmed.

Geo. S. Peters, for the People. *W. R. Watrous* and *W. W. Woods*, for appellant.

HENDERSON, J. The defendant was convicted in the district court of the crime of grand larceny. Motion for new trial was made and denied. The defendant was sentenced, and he now appeals to this court from the order denying his motion for a new trial, and from the judgment. The only complaint made here is that the court erred in charging the jury. No bill of exceptions was settled or signed by the trial judge, and no statement on motion for new trial was made. The record shows that the defendant filed with the clerk in the court below a paper which was entitled "Bill of Exceptions," which purports to contain the substance of the testimony on the trial and the charge of the court, but this bill was never signed or settled. The record discloses no written requests to charge the jury, but the part of the charge complained of is said to be contained in the general charge of the court, which was delivered orally and taken by the court stenographer.

The appellant claims that under section 315 of the criminal practice act of 1878, (Laws 1878, p. 126,) he can have the benefit, on this appeal, of objections to the charge without settling a bill of exceptions or statement on motion for new trial; that the stenographer's minutes transcribed are a part of the record, and, as such, can be reviewed on appeal. The section referred to is as follows:

"Sec. 315. When written charges have been presented, given, or refused, the questions presented by such charges need not be excepted to or embodied in a bill of exceptions, but the written charges, or the report, with the indorsements showing the action of the court, form a part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if embodied in a bill of exceptions."

Section 284 of the criminal practice act (Laws 1878, p. 120) provides that "either party may present to the court any written charge, and request that it be given. If the court think it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented, and given or refused, the court must indorse and sign its decision."

These provisions of the statute are intended to give to a party the right to present written requests for instructions to the jury, and, when such requests are presented, require the court to indorse its decisions respecting such requests thereon in writing, and to constitute such requests and decisions a part of the record which may be reviewed by this court on appeal without being embodied in a bill of exceptions, or statement on motion for new trial; but they do not refer to the general charge of the court given orally, and taken by the stenographer. Such instructions can only be made part of the record by bill of exceptions or statement settled and signed by the trial judge. Laws 1878, § 309, p. 125; *Id.* § 339, p. 132; *Id.* § 369, p. 138. Therefore in this case the charge is not before us. *State v. Forsha*, 8 Nev. 139; *State v. Ah* v.14p.no.6—22

Mook, 12 Nev. 373; *People v. Thompson*, 28 Cal. 219; *Page v. O'Neal*, 12 Cal. 483.

No error appearing in the record, the judgment and order appealed from should be affirmed.

ZANE, C. J., and BOREMAN, J., concur.

TARPEY v. DESERT SALT CO.

(*Supreme Court of Utah*. June 14, 1887.)

1. DEED—REQUISITES—ATTESTATION.

In the territory of Utah a deed is not good for every purpose unless it fulfills all the requirements of the territorial statute—Comp. Laws, p. 254, § 1, (617)—which provides that conveyances of lands, or any estate or interest therein, may be made by deed signed by the person from whom the estate or interest is intended to pass, and by one or more credible witnesses, and acknowledged or proved and recorded. A deed, therefore, which is acknowledged, but not witnessed or otherwise proved, is not admissible in evidence in an action for the recovering possession of real estate in said territory brought against one who was a stranger to the deed.

2. SAME.

A deed so defective in its execution for want of witnesses cannot be admitted in evidence as a contract for the purchase of the land, carrying with it the equitable right to possession, in order to establish the plaintiff's case against the defendant, who was a stranger to the instrument.

3. EJECTMENT—ACTION TO RECOVER POSSESSION—EQUITABLE TITLE.

A plaintiff who bases his claim to property, or its possession, upon a legal title, cannot recover on the strength of an equitable title.

4. SAME—LEASE.

A lease duly executed passes a legal and not an equitable interest, and confers such right of possession that it is error to refuse to admit the same in evidence on the trial of an action for recovering possession of real estate.

5. SAME—PARTIES.

A recital in such lease, that any action to recover possession should be in the name of the lessor, affects only the parties to it, and the lessee may bring an action for possession in his own name in pursuance of the Civil Code of Procedure of Utah territory, providing that actions shall be prosecuted in the name of the real party in interest except when otherwise provided.

HENDERSON, J., dissenting.

C. S. Varian, for appellant. P. L. Williams, for respondent.

BOREMAN, J. This is an action for the recovery of the possession of real estate. Upon the trial in the court below, when the plaintiff (appellant here) had introduced his evidence and rested his case, the defendant (respondent) moved the court for judgment of nonsuit against the plaintiff, which motion was granted. From this judgment of nonsuit the appellant has brought the case to this court.

1. The first alleged error was the action of the court in sustaining the objection of the respondent to the introduction in evidence of a certain deed purporting to be from the Central Pacific Railroad Company to the plaintiff. It was offered to show title in appellant. A ground of objection to this deed was that it was not signed by one or more witnesses as required by the territorial statute. Comp. Laws, p. 254, § 1, (617.) That section of the statute provides "that conveyances of lands, or any estate or interest therein, may be made by deed signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and by one or more credible witnesses, and acknowledged or proved and recorded as provided in this act." This section was evidently intended to cover the whole subject, and requires the use of the formalities specified to make a deed good. *Crane v. Reeder*, 21 Mich. 60. It sets forth all the required formalities of a deed of conveyance of real estate to make the deed good for every

purpose. To make a deed good for all purposes, therefore, each of these requirements must be complied with. By the execution of a deed is meant the various formalities required by law for the completion of it, which include the signing, sealing, attestation, and acknowledgment. Tied. Real Prop. § 804. A deed may be good as between the parties thereto, and yet not be good for all purposes,—not good as against a stranger. The respondent is a stranger to the deed under consideration. Can any of the requirements referred to be dispensed with, and the deed yet be held good as against respondent?

The second section of the statute referred to provides that every conveyance of land "proved, acknowledged, and certified in the manner prescribed by this act" shall be valid between the parties, and to all persons having actual notice thereof, without being recorded. The recording may, therefore, as to the parties and persons having actual notice thereof, be dispensed with. By a later statute it seems that, as between the parties, all these formalities are dispensed with except the signing by the party. Laws 1884, p. 366, § 1206. We find nothing, however, in the statutes that would authorize the acknowledgment and proving to be dispensed with, and yet the deed be held good as to one not a party nor privy, nor having notice thereof. Either the acknowledgment or the proving must accompany every deed to make it valid. Both are not necessary to make it *prima facie* good, either being sufficient if the deed be otherwise sufficient. The deed in the present case was acknowledged, but not otherwise proved. The proving of a deed, when necessary to be made, must be by the testimony of a subscribing witness. If the subscribing witnesses are all dead, or cannot be had, then proof of the handwriting of the grantor, or of the subscribing witnesses, may be taken. Comp. Laws Utah, p. 259, § 22. (688.)

In the case before us, the deed having been acknowledged, and therefore no proving thereof being necessary, the question arises whether the deed is valid *prima facie* as against the respondent, without any witnesses having signed it. Is the signing by a witness an essential part of the deed as against a stranger when the deed has been duly acknowledged? The object of the witnesses' signing is to attest that the deed was executed, and that they are ready to certify to its genuineness. The object of having witnesses at all is to establish the fact that the deed has been executed by the party by whom it purports to have been done. Tied. Real Prop. § 809, referring to *Dean v. Fuller*, 40 Pa. St. 474; 3 Washb. Real Prop. 247, side page 572.

But it is claimed that the acknowledgment was proof of the due execution of the deed, and that such was all the proof necessary; that the deed having been acknowledged, and the certificate thereof having been attached, the proof by witnesses was not essential, and that, therefore, the signing by the witnesses is not essential; that, the reason for requiring the witnesses to sign having been removed, the necessity for the signing did not exist in regard to this deed; that, the reason of the requirement failing, the requirement itself fails.

A deed may be acknowledged and admitted to record. One object of the acknowledgment is to entitle the deed to be recorded. But the record is only the *prima facie* evidence of the facts therein stated. Laws Utah 1884, p. 363, §§ 1177, 1178. The certificate of acknowledgment is itself only *prima facie* evidence of the facts therein stated. It is not conclusive, and may be rebutted. Comp. Laws Utah, p. 255, § 9, (625.) Further proof may become necessary in support of the certificate, or to show its falsity. The statute points to the subscribing witnesses as the first persons to look to in such cases for proof, and the proper ones to furnish proof in the first instance of the due execution of the deed, in all cases when it is attacked, or when its validity is in any manner called into question. Besides, the statute requiring one or more witnesses to a deed increases the difficulty of making a fraudulent or forged deed, and adds to the solemnity of its execution. The signing of deeds

by witnesses was not required at common law, nor was the signing by the party required. But here we have a statute that specifies, as parts of the due execution of the deed, the signing by the party and the signing by the witnesses. It may be true that, where the reason of a rule or requirement fails, the rule or requirement itself fails. But such an axiom applies only where the plain import of the words is dubious. The spirit and reason of the law cannot be appealed to when the words of the statute are clear and unambiguous. *Opinion of Justices*, 22 Pick. 571; *In re Kilby Bank*, 23 Pick. 93.

The words of the statute under examination are not dubious, but are clear and unambiguous. As there is no doubt as to what it does say, nor about the import, we have no right to reject the plain import because we may deem it unreasonable or contrary to the general spirit of the law. Although the words used, taken alone in the section in which they appear, may have no doubtful meaning, yet it is said that the context, another part of the same act, shows that the signing of the witnesses was not essential; and we are referred to section 7 of the same act as showing that fact. The section reads as follows: "623. Sec. 7. That every conveyance or other instrument conveying or affecting real estate which shall be acknowledged, or proved and certified, as prescribed by law, may, together with the certificate of acknowledgment or proof, be read in evidence without further proof." Comp. Laws, 255.

This section evidently presupposes that the deed is ready to be proved; that it has already been signed by the party and the witnesses. Nothing appears in the section to show that the witnesses could be dispensed with; but that, after having been signed by the party and by the witnesses, then the deed could be either acknowledged by the party, or proven by the oath of the witnesses.

Whatever might be the effect of the deed as between the parties or privies, we are of the opinion that, as to the respondent, a total stranger to it, it is essential to its validity that it should have been signed by one or more witnesses. This seems to be the general rule where statutes exist providing for the attestation or signing of deeds by witnesses. *Clark v. Graham*, 6 Wheat. 577; *Townsend v. Little*, 109 U. S. 512, 3 Sup. Ct. Rep. 357; *U. S. v. Crosby*, 7 Cranch, 115; *Lessees of Patterson v. Pease*, 5 Ohio, 191; *Richardson v. Bates*, 8 Ohio St. 261; *Stone v. Ashley*, 13 N. H. 38; *Kingsley v. Holbrook*, 45 N. H. 320; *Winsted Sav. Bank v. Spencer*, 26 Conn. 195; *Crane v. Reeder*, 21 Mich. 60.

2. It is contended that, if the instrument be not sufficient to pass the title, it would doubtless be held to be a contract of purchase. That might be true as against the grantor to compel the conveyance of the title to the appellant; but, as against the respondent, it gives no sort of right, legal or equitable. To enable the appellant to maintain this action there would have to be some kind of conveyance or transfer of the right of property, or of a right to the possession. Every such transfer or conveyance would, under the first section above quoted, have to be accompanied by the same formalities as a deed of the fee, in order to affect strangers to it. A transfer of a right to the possession would be the conveyance of an "estate or interest" in the property; and every such transfer requires the signature of one or more witnesses. By calling the instrument a contract of purchase, we cannot escape the requirement in regard to witnesses. The transfer of every "estate or interest" requires witnesses. The appellant claims that the instrument, being a contract of purchase, gives him the equitable right to its possession. The appellant does not allege an equitable title. He bases his claim to the property or its possession wholly upon the legal title. Having alleged a legal title, he cannot recover upon an equitable one. *Seaton v. Son*, 32 Cal. 481; *O'Connell v. Dougherty*, Id. 458; *Talbert v. Hopper*, 42 Cal. 402; Pom. Rem. § 102, and note; *Felger v. Coward*, 35 Cal. 650; *Lawrence v. Webster*, 44 Cal. 386;

San Felipe M. Co. v. Belshaw, 49 Cal. 655. If an equitable title had been alleged, it might be questionable, under our statute, whether it could have been ground for maintaining this action. The Code of Civil Procedure provides that, in actions for the recovery of real property, the issue is to be tried by a jury. Laws Utah 1884, p. 234, § 469. Besides, this is a constitutional right. Equity cases are not tried by jury. Notwithstanding our Code of Civil Procedure has obliterated all distinctions as to form between law and equity, yet it has not and cannot obliterate the difference between law and equity as regards the mode of trial. Law cases are tried by jury, and equity cases are tried by the court.

3. The next alleged error was the refusal of the court to admit the lease offered in evidence by the appellant. The present is an action somewhat in the nature of an ejectment, and in every such action the rule is established that the plaintiff must recover upon the strength of his own title. It is the right of possession, as between the parties, that is tried, and the right of possession is the title. *Marshall v. Shafter*, 32 Cal. 176. The abstract right to the soil is not tried, but the action is to recover the actual possession. *Adams, Ej. 32-34; President, etc., of Cincinnati v. White's Lessee*, 6 Pet. 431. The plaintiff must show a right in himself, before the defendant, under a simple denial, is called upon to make any proof or showing on its part. And even then the defendant may confine itself to merely rebutting the evidence of the plaintiff. It need not show that it has any title whatever. To show that the plaintiff had no title or interest entitling him to the possession is sufficient. *Coryell v. Cain*, 16 Cal. 572; *Moore v. Tice*, 22 Cal. 516; *Adams, Ej. 337-380*, and notes. The title is the plaintiff's legal or actual right to the possession of the property. A claimant in fact may not own the land, or have absolute fee in it, but the circumstances may be such that, as between the parties, the title in him is established. The plaintiff does not need to show a title good against all the world. *Tyler, Ej. 165, 166*.

The lease is not an equitable title, but it is in its nature legal. It is not the title in fee, but it is of the same nature, yet a less estate,—one of a lower grade. It is embraced within the fee, and is in subordination to it. The fee title includes the right to the possession. A party may convey a part of his right,—his right to the possession. The appellant alleges his right to the possession. He also alleges his title in fee. Under this state of the case the question arises whether the appellant, because he cannot prove his ownership in fee, shall be denied the right to prove his legal right to the possession. He has not proved all that he alleged,—the whole of his title,—but he has offered to prove his right of possession, and a right to the possession is a sufficient ground upon which to base this action. *Toland v. Mandell*, 38 Cal. 43. Under the averments of the complaint, we see no reason why appellant might not introduce evidence to show that he was entitled to a less estate than the fee,—to show his right of entry and possession. *Tyler, Ej. 168-170; Stark v. Barrett*, 15 Cal. 361; *Marshall v. Shafter*, 32 Cal. 195; *Gillespie v. Jones*, 47 Cal. 263; *Day v. Alverson*, 9 Wend. 223. The lease was offered to show title in appellant. It purports to have been made by the Central Pacific Railroad Company, and recites that said company had caused the lease to be signed by the land agent and secretary of the grantor, and that it had caused the corporate seal of the grantor to be affixed. That which purported to be the corporate seal of the said company was affixed to the lease.

The lease was sufficiently proven to have been executed by authority, and to be *prima facie* the act of the railroad company. This entitled it to have been admitted in evidence to show the appellant's right to the possession. It was error to exclude it. It is claimed that the recital in the lease that actions for possession should be in the name of the railroad company precluded the institution of the action by the plaintiff, appellant. The lease was intended to convey to the appellant a full title of possession as against the railroad

company and all the world. He is therefore the real party in interest, and the Code of Civil Procedure provides that the actions shall be prosecuted in the name of the real party in interest, except where otherwise provided. It is nowhere otherwise provided that an action of this character could be instituted in the name of any one not having the title to the possession. That title was not in the railroad company. It was alone in the appellant.

The recital in the lease did not pertain to the issue as to the possession, but was a collateral matter, affecting only the appellant and the railroad company. It did not affect the respondent.

For the error of excluding the lease, the judgment of the lower court is reversed, and the cause is remanded, to be proceeded with in accordance with this opinion.

ZANE, C. J., concurs. HENDERSON, J., dissents.

UNITED STATES v. PEAY.

(*Supreme Court of Utah. June 29, 1887.*)

1. **BIGAMY—POLYGAMY—"EDMUNDS ACT."**

Under the Edmunds law against polygamy, the gist of the offense is not living *ostensibly* with more than one wife, but the fact of such cohabitation, whether *ostensibly* or in secret.

2. **SAME—EVIDENCE.**

Evidence of the course of life, the polygamous marriage, and the continuance of the marital relations between defendant and his wives, previous to the time stated in the indictment, are admissible and proper evidence to throw light on the acts charged within the time.

3. **SAME—PRESUMPTIONS.**

A charge to the jury that "when you come to the proof of cohabitation with the illegal wife it requires actual proof of the fact. The presumption would be against it, to commence with. The presumptions of the law are in favor of innocence, and until some evidence has been given tending to show these acts of cohabitation on his part, the presumption would be he didn't do that; but where it is shown these acts of cohabitation have taken place with the plural wives, if shown beyond a reasonable doubt, then it is cohabitation within the meaning of the law,"—is not error.

4. **SAME—EVIDENCE.**

The fact that a woman, not the lawful wife of defendant, bore his name, is properly considered as a circumstance tending to prove the unlawful cohabitation.

5. **SAME.**

Evidence of a witness that he saw the defendant going towards the abode of his polygamous wives in the evening, and returning in the morning, from 50 to 100 times a year, though the place where he was seen was one and a half miles from the residence, the intervening country being open prairie; that he saw defendant drive his cattle to such premises frequently,—is competent on the question of cohabitation, the remoteness going simply to the weight of the evidence.

6. **SAME.**

In Utah, where the evidence shows that defendant had been married to two wives for 25 years, and a third woman had been recognized as a wife for 20 years, and each had borne children by defendant, they and their children bearing his name by his consent; that two of the families lived on a farm, and the other—that by his first wife—in town; that the former were visited and supported regularly by defendant, he being at the farm-house from 50 to 100 nights during the year, and this continuing up to the time of trial,—a verdict of guilty under an indictment charging unlawful cohabitation is supported by the evidence.

7. **WITNESS—CREDIBILITY—INSTRUCTION.**

A charge to the jury that "they were not bound to believe the testimony of any witness as to a state of facts testified to, but could believe or disbelieve any witness, etc.,"—is not error.

8. TRIAL—INSTRUCTIONS—ASSIGNMENT OF REASONS.

It is not error for the court, in ruling upon evidence, to give reasons for that ruling; and, if counsel deem their case prejudiced thereby, a request should be made that it be corrected in the charge.

J. B. Milner, for appellant. *George S. Peters*, for the United States.

BOREMAN, J. The appellant was convicted of the crime of unlawful cohabitation. He moved for a new trial, which was denied. He has appealed to this court, both from the order overruling the motion for a new trial and from the judgment.

1. The principal assignment of error is that "the verdict was contrary to the evidence in this: that it is conclusively shown that, upon defendant knowing of the passage of the Edmunds law, he ostensibly ceased cohabiting with any woman except his lawful wife, and no acts of his towards either of his plural wives afterwards, that imply cohabitation with either of them, have been proved or testified to."

The first part of this assignment conveys the idea that the defendant may be guilty in fact, but that, if he be not so "ostensibly," he cannot be legally convicted. It is the same thought which has been frequently presented to the district courts, by polygamists asking how they can act towards their polygamous wives and not lay themselves liable to conviction for unlawful cohabitation. With the same propriety might a man who steals a horse ask how he can act in regard to other men's horses and not lay himself liable to conviction for larceny. To tell him that he must simply cease stealing would not be at all satisfactory to him. To tell the polygamist that, to escape conviction for unlawful cohabitation, he must simply cease living with his polygamous women, is not at all satisfactory to him. The facts proven are not alike in any two cases of horse-stealing; nor are the facts proven in any two cases of unlawful cohabitation alike. Each case shows a different set of facts from every other case. Counsel for appellant is deluded with the idea that if one set of facts be proven in one case a similar set of facts must be proven in every other case, and that without this there can be no conviction; and he seems to think (and this assignment is based upon that idea) that polygamists may live in violation of the law if they do so secretly; that the gist of the offense is to "ostensibly" live with them. Any more preposterous idea could not well be conceived.

But the latter part of the assignment is more tangible. It asserts, in substance, that no acts of the defendant, after he heard of the passage of the Edmunds law, were such as to imply cohabitation by the defendant with either of the polygamous women. In other words, that the facts proven did not constitute unlawful cohabitation. It is the same position as that assumed by the second assignment of error.

Some of the leading facts which the jury were authorized to find from the evidence are as follows: The defendant married his first wife 27 years ago. He married Hannah Paasch 25 years ago, and for 20 years Mary Sorenson has been recognized in the families of the defendant as his wife. Each of these women has had a number of children by the defendant, and all of the women and their children bear his name, and have done so all through these years, and up to the very day of the trial. And all of this has been with his knowledge and consent. He provides homes for all three families. Two of them reside on a farm, and in a house owned by him, a couple of miles from the town of Provo. The other family, that of the legal wife, lives in a house owned by him in Provo. He takes his meals part of the time with the families living on the farm, and part of the time with the family residing in town. His children by the first wife come from town to work on the farm, and when they do so they take their meals with the families living on the farm. He himself takes general control of the farm, and works it, and keeps his stock

there. During the time laid in the indictment he has been accustomed to go out to the farm in the evenings from 50 to 100 times each year, returning to town generally on the following mornings. In fact, his general course and conduct towards his various families have not been in any manner different during the last two or three years from what it was prior to the passage of the Edmunds law, except that he has made a pretense of living with his legal wife since the passage of that act. But it clearly appears from the evidence that it is all a pretense, and nothing more. He did not in fact do so. A man cannot live in the promiscuous style of the defendant, with three different women, and yet expect to escape arrest and punishment merely upon a pretense or claim that he is obeying the law. He must lay aside all *indicia* of the crime. He must act in good faith, and separate himself entirely from his polygamous women. A pretense of doing that which in fact he does not do will be of no avail. His acts must correspond with his claim or pretense. Where there is an honest effort in this class of cases, as in others, to conform to the law, it is not difficult to succeed.

The witnesses for the prosecution in this class of cases are generally of the unwilling character, and mostly drawn from the households of the accused. The counsel for the defendant seems to think that the jury must accept all that such witnesses say of a character favorable to the defendant, and must discard or give less prominence to all that may be of a contrary character. It is the duty of the jury to weigh all of the evidence, and discard only such as upon their oath they cannot accept as true. They are authorized to take into consideration the relationship between the witnesses and the accused, and also their manner of testifying. When the jury find that such witnesses have been drilled to answer in line, and not to allow perjury to be a stumbling block in their efforts to save the accused from conviction, it is impossible for them to give the testimony of such witnesses in his favor as much weight as they otherwise would have done. From the inconsistencies and contradictions of such witnesses, and from the plain counter-statements of other and disinterested witnesses, the truth usually appears. Important truths are sometimes evolved from a witness' testimony when he does not intend it. He is the unconscious instrument of proving that which he is purposing to conceal. He does not always know the bearing of the different parts of his testimony. We think that the evidence fully justified the verdict, and the verdict was not contrary to law.

2. It is assigned as error that the court below allowed evidence to go to the jury tending to show cohabitation of defendant with the plural wives prior to the passage of the Edmunds law, and prior to the time laid in the indictment, and also instructed the jury to consider such evidence. The evidence thus objected to had reference to the marriages of the defendant with these women, and the continuance of marital relations. Such evidence may not always be necessary, but in the present case it was entirely proper. It was not introduced to show acts or conduct for which the party was liable, or to show a cohabitation for which the defendant would be liable under this indictment. It was merely to illustrate and explain the evidence as to what took place during the time laid in the indictment. The instructions of the court clearly told the jury that the cohabitation necessary upon which to base a verdict was that within the time covered by the indictment.

3. It is assigned for error that the court made remarks during the trial which were unnecessary, and tended to prejudice the jury against defendant. The remarks objected to were used by the court in ruling upon the introduction of evidence. It is an almost universal rule, and one hoary with age, for courts to give their reasons for their rulings, and especially is this so where the questions are important. It would hardly be satisfactory to counsel if the court failed in this respect on points of importance, and the court would often be subjected to adverse criticism for not doing so. The giving of reasons is

often an unavoidable necessity, to prevent the court from being misunderstood, and also to save time. The remarks are not made to nor for the jury, although in their presence; but that is not sufficient ground for their exclusion. If the court should inadvertently say something that might be construed as injurious in case the jury should regard it, the counsel should call attention to the matter, and request the court to correct it in the charge to the jury.

4. The refusal of the court to exclude the testimony of the witness Westfall, as to defendant's passing Westfall's house, on a public road, one and a half mile distant from the place where the plural wives were supposed to live, is assigned for error. It is urged that he was too far removed for his testimony to be of value. Between the house of the witness and that where the polygamous women lived the country was an open prairie. The witness says that he has seen the defendant going past his house, and along the highway, out to defendant's farm, in the evenings, and returning in the mornings, 50 to 100 times a year, within the time laid in the indictment; that he has seen him go through the gate, and into the corral; that he had seen him drive his cattle out there frequently. The "remoteness" of the witness from the dwelling where the polygamous women lived was a question for the consideration of the jury in weighing the testimony. It does not go to its competency.

5. It is assigned as error that the court told the jury that "the law aims at the wrongful example of an apparent as well as an actual continuance of the polygamous relation, without reference to what actually occurs with his plural or polygamous wives." Whether the defendant was in fact living with these women was not necessary to be shown. The jury were authorized from the facts and circumstances proven, to conclude that such was the fact. A man cannot display all the *indicta* of a married life, and yet plead its non-existence successfully. He must put away the evidences. In trials for murder, it is not infrequent that no witness can be produced who saw the killing, but facts and circumstances may be shown which point clearly to the guilty party, and from the certainty of his guilt there is no escape. Men are often executed when the conviction is based wholly upon circumstantial evidence. These crimes against chastity and the home are of no more sacred character than those against life. Upon the same point the supreme court of the United States has said: "It was such offense that section 3 of the act was intended to reach,—the exhibition of all the *indicta* of a marriage; a household and a family twice repeated." *Cannon v. U. S.*, 116 U. S. 75, 6 Sup. Ct. Rep. 278. The district court did not go beyond the interpretation given by the supreme court of the United States, and we see no error in that part of the charge of the district court.

6. It is assigned as error that the court below, in its charge to the jury, assumed that the name by which the plural wives may be known is a part of the offense. There is no such assumption anywhere in the charge. The court simply refers to the name borne by the polygamous women as one among the many marks of the guilt of the defendant. Where a woman is recognized in a family by the name of a man, it is indicative that she is something more than a stranger; and if connected with the other facts of his having married the woman, and continues to treat her as a wife, etc., it is proper for the jury to take it into consideration.

7. The following extract from the charge of the court is assigned as error: "But, when you come to the proof of cohabitation with the illegal wife, it requires actual proof of the fact. The presumption would be against it, to commence with. The presumptions of the law are in favor of innocence, and until some evidence has been given tending to show these acts of cohabitation on his part, the presumption would be he didn't do that; but where it is shown these acts of cohabitation have taken place with the plural wives, if

shown beyond a reasonable doubt, then it is cohabitation within the meaning of the law."

It is claimed that this part of the charge "assumes that the instant that some evidence has been given tending to show his guilt the presumption of innocence vanishes and is lost." We do not think that the language used conveys any such idea. Had the latter part of the last sentence been omitted, there might have been some basis for the position of the counsel for the appellant; but that latter clause completely obliterates it. The language of the charge, taken together, conveys no idea that the presumption of innocence is changed or overthrown by any evidence less than that which proves the guilt of the defendant beyond a reasonable doubt.

8. It is objected that the court erred in telling the jury that they were not bound to believe the testimony of any witness as to a state of facts testified to, but could believe or disbelieve any witness, etc. The language of the court does not convey the impression that the jury could willfully or capriciously refuse to accept the testimony of a witness; but, on the contrary, that they should weigh all of the evidence, and seek the truth. There might be in the language used an intimation that probably some one had sworn falsely, and yet the instruction be entirely proper. There were statements of the witnesses that were contradictory, and some one had evidently been mistaken or sworn falsely. In either case they had to reject some of the testimony. The charge of the court simply told them that they had the right to do so. The court did not tell the jury what testimony to reject, and the language used was in no sense an invasion of the province of the jury. The only apparently obnoxious language of the court was the closing part of the sentence, namely, "or did any of the acts I have specified here as cohabitation with these women. If he has, he is guilty; if not, he is not guilty." We have frequently called attention to the fact that an isolated extract from a charge to a jury cannot be considered by itself, but that the whole charge must be taken together. The words just quoted might, if taken alone, be considered objectionable; but, when taken in connection with the other parts of the charge, their meaning is apparent. The thought conveyed, in the light of the context, is that the jury could not find the defendant guilty unless there was proof of facts which the court had said were sufficient to constitute the cohabitation. That was the fair construction of the language used, and it could not well have been understood otherwise by the jury.

9. It is further claimed that the charge, as a whole, conveyed to the minds of the jurors that the fact that at the passage of the Edmunds law the defendant was a polygamist was of the essence of the offense. It is needless to say that nothing of the kind anywhere appears in the charge as we view it. But the very contrary is declared. They are told that they are to believe from the evidence, beyond a reasonable doubt, that the offense was committed within the time laid in the indictment.

10. The counsel for the defendant has made some points that are so attenuated as to be hardly tangible; but the following is an entirely new phase of this character of cases: The brief says: "The contention of appellant is this: That he is now incarcerated in the penitentiary, not for any act or acts he has done in violation of law, but because he has not dissolved the relation in which this law found him, and which he knows no legal way of dissolving. If the law commanded its dissolution, it would point out a mode, but it neither commands or points out a way for its dissolution. It simply says, refrain from all acts in this relation, which this defendant has done; but yet, because of these errors of law in court and jury, he exists as a convict, without even the privilege of bail, pending this appeal, solely because he has no way of severing those relations." This language is of startling simplicity. But if the defendant has been unable to find out any way to cease living with his polygamous women, it is not the fault of the law that he suffers for his imper-

fect knowledge. The law simply says, "Refrain from all acts in this relation;" and this the evidence plainly shows that the defendant did not do. Hence, in accordance with the law, "he exists as a convict."

We see no reason for disturbing the judgment or the order overruling the motion for a new trial. They are affirmed.

ZANE, C. J., and HENDERSON, J., concur.

PATCHEN v. KEELEY and others. (No. 1,237.)

(Supreme Court of Nevada. May 10, 1887.)

1. MINES AND MINING—LOCATION—POSSESSION—TITLE.

In an action for trespass upon a mining claim alleged to belong to plaintiff, evidence for plaintiff tended to show that plaintiff had discovered and located it under the laws of the United States and the Ely Mining District, and was in actual possession thereof up to the date of defendants' alleged wrongful entry. Defendants did not attempt to inquire into the nature of plaintiff's possession upon cross-examination, nor show title in themselves. *Held*, that plaintiff's evidence entitled him to maintain the action, and that a nonsuit was improperly granted.

2. TRESPASS—DAMAGES.

In an action for trespass upon plaintiff's mine, the wrongful entry is the gist of the action, and evidence of damage to the claim outside of ores converted to defendants' use is not admissible unless specially pleaded.

3. SAME.

In an action for trespass upon plaintiff's mine, evidence of damages accruing between the date of the commencement of the action and the date of trial is not admissible.

4. SAME.

Plaintiff in trespass for wrongful entry upon his mine is entitled to nominal damages, though it should be held that the "screenings," whose removal constituted the main injury to plaintiff, did not pass to him upon his location of the claim, and a nonsuit is therefore improperly granted in such a case.

5. SAME—MINES—DAMAGES.

If defendants wrongfully enter upon plaintiff's claim, and remove and convert to their own use ore therein, plaintiff in an action of trespass is entitled to the enhanced value thereof, without any deduction for working expenses, if such trespass was willful, and without a fair reason for belief in any title in themselves.

6. APPEAL—STATEMENT FOR APPEAL—JURISDICTION.

In California a party having the right to appeal may, within 20 days after the entry of the judgment or order, file his statement upon appeal, and have it settled by the trial judge; and, within the time limited, jurisdiction of the case for that purpose is retained by the trial court, even though the appeal is perfected before such statement is preferred; following *James v. Lepert*, 2 Pac. Rep. 753.

7. SAME—HARMLESS ERROR.

Error in excluding evidence is cured by its admission at a subsequent stage.

Appeal from the district court of Nevada, in and for Lincoln county, on an order granting a nonsuit, and the judgment entered thereon in favor of defendants.

Action in trespass for wrongful entry by defendants of a mine claimed by plaintiff to be located by him, and in his possession, at the time of the trespass complained of. Plaintiff offered in evidence his notice of location and claim to the mine under the laws of the United States and the Ely mining district. This the court at the time excluded, but at a subsequent stage admitted in evidence. At the close of plaintiff's evidence, defendant moved for a nonsuit, which was granted, and plaintiff appealed. The following stipulation was entered for time to file amendments to the statement of appeal:

"It is hereby stipulated and agreed that defendants in the above action have up to and including the twenty-fifth day of September, 1885, in which to file and serve amendments to the proposed statement of plaintiff on motion for a new trial in said action. It is also expressly stipulated and agreed that the

appeal in the above action shall be set down for hearing in the supreme court of the state of Nevada at the next [October] term of said court, and that the statement on appeal shall be settled at once upon the filing of any amendments thereto, and that no delay shall be occasioned by the parties to said action which will tend to prevent a hearing of said appeal at said October term of said supreme court

GEO. S. SAWYER and

"C. H. PATCHEN, *in pro. per.*,

"Attorneys for Plaintiff.

"BAKER & WINES,

Attorneys for Defendants.

"August 31, 1885.

"Filed this second day of September, A. D. 1885.

"H. F. GEAR, Clerk."

Thereafter the court made the following order:

"Upon good cause being shown therefor, the defendants are hereby granted until and including October 10, 1885, in which to file and serve amendments to plaintiff's proposed statement on appeal in the above-entitled action.

"Eureka, September 22, 1885.

HENRY RIVERS, District Judge.

"Filed this twenty-fifth day of September, 1885.

"H. F. GEAR, Clerk."

Thereupon the defendants entered the following objection:

"Now come the defendants, and, before proposing any amendments to plaintiff's proposed statement on appeal, object to the jurisdiction of the said court, or the judge thereof, to hear and settle any statement on appeal herein, for the reason that said action was tried in said court upon the seventh day of August, 1885, and the judgment was rendered in said action upon the eighth day of August, 1885, and the notice of appeal in said action was filed in said court, and served upon the defendants herein, upon the seventeenth day of August, 1885, and the undertaking on appeal was executed and filed in said court within five days after the filing of said notice of appeal, as required by law; and the proposed statement on appeal herein was not filed nor served until August 24, 1885, after the filing of the undertaking and service of the notice of appeal herein; and upon service of said notice of appeal in said action, and the filing of said undertaking on appeal herein, the said court was ousted of jurisdiction in said action, and the same was, since the service of said notice, and the filing of said undertaking, transferred to the supreme court of this state.

"Defendants, therefore, object to such proposed statement; and, in filing amendments thereto, reserve the right to waive to have said statement stricken out of the transcript on appeal in this action, and file these their said objections, and ask to have them incorporated in the transcript on appeal in this action.

BAKER & WINES, Attorneys for Defendants.

"Filed in said court, before filing amendments to plaintiff's proposed statement on appeal, this eighth day of October, A. D. 1885.

"H. F. GEAR, Clerk."

Other facts appear in the opinion.

Geo. S. Sawyer, C. H. Patchen, and T. Coffin, for appellant. T. J. Osborne and Baker & Wines, for respondents.

LEONARD, C. J. This was an action of trespass *quare clausum fregit*. Plaintiff alleged in his complaint that since January 1, 1883, he had been, and then was, the owner and in possession of the Gold Ledge mining claim, particularly described; that on the ninth day of March, 1885, without the leave or license of plaintiff, defendants broke and entered said described close, and commenced to dig up, reduce, and remove, and had ever since continued to do so, large quantities of earth, rock, and earthy material containing gold, silver, lead, and other metals of great value, and converted and were converting them to their own use and benefit, to damage of the plaintiff in the sum

of \$10,000. Defendants' answer was a specific denial of each allegation contained in the complaint. At the trial, to sustain the allegations of his complaint, plaintiff introduced evidence of his title and possession subsequent to January 1, 1883, and in support of the charge of trespass, together with the damages resulting therefrom. Certain exceptions were taken by plaintiff to the court's ruling, and at the close of his case in chief, upon the motion of defendants, the court granted a nonsuit. Plaintiff appeals from that order, and the judgment entered thereon.

1. We are satisfied with the decision in *James v. Lepert*, 2 Pac. Rep. 753, and respondents' objections to a consideration of the statement on appeal are answered by that decision.

2. If the court erred in excluding the notice of location of the Gold lode claim when it was first offered in evidence, the error was corrected by its subsequent admission, before plaintiff rested.

3. After plaintiff had introduced in evidence the mining laws of Ely mining district, wherein the Gold Ledge is situated, and, after his notice of location had been excluded as evidence, he offered, and endeavored to prove, his actual possession and occupation of said mining claim subsequent to January 1, 1883, continuously to the time of trial. Defendants objected on the ground that plaintiff was precluded from showing actual possession not in conformity with the local rules and regulations in evidence; and counsel for respondents have argued in this court that actual possession was insufficient, in the absence of a compliance with the local rules and regulations. We think the court erred in excluding evidence of actual possession up to the time the action was commenced for reasons that will subsequently appear; still, for the purposes of this appeal, plaintiff was not injured by the exclusion at that time, because afterwards, and without objection, plaintiff testified that he had been in full charge and control of the entire Gold Ledge claim since January 1, 1883; and two witnesses testified in his behalf that they had worked continuously on the claim for plaintiff since the fall of 1883, during which time plaintiff had full possession, charge, and control of the claim, and had expended in work and machinery thereon, several thousand dollars. So, if proof of actual possession was admissible, and important to plaintiff, it is still true that, at the time the motion for nonsuit was made and granted, there was evidence of such possession.

4. We are of opinion that, under the allegations of the complaint, plaintiff was not entitled to show damage to the mining claim outside of ores converted. The gist of the action is the alleged unlawful entry upon the mining claim in question, and the digging and removal of the ores are mere matters of aggravation. *Pico v. Colimas*, 32 Cal. 580. Of the same nature is an injury to the mine beyond that caused by taking the ores. Beyond the value of the ores taken, the mine was not necessarily injured by the acts complained of. Such damages are special, and they must be stated in the complaint. *Suth. Dam.* 763; *Knapp v. Slocomb*, 9 Gray, 75; *Sampson v. Coy*, 15 Mass. 494; *Baldwin v. Railroad Corp.*, 4 Gray, 335.

5. The court did not err in refusing to allow proof of damages between the commencement of the action and the date of trial. Such damages were not the natural and necessary result of the acts complained of in the complaint. *Mayne, Dam.* 51; *Warner v. Bacon*, 8 Gray, 406; *Town of Troy v. Railroad Co.*, 3 Fost. 102; 1 Sedg. Dam. 190.

6. The grounds of the motion for nonsuit were as follows: "*First*. The evidence on the part of plaintiff is insufficient to maintain the action. *Second*. It is shown from the evidence that the ore taken and removed by defendants was waste and screenings which were left in the stopes and chambers of the Washington ledge by the Meadow Valley Company, and were, when taken and removed by defendants, personal property, detached from the freehold, and not a part or parcel of any mining claim located or claimed by plain-

tiff. *Third.* There is no evidence before the court that the plaintiff discovered any ledge, lode, or deposit of ore within the boundaries of this claim, prior to the date of its location by him. *Fourth.* The evidence shows that the mining claim called the Gold Ledge was located upon the Washington & Creole mining claim, and there is no evidence before the court that, at the date of said location, the Washington & Creole mining claim was either abandoned or forfeited by its owners, or that the same was subject to relocation as a part of the public domain. *Fifth.* Plaintiff has shown by his evidence that the defendants entered upon the ground from which these screenings were taken in good faith, believing it to be a part of the Meadow Valley mine, and that the value of the ore removed was less than the cost of reducing it to coin, and that no damage has accrued to plaintiff."

In considering the court's ruling granting the nonsuit, we must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, (*Brown v. Warren*, 16 Nev. 231; *Dow v. Gould & C. S. M. Co.*, 31 Cal. 650,) and give him the benefit of all legal presumptions arising from the evidence.

Was plaintiff's evidence insufficient to maintain the action, for the reasons stated in the second, third, fourth, and fifth grounds of the motion? As we have seen, the gist of the action was the breaking and entering of plaintiff's close, to-wit, the Gold Ledge mining claim, and the digging and conversion of ores were mere matters of aggravation. The said close embraced the entire land within plaintiff's boundaries, and not merely the Gold Ledge, included therein. *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev. 329; *Gleeson v. Martin White M. Co.*, 13 Nev. 456; *Mt. Diablo M. & M. Co. v. Callison*, 5 Sawy. 455. There was uncontradicted evidence that plaintiff located the claim in question January 1, 1883, according to the mining laws of the United States, and the local rules and regulations of Ely mining district, and held and worked it in the usual and customary mode of holding and working similar claims in the vicinity thereof. Such holding and working constitute occupation and adverse possession under the statute. Gen. St. Nev. § 3682. There was no evidence that any prior location, valid or otherwise, had been made of the claim in question. The only evidence upon that point was that plaintiff's claim was located upon the old Washington & Creole mining claim. It might have been so called without any valid location under the mining laws; and there can be no relocation unless there has been a prior valid location, or something equivalent, of the same property. *Belk v. Meagher*, 104 U. S. 289. Plaintiff did not set up title as a *relocator*, and thus impliedly admit the validity of a prior location. In his notice of location he claimed the ground as a discoverer and locator; and he testified that he *located* the claim, January 1, 1883. Testimony to the effect that the Gold Ledge was located upon the old Washington & Creole mining claim was not evidence of a valid prior location, or even of an attempted prior location, under the mining laws. It is true that, in his first brief, counsel for appellant, in discussing another question, asserts that "the proof is uncontradicted that the Gold Ledge mining claim was the old Washington & Creole ledge, which was well known, and which had been abandoned and relocated by plaintiff;" but he retracts the last part in his second brief. At any rate, he was mistaken at first, and we must look at the record to ascertain the nature of the evidence, rather than the opinion of counsel.

There was uncontradicted evidence that plaintiff had full charge, control, and possession of the entire claim during the whole period between his location and defendant's entry; that he commenced work thereon in the fall of 1883, put machinery thereon, and kept two men constantly employed until the trial; that when he was in possession, as stated, defendants, in March, 1885, entered, dug, and converted the ores found in the waste rock left in the stopes and chambers by the Meadow Valley Company, years before plaintiff's

location. There was no evidence that plaintiff did not hold the claim according to law, and the rules and customs of Ely mining district; and, if he was in possession at the time of defendants' entry, the presumption is that he did so hold it, upon the same principle that the possessor of any real estate is presumed to be the owner thereof until the contrary is shown. *Robertson v. Smith*, 1 Mont. 414; *Sears v. Taylor*, 4 Colo. 42. There was no evidence that the defendants had title to the *locus in quo*, or the ores taken, or possession or right of possession thereof. They stated at the time that, when at work, they thought they were in a ledge which, prior to plaintiff's location, had been claimed and worked by the Meadow Valley Company, but they did not connect themselves with that company, or any person or company claiming or having title or possession; nor did it appear that the Meadow Valley Company ever had any title, or that it claimed or had any possession for more than two years prior to the trespass complained of, or subsequent to plaintiff's location.

In view of the above facts and conclusions, no one of the grounds stated, nor all combined, justified the order of nonsuit. Plaintiff's evidence was sufficient to maintain the action. In addition to plaintiff's location, the testimony showed that he was in the actual possession of the entire claim. He and two other witnesses so testified. They were not questioned as to the nature of their possession by defendants.

In *Brown v. Benjamin*, 8 Allen, 197, which was an action of trespass *quare clausum*, plaintiff testified that he was in the occupation of the *locus in quo* at the time of the alleged trespass upon it, and did not attempt to show any title thereto, besides actual possession. Defendant did not cross-examine plaintiff concerning the nature of his possession. The court said: "As no inquiry was made of the plaintiff, as there might have been, respecting the nature of his possession, and as there was no evidence that the defendant was not a mere stranger and wrong-doer, we cannot sustain the ruling that the evidence showed that the plaintiff could not sustain this action; for it is settled law that actual possession of real estate is sufficient to enable the party in possession to maintain trespass *quare clausum fregit* against a stranger who cannot show any title or elder possession." The rule is the same in relation to personal property. Wood, Pr. Ev. §§ 60, 61.

According to plaintiff's evidence, defendants were mere strangers and tortfeasors; and, in order to recover, plaintiff was only obliged to prove a rightful possession as against them. *Rogers v. Cooney*, 7 Nev. 217.

"In this action the defendant may dispute the plaintiff's possessory right by showing that the title and possessory right are vested in himself, or another under whom he claims, or whose authority he has. But, if the plaintiff prove possession merely, that will suffice, if the defendant cannot show a superior right in himself, or another under whom he can justify. It is true, the plaintiff must prove such lawful possession as the defendant had no right to distrust, but any possession is legal possession as against a wrong-doer." *Reed v. Price*, 30 Mo. 446.

"In an action of trespass *quare clausum fregit*, the defendant can never plead soil and freehold in a third person, without alleging a license from him; because a party having actual possession, but not a right of possession, has a good title against a party having none." *Slater v. Rawson*, 6 Metc. 445. And see *First Parish in Shrewsbury v. Smith*, 14 Pick. 301.

Indeed, counsel for respondents admit that actual possession of such real estate as farms and timber land is *prima facie* evidence of title, and is sufficient as against a trespasser; but they claim that since the passage of the mining laws by congress it is not so in case of a mining claim where it is shown that there are local rules and regulations which require the doing of other acts besides the taking of actual possession. No authorities are cited, or reasons advanced, in support of this claim. We may admit that any com-

patent person may locate, according to law, a mining claim in the actual possession of another which is not affected at the time by a valid prior location, if this can be done peaceably and without force, and that, as against such a location, proof of a prior actual possession would go for naught. The reason is that, under the laws of congress, any competent person may locate, peaceably, any vacant mineral land, and as to him it is vacant in law until a valid location is made. *Belk v. Meagher*, 104 U. S. 287; *Horswell v. Ruiz*, 67 Cal. 112, 7 Pac. Rep. 197. But, assuming the facts to be as they appear in the record, we are not dealing with that kind of a case.

Judge STORY said, in *Ricard v. Williams*, 7 Wheat. 107: "The law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful."

We can see no reason why a stranger may trespass upon a mining claim held only by actual possession, any more than he can upon farming lands so held, where no attempt has been made to secure the government title. They are both valuable to the possessors, and, in one case as much as in the other, presumption of title follows possession.

In *Lebanon M. Co. v. Consolidated Rep. M. Co.*, 6 Colo. 381, it is said that, in possessory actions, proof of possession of a mining claim is always *prima facie* evidence of title. It is presumptive of the ownership declared on, and, until overcome by evidence of a superior character, is sufficient to maintain the action. The same doctrine is held in *Sears v. Taylor*, 4 Colo. 38, (decided in 1877.)

In *Campbell v. Rankin*, 99 U. S. 261, an action for damages to a mining claim, decided in 1878, the court said: "In actions of ejectment or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of legal title, and, as against a mere trespasser, is sufficient. 2 Greenl. Ev. 311. If this be the law when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior rights of possession under the acts of congress which respect such possession among miners."

We quote also from *Funk v. Sterrett*, 59 Cal. 614: "The act of congress in question (section 2324, Rev. St.) provides that 'the location must be distinctly marked on the ground, so that its boundaries may be readily traced.' Since the passage of that act, a party can show a right to the possession of a mining claim (where no patent has been issued) only by showing an actual *possessione pedis* as against a mere wrong-doer, or by showing a compliance with the requisites of the act of congress." See, also, *Belk v. Meagher*, *supra*, 288.

In *Noyes v. Black*, 4 Mont. 534, 2 Pac. Rep. 769, (decided in 1883,) plaintiffs attempted, by virtue of possession alone, to hold a mining claim against a valid location. It was held that they could not do so; but, said the court, "as against a stranger, possession is sufficient to maintain trespass or ejectment."

We conclude, from reason and authority, that in this action the presumptions arising from possession, and the rights given thereby, are the same as they would have been if the *locus in quo* had been farming or timber land.

We will now consider the different grounds of the motion in the light of the preceding principles and conclusions. Although, upon the evidence before us, we have no doubt that the screenings left in the stopes and chambers as waste rock by the Meadow Valley Company were a part of the mining claim located by plaintiff, (*Noble v. Sylvester*, 42 Vt. 149; *Brown v. '49 & '56 Quartz M. Co.*, 15 Cal. 158,) and that a patent from the government conveying the claim would carry the screenings, yet an opposite conclusion would not justify the nonsuit. Plaintiff was entitled to recover nominal damages, at least, for the trespass upon his possession, together with such other damages as were shown to have been suffered by reason of the acts alleged by way of aggravation. 2 Wat. Tresp. §§ 999, 1000, 1090; *Parker v. Griswold*, 17 Conn. 302;

North Noonday Co. v. Orient Co., 6 Sawy. 319, 1 Fed. Rep. 522; 1 Add. Torts, 322; *Empire G. M. Co. v. Bonanza M. Co.*, 7 Pac. Rep. 810.

As to the third ground, it is enough to say that plaintiff was not obliged, as against defendants, to prove any better title than actual possession gave him. It was not necessary for him to prove the discovery of any lode within the boundaries of his claim prior to location. In a word, in order to make a *prima facie* case against defendants, having shown possession, plaintiff was not obliged to prove a valid location. Defendants were not in position to assail plaintiff's title. It was no answer to plaintiff's proof of possession to say that the title was in the government, or a third person, and not in plaintiff. *Shewsbury v. Smith*, 14 Pick. 302, par. 1; *Keane v. Cannovan*, 21 Cal. 305; *Branch v. Doane*, 18 Conn. 242; *Inhabitants of Barnstable v. Thacher*, 3 Metc. 242; *Hughes v. Graves*, 39 Vt. 359; *Williston v. Morse*, 10 Metc. 24; *Courchain v. Bullion M. Co.*, 4 Nev. 369. Besides, a location is made valid by the discovery of a lode at any time after the location, if such discovery is made before any rights are acquired in the same claim by another person. *North Noonday M. Co. v. Orient M. Co.*, 6 Sawy. 300, 1 Fed. Rep. 522; *Zollars & Highland Chief Con. M. Co. v. Evans*, 2 McCrary, 43, 5 Fed. Rep. 172.

A sufficient answer to the fourth ground has already been made; that is to say, there was no evidence that there had ever been a valid location of the Washington & Creole claim; but, in addition, what we first said in answer to the third ground is equally applicable here.

The fifth ground was without merit. Plaintiff was entitled to recover nominal damages in any event, and whether defendants could demand a deduction of reasonable working expenses depended upon facts that should have been left to and decided by a jury. We need not decide what would be the legal result if defendants converted the ores under a *bona fide*, but mistaken, belief that they had a right to appropriate them; especially if they had no fair reason in law to so believe. If they were willful trespassers, (a question for the jury,) no deductions were allowable for working expenses. In other words, in that case plaintiff was entitled to the enhanced value of the property taken. *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398; *Silsbury v. McCoon*, 3 N. Y. 381; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; 1 Suth. Dam. 716.

It would be manifestly improper for us to draw any conclusions from the evidence before us in relation to defendants' motives, but we are satisfied that, upon plaintiff's case in chief, it was the duty of the court to submit the question of damages to the jury.

The order of the court granting a nonsuit, and the judgment entered thereon, are reversed, and the cause remanded.

NEPPACH and others v. JORDAN.

(*Supreme Court of Oregon.* June 13, 1887.)

1. LANDLORD AND TENANT—RELATIONSHIP—NOTICE TO QUIT.

While a mere agreement to give a lease at a future date does not create the relation of landlord and tenant, or give to the party with whom it is made a right to the possession, yet, when the owner permits another to go into possession under an agreement for a lease, a tenancy is created between the parties which entitles the person in possession to notice to quit before the owner can sue for possession of the land.

2. SAME—NOTICE TO QUIT.

In Oregon, ordinarily 10 days' notice to quit is sufficient; but, where land is held for agricultural purposes, 90 days' notice is necessary (Misc. Laws Or. Code, § 11, subd. 2, § 13, p. 615) before an action of forcible entry and detainer can be brought.

3. FORCIBLE ENTRY AND DETAINER—CHARACTER OF POSSESSION—PROVINCE OF JURY.

In an action of forcible entry and detainer, it is error for the court to assume in its charge to the jury that defendant's possession was or was not with the consent of the plaintiff; that is a question for the jury to determine.

v.14p.no.6—23

E. O. Dowd, for appellant. *Chas. H. Hewitt*, for respondent.

LORD, C. J. This was an action of forcible detainer, commenced in a justice's court, and in which judgment was rendered for the plaintiff, and by the defendant appealed to the circuit court. A trial was had, and a verdict was found against the defendant of guilty, upon which judgment was rendered in favor of the plaintiff for the possession of the premises described in the complaint. From this judgment the defendant has appealed to this court. The error assigned relates to certain instructions given, and the refusal to give one asked and the substitution by the court of another in lieu thereof. Briefly, it may be said that it appears by the bill of exceptions that the evidence of the plaintiff tended to show that the defendant had entered into the possession of the premises without his consent, and without any lease or agreement, written or verbal, therefor, and had refused to deliver the possession of the premises after demand and notice to quit, and had said to the plaintiff that he would "defend the possession with the gun." On the other hand, the defendant, after denying the complaint, alleged affirmatively, and his evidence as disclosed by the bill of exceptions tended to show, that the plaintiff had verbally agreed to give him a written lease for the premises for five years for agricultural purposes; and that he consented if he (the defendant) could make arrangements with one Pike, who was then in possession of the premises under a lease which expired within a month, he might enter thereon, and that, in pursuance thereof, he effected such an agreement with Pike, and was in possession of the premises when Pike's lease expired and he quit the premises; but that the plaintiff had refused to make the lease as he had agreed. There was also evidence tending to show the character of his occupation, and the various things he did while thus occupying it, based on the expected or promised lease. It was admitted that 10 days before the commencement of the action the plaintiff had served a written notice upon the defendant, demanding the possession of the premises. This was after Pike's lease had expired, and the defendant was in the possession of the land.

It will be seen, then, that the plaintiff claimed that he was entitled to the possession of the premises when Pike's lease expired, as the defendant had occupied them without his consent for any purpose, agricultural or otherwise, and had refused to deliver the possession, and threatened to defend it; while the defendant claimed the facts to be as stated, and that his possession was with his consent and for agricultural purposes, and that, therefore, he was entitled to 90 days' notice instead of 10 days' notice as given. The theory of the defendant is that the relation of landlord and tenant existed between the plaintiff and himself. To create that relation, the defendant must have entered into the possession of the premises in subordination to the plaintiff's title, and with his consent, express or implied. A mere agreement for a lease does not create a tenancy, or give to the party with whom it is made a right to the possession, (*Billings v. Canney*, 57 Mich. 425, 24 N. W. Rep. 159;) but where the owner permits a party to go into possession under an agreement for a lease which he afterwards refuses to make, the case is different, and the relation of landlord and tenant does exist between the parties. In such case his possession is lawful until it is properly terminated. Our statute provides that an action for the recovery of the possession may be maintained in the case specified in subdivision 2 of section 11, when notice to quit has been served upon the tenant or person in possession, for the period of 10 days before the commencement thereof, unless the leasing or occupation is for the purpose of farming or agriculture, in which case such notice must be served for the period of 90 days before the commencement of the action. Misc. Laws Or. Code, § 18, p. 615. Subdivision 2 of section 11, referred to, provides that after a notice to quit, etc., "or without any written lease or agreement therefor," shall be deemed a case of unlawful holding by force. Now, the defend-

ant contends that the possession or occupation of the premises was with the consent of the plaintiff, and in subordination of his title, under a verbal promise or agreement with him to execute a lease for five years for agricultural purposes, which, subsequently to his occupation made in pursuance thereof, the plaintiff refused to make; and that he is therefore, within the purview of the statute cited, a tenant or person in possession or occupation of the lands for the purpose of agriculture, and entitled to 90 days' notice. The court charged the jury "that if they found that the defendant entered into possession of said premises without the consent of William Neppach, (the plaintiff,) when Neppach was entitled to the possession, then he would be a mere trespasser, and would not be entitled to but 10 days' notice, and it would make no difference whether the premises were agricultural lands or not." As the plaintiff was entitled to the possession of the premises upon the expiration of Pike's lease, unless he had given his consent to the occupation of the premises by the defendant, under the circumstances indicated, it would seem to follow if he had not given such consent, and the plaintiff had entered and held the possession when the plaintiff was entitled to it, that the defendant was a trespasser, and not entitled to the notice he claims. This is the effect of the instruction, and in this, we think, there was no error.

The court further charged the jury "that if they find the defendant entered into the possession of said premises without the consent of William Neppach, but through an arrangement with Pike before Pike's term expired, then he would be in lawful possession, but would be holding over under Pike's lease, and consequently would only be entitled to ten days' notice, and that it would make no difference whether the premises were agricultural lands or not." This instruction is based on evidence offered both by the plaintiff and the defendant. But the conclusion which it reaches, that the defendant in the case stated would be holding over under Pike's lease, and only entitled to 10 days' notice to quit, etc., is hardly correct, and is calculated to confuse and mislead. The defendant had no assignment of the Pike lease, and did not stand in his shoes. He simply arranged with Pike to enter into possession according to his verbal agreement with the plaintiff preparatory to the contemplated lease. Pike consenting, they thus occupied together, but, when Pike's lease expired, he quit the premises, and thus terminated his lease. The defendant, therefore, could not be holding over under that lease. The consent which the plaintiff gave the defendant to occupy was nugatory, unless Pike consented during his lease; but such consent was good until it was withdrawn, and attached when Pike's lease expired, and inured to the benefit of the defendant until his occupancy was lawfully terminated. For the defendant to have sustained the relation to the plaintiff as Pike holding over, he would have to have been the assignee of the Pike lease. If, therefore, he entered without the consent of the plaintiff, but simply went into possession with the assent of Pike, when the Pike lease terminated, and Pike vacated the premises, the defendant was not in lawful possession, or holding over under Pike's lease. But whether Pike would be entitled to 10 or 90 days' notice to quit, as a tenant holding over from the expiration of his lease, would depend on the fact whether the leasing was for the purpose of farming or agriculture; and as the defendant did not succeed by assignment to the Pike lease, but his rights depend on the consent of the plaintiff to make out the relation claimed to exist, his right in no way depended upon, or can be measured by, that lease. We think this instruction was error.

The next exception is in refusing to give this instruction: That "if the jury find that the defendant occupied the premises in question for agricultural or farming purposes, then said defendant would be entitled to ninety days' notice to quit the premises before the action of forcible entry and detainer could be brought;" and in lieu thereof instructing the jury that "if they find from the evidence that the defendant and William Neppach made an oral

agreement that said Neppach would make a lease in writing, demising the premises in controversy to the defendant for five years, at a rent of \$150 a year in advance, and in pursuance of that agreement, and with the consent of said William Neppach, the defendant entered into the possession of the premises, such possession was lawful until defendant's right to possession should be terminated in a lawful manner; and in that case William Neppach, though not bound to make a five years' lease, could not terminate the lawful occupation of the defendant, so created, without a notice to quit of ninety days; and if the jury find the facts as stated in this instruction, and further find that only ten days' notice to quit was given the defendant, then the verdict should be not guilty." Upon the assumption that the contemplated lease was for the purposes of agriculture as alleged, and the evidence tended to prove, this instruction is not only correct, but as favorable to the defendant as he could have asked. Nor is it understood that any particular complaint is made directly against it, but that it was not sufficient to exclude the instruction asked, or to take its place. The error in the instruction asked lies in assuming that the possession of the defendant, as against the plaintiff, was with his consent. That was a fact to be found before the jury could proceed to the consideration of the matter suggested in the transaction. The consent of the plaintiff was essential to create the tenancy; and when that is the fact in dispute, as here, the question whether the relation of landlord and tenant exists is for the jury. *Chamberlin v. Donahue*, 44 Vt. 57; *Rigge v. Bell*, 5 Term R. 471. But, for the reasons already suggested in the second instruction given and excepted to, the judgment must be reversed, and a new trial ordered.

PUTNAM v. PUTNAM and others.

(*Supreme Court of Arizona.* July 12, 1887.)

1. APPEAL—WHEN LIES—SUBSTANTIAL RIGHT.

Where a bill to settle accounts between partners is filed, and creditors intervene, an order determining that certain chattels levied upon were partnership assets, affects a substantial right, and may be appealed from. An order refusing to dissolve a temporary injunction is not such an order.

2. SAME—REVIEW OF FACTS.

Where there is no motion for a new trial, findings of fact are conclusive.

(*Syllabus by the Court.*)

Appeal from district court, Pinal county.

G. H. Oury and Edwards & Chalmers, for appellant. *H. B. Summers and Goodrich, Smith, Street & Goodrich*, for appellee.

BARNES, J. The sheriff of Pinal county, in order to satisfy execution in his hands against C. D. Putnam, levied upon certain cattle on the range as the property of said defendant, and on the sixth of April, 1886, gave notice of sale of all the right, title, and interest of said defendant therein. Thereafter, but before the satisfaction of said execution, J. D. Putnam filed this bill, alleging that himself and said defendant were co-partners, doing business in the firm name of Putnam Bros., grazing cattle at large on the Gila and San Pedro rivers; that the cattle were branded "P;" that defendant had become indebted on account of transactions foreign to the partnership, and that judgment had been recovered against him. The above levy and sale was alleged. He alleged that the partnership was indebted to him in a large sum. He prays for a dissolution of the partnership, for an accounting, and for a distribution of the assets. He made the sheriff a party, and asked that he be enjoined from proceeding under execution, and a temporary injunction was issued restraining proceedings until further order of the court. The judgment creditors intervened, and denied the partnership. Issues were joined on the original bill of complaint and the bill of intervention. The cause was tried

by the court without a jury, on the issue denying the partnership, and the court found that the partnership existed as alleged and that the property levied upon was partnership property. The said sheriff and judgment creditors moved to dissolve the injunction theretofore issued, which said motion was overruled. The sheriff and the judgment creditor gave notice of appeal from the judgment, finding the issues as above, and from the order refusing to dissolve the injunction. There is no final decree settling the partnership, and distributing the assets, and determining the rights of all the parties.

By the act of February 14, 1879, section 349 of the practice act of this territory was amended so as to provide that appeals may be taken from a final judgment in the district court, and from an order granting or refusing a new trial, *or which affects a substantial right in an action or special proceeding*. The words in italics are new. The appeal in this case is attempted to be prosecuted from two orders. One is the order which determines the issues raised by the intervenors and the sheriff in denying that a partnership existed between the two Putnams, and in asserting that the cattle levied upon were the separate property of the defendant in execution. This order, though not a final judgment, does affect a substantial right, and is such an order as may be appealed from. See *Gurney v. St. Paul*, (Minn.) 80 N. W. Rep. 661; *Fisk v. Henarie*, 13 Pac. Rep. 760. The court found, as a matter of fact, that the two Putnams were partners, and that the property levied upon was and is partnership property. No motion for a new trial of these issues was made, and the findings must be conclusive. We cannot disturb them. Comp. Laws, §§ 2630, 2631. It is the purpose of a motion for a new trial to enable the court to look into the sufficiency of the evidence to sustain the findings.

The other order attempted to be appealed from is the order refusing to dissolve the temporary injunction. This was by no means a final judgment, nor was it an order affecting a substantial right. The object and purpose of the injunction was to hold the property until the final decree, which would settle all legal and equitable rights of all the parties before the court. The parties were before the court, and this property was the subject-matter of controversy. One of the original subjects of equity jurisdiction is the settlement of partnership matters, and it is familiar principle that, where a court of equity once acquires jurisdiction of both the parties and the subject-matter of a controversy, it has jurisdiction to settle all legal as well as equitable rights. This had not in this case yet been done. The cause was undisposed of. Until final disposition it was the duty of the court to retain control of this property. In doing so no substantial right was affected. It was a mere interlocutory order, in aid of the procedure of the cause. Before the court makes a final decree in this cause the court must ascertain all the assets of the partnership; state the account between the partners; ascertain the debts of the partnership, if any. The assets must then be disposed of, by paying the partnership debts, of the balance distributing to the plaintiff his portion of the assets. The court may then determine what shall then be done with the portion of the debtor partner. All these are matters for final determination in this case.

The judgment of the court finding the partnership and ownership of the property is affirmed. There can be no appeal from the order refusing to dissolve the temporary injunction.

WRIGHT, C. J., PORTER, J., concur.

HERRLICH v. McDONALD. (No. 12,161.)

(Supreme Court of California. June 24, 1887.)

1. APPEAL—BOND—MISTAKE IN TITLE OF CASE.

An undertaking on appeal, in due form of law, is not rendered ineffective by a mistaken indorsement of the title of the case.

2. SAME—NOTICE OF APPEAL—MISNOMER.

The true title of a cause was *Julia Herrlich v. Maggie McDonald*. The notice of appeal was entitled *Julia Herrlich v. H. M. McDonald*. Held that, the notice being sufficient in other respects, it was not vitiated by the incorrect title.

3. SAME—TRANSCRIPT—CORRECTNESS.

As against the certificate of the clerk, the mere statement of counsel, on a motion to dismiss the appeal, that errors exist in the transcript, does not establish the fact.

In bank. Appeal from superior court, San Francisco county.

On motion to dismiss appeal.

W. B. Tyler, for McDonald, appellant. *Chas. F. Hanlon*, for Herrlich, respondent.

MCKINSTRY, J. The order of the superior court appealed from was made and entered February 18, 1887. Notice of appeal was filed and served April 14th, and the undertaking filed April 18, 1887. A transcript on appeal, duly certified, was delivered by the clerk below to the appellant on the twenty-fifth day of May, served on respondent on the same day, and filed in this court on the twenty-sixth May, 1887, within 40 days after the appeal was perfected. Respondent moved to dismiss the appeal on the ground, among others, that the transcript was *not* filed within the 40 days. On the day of the service on him of the paper purporting to be a copy of the transcript, the attorney for respondent notified appellant that he refused to certify to the transcript as correct, in his notice pointing out certain alleged errors and mistranscriptions of the record or papers on file. But, conceding there is any law or rule which requires the appellant to serve on the adverse party a copy of the transcript to be filed, it has not been made to appear to us, either by additional certificate of the clerk below or otherwise, that the alleged errors or mistranscriptions exist, (unless it be in the *notice of appeal*.) Doubtless the respondent is entitled to have filed here, at the expense primarily of the appellant, a correct transcript of the record below. But it is not our province now to indicate how it can be obtained, proved, and substituted for the transcript actually filed, if the latter is incorrect. As against the certificate of the clerk, the mere statement of counsel that errors exist does not establish the fact. From an examination of the transcript it would seem that some of the papers printed in it are in no manner identified as having been used on the motion. But if the consequence of such omission shall be that the court here will refuse to look at such papers when the appeal is heard on the merits, the want of identification of some of the papers will not justify a dismissal of the appeal. Moreover, the absence of such identification is not urged by counsel for respondent as a reason for dismissing the appeal.

Respondent further contends: *First*, that no appeal has been taken; *second*, that no notice of appeal was filed or served. In the certificate attached to the transcript on file, the clerk certifies that an undertaking on appeal, in due form of law, was properly filed. In the additional certificate, on which the motion to dismiss is based, he certifies that the undertaking filed was indorsed "*Julia Herrlich v. H. M. McDonald*." The undertaking, if in due form of law, (and no other objection has been made to it,) was not rendered ineffective by a mistaken indorsement. The copy of the notice of appeal, as printed in the transcript, is headed "Title of Court and Cause." The certificate of the clerk, presented on hearing of the motion to dismiss, shows that the notice of appeal filed below was entitled *Julia Herrlich v. H. M. McDonald*. But the notice was signed by the "attorney for the defendant;" the subscriber being the attorney for the defendant in the action *Julia Herrlich v. Maggie McDonald*. It was filed in the court in which that action had been pending, and was served on the attorney for the plaintiff therein, who acknowledged service, "reserving all objections." The notice refers to an order made February 18, 1887, refusing to recall an execution, etc. The transcript

contains a copy of an order entered on the day last named in the action *Julia Herrlich v. Maggie McDonald*, denying the motion of defendant, counsel for plaintiff herein being present, to vacate and set aside an execution. The reckless inexactitude displayed in the preparation of the papers connected with this appeal is not to be commended. We cannot say, however, but that the notice described the order in such manner as clearly to identify it, and so to inform the respondent of the particular order appealed from.

Motion to dismiss the appeal denied, without prejudice.

We concur: SEARLS, C. J.; SHARFSTEIN, J.; MCFARLAND, J.; TEMPLE, J.; PATTERSON, J.; THORNTON, J.

72 Cal. 535

HEGARD v. INSURANCE CO. (No. 11,073.)

(Supreme Court of California. June 22, 1887.)

APPEAL—REHEARING.

Under Code Civil Proc. Cal. § 45, providing that "every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments," a rehearing will not be granted in a case decided in department, and afterwards in bank.

In bank. Appeal from superior court, Plumas county.

Action on a policy of fire insurance. On second petition for rehearing. For the decision in department, see 11 Pac. Rep. 594, and for that in bank, 14 Pac. Rep. 180.

E. W. McGraw, for appellant. *W. W. Kellogg* and *R. H. F. Vartel*, for respondent.

BY THE COURT. This cause was heard and decided in department, after which a rehearing in bank was ordered, where the cause was again heard and decided. Appellant now files a second petition for a rehearing. The petition is denied for the reasons—*First*, that an examination of the record shows no sufficient cause therefor; and *second*, that the constitution does not provide for a rehearing of causes decided in bank, and the statute (Code Civil Proc. § 45) expressly provides that "every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments," etc. Whatever may be the inherent right of the court, independent of statutory provision, to amend, alter, modify, or set aside its judgments,—a question upon which we express no opinion,—we think it clear that the right to petition for a rehearing should not be recognized in cases decided in department and afterwards in bank.

72 Cal. 532

PEOPLE v. ECKMAN. (No. 20,298.)

(Supreme Court of California. June 24, 1887.)

1. CRIMINAL PRACTICE—EVIDENCE.

At a trial for burglary, a witness, in answer to certain preliminary questions as to whether the defendant made certain statements with reference to the burglary voluntarily, stated that defendant, speaking to him, "said he would plead guilty." Held, that a refusal to strike out the words quoted is not ground for setting aside a conviction.

2. SAME—EVIDENCE—CHARACTER.

A certificate of the discharge of the defendant from the United States army for disability, which certifies his character to be good, is not admissible in evidence, at a trial for burglary, to show the good character of the defendant.

3. SAME—CIRCUMSTANTIAL EVIDENCE—INSTRUCTION.

At a trial for burglary, an instruction which, after directing the jury that circumstantial evidence must exclude to a moral certainty every other hypothesis than that of guilt, states that, "to convict upon circumstantial evidence, it should be such as to produce nearly the same degree of certainty as that which arises from direct testimony," is not erroneous; following *People v. Cronin*, 34 Cal. 201.

In bank. Appeal from superior court, San Luis Obispo county
Indictment for burglary.

V. A. Gregg, for appellant. G. A. Johnson, Atty. Gen., for respondent.

McFARLAND, J. The defendant was convicted of burglary in the second degree, and appeals from an order denying him a new trial, and from the judgment rendered in the case.

1. Appellant contends for a new trial for error in refusing to strike out certain testimony of the witness for the prosecution, McLeod, who was the sheriff of the county. The witness was asked if he had heard the defendant make any statements in reference to the burglary, and, if so, were these statements made voluntarily. He answered that he had, and that they were made voluntarily. Thereupon defendant's attorney "requested the privilege of asking the witness *preliminary* questions, to see if the statement made by the defendant to the witness was voluntary; and the court granted the request." The preliminary question having been asked, the witness replied: "I told him probably, if he was guilty, and pleaded guilty, he would probably get a shorter sentence. Then he told me he wanted to see the district attorney. I went down and brought him up into the office. Mr. Eckman came into the office, and made the statement that he would plead guilty voluntarily." Defendant's attorney then said: "I ask that that be stricken out,—that he said he would plead guilty." The court said, "I deny the motion;" and the attorney for defendant said, "We except." This is all the record shows upon the subject.

Technically, the testimony was not before the jury at all. It was addressed to the court upon the preliminary examination. In the next place, a party moving to strike out the answer of a witness must specify his objection to it in like manner as he is required to specify the grounds of his objections to a question. *People v. Frank*, 28 Cal. 519; *Sill v. Reese*, 47 Cal. 341. And no grounds of objection were stated here at all; not even the hackneyed one of "irrelevant and incompetent." But if such objections to the point here sought to be made ought to be disregarded in a criminal case, the court did not abuse its discretion or commit a fatal error in denying the motion to strike out. The sheriff had not charged defendant with being guilty; had not claimed to have evidence against him; had not threatened him in any way. He did not tell him, as was told the defendants in *People v. Johnson*, 41 Cal. 452, "there was no use in fooling about it; they may as well confess, as there was evidence enough to convict them." Moreover, the statement testified to was not a confession. Under the circumstances we think that it would be going too far to reverse the case for the denial of the motion, even if defendant's counsel had stated the grounds upon which he made it.

2. The second ground of error assigned by appellant is the refusal of the court to allow in evidence, as proof tending to show the good character of the defendant, a certificate of the discharge of the defendant from the United States army for disability, which also certified his character to be good. It does not appear what particular traits of character were certified to in the document excluded; but we do not know of any rule which, upon the general issue of character, allows the introduction of written declarations, official or otherwise, made by third parties out of court. We think, therefore, that this point is not tenable.

3. The appellant makes several objections to parts of the instructions given by the court to the jury. The most serious is the objection to part of instruction No. 3. This instruction is on the subject of circumstantial evidence; and, while stating that the circumstances must exclude to a moral certainty every other hypothesis than that of guilt, it includes this language: "To convict upon circumstantial evidence, it should be such as to produce *nearly* the same degree of certainty as that which arises from direct testimony." This

instruction was given at the request of the district attorney; and it may be remarked that many prosecuting officers seem to be moved by some sort of fascination to travel along the very edge of the precipice of error, when they could go just as effectively, and much more safely, along the center of the beaten road. This hazardous language, probably, had no effect whatever on the jury, and yet its propriety is extremely doubtful. It happens, however, that a good many years ago this court decided that a similar instruction was not erroneous; holding that "it was but another mode of telling the jury that although, as a general rule, circumstantial evidence, in the nature of things, may not be so entirely satisfactory proof of a fact as the positive testimony of credible eye-witnesses, yet they must convict if they were satisfied of the guilt of the defendant to the exclusion of rational probabilities." *People v. Cronin*, 34 Cal. 201. We would not be warranted in overruling that case on the point under discussion, and therefore hold that a new trial should not be granted in the case at bar on account of said instruction.

There are some other exceptions to the instructions, but they are not, in our opinion, well taken. The law of the case was, we think, properly and fairly given to the jury.

Judgment and order affirmed.

We concur: PATERSON, J., THORNTON, J.

We concur in the judgment: SEARLS, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

(73 Cal. 61)

TUBBS v. WILHOUT and others. (No. 11,735.)

(*Supreme Court of California. July 1, 1887.*)

1. PUBLIC LANDS—SWAMP LANDS—VESTING OF TITLE.

The act of congress of September 23, 1850, known as the "Swamp-Land Act," is a grant in *presenti* of the lands determined to be of that character at that date.

2. SAME.

The fourth section of the act of congress of July 23, 1866, entitled "An act to quiet land titles in California," provides that where township surveys have been made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify to the state of California as swamp and overflowed all land represented on such approved plats within one year from the passage of this act, or within one year from the return or approval of such plats. *Held*, that the title to such lands vested upon the approval of the plats, and not from the date of the commissioner's certificate.

Department 2. Appeal from superior court, San Joaquin county.

J. B. Hall, for appellants. *J. H. Budd*, for respondent.

THORNTON, J. This is an action of ejectment. The plaintiff's title is founded on a patent of the United States issued on homestead entry commuted to a cash entry, which entry was made on the eighth of May, 1873. On this last-named day whatever right the plaintiff had, attached. The defendants' title rests on a patent of the state of California, issued to one Joseph Kile on the fifth day of August, 1865, for the land in controversy, purchased by said Kile from the state on an application to purchase made to the proper state authorities in the month of August, 1864. The plaintiff claims that the land is and was dry land on the twenty-eighth of September, 1850, the date of the passage of the swamp-land act, while defendants (who are the executors of Kile) claim that it was swamp and overflowed land at the date just above mentioned, and that it was conclusively determined to be such before any right of plaintiff attached.

It appears from the findings that in April, 1864, a plat of the survey of the township in which the land in controversy is situated was approved by the

United States surveyor general for California. On this approved township plat the land in suit was represented to be swamp and overflowed. On the twenty-third of July, 1866, an act of congress entitled "An act to quiet land titles in California," was passed. The fourth section of that act provides, among other things, as follows: "That in all cases where township surveys have been or shall hereafter be made under the authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the general land-office to certify over to the state of California as swamp and overflowed all the lands represented as such upon such approved plats within one year from the passage of this act, or within one year from the return and approval of such township plats."

It must be considered as settled law that the first section of the swamp-land act is a grant *in presenti* to each state of the swamp and overflowed lands within its limits. "The words of the first section of the act," say the supreme court of the United States in *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, by FIELD, J., "'shall be and are hereby granted,' import an immediate transfer of interest, not a promise of transfer in the future." The provision made for a patent in the second section is for the purpose of furnishing to the grantee documentary evidence that the land was swamp and overflowed, and a further assurance of title. See *Owens v. Jackson*, 9 Cal. 322; *Summers v. Dickinson*, Id. 554; *Kernan v. Griffith*, 27 Cal. 87; *Sacramento Val. Rec. Co. v. Cook*, 61 Cal. 342; *Lux v. Haggin*, 10 Pac. Rep. 674; *French v. Fyan*, 93 U. S. 169; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, and cases cited.

To make the grant perfect, the lands must be identified as of the character granted. When the land was clearly swamp and overflowed, it could be clearly identified as such by parol evidence. In most cases such identification from the character of the lands could be made without difficulty. In some instances it might not be so easily done, and congress provided in the act of 1850 for a mode of identification by the secretary of the interior. This action by the secretary of the interior, in identifying the land as swamp and overflowed, is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is submitted; and, when the secretary has neglected or failed to make the identification, it is competent for the state or its grantees, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object, as by a resort to parol evidence. *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985, and cases cited. But congress has furnished other modes of identification, and one of those is set forth in the portion of the fourth section of the act of 1866 above quoted. *Wright v. Roseberry, supra*.

That the township plat was approved in this case long before any right of the plaintiff attached clearly appears from the findings. A copy of the plat approved by the United States surveyor general for California was filed in the United States district land-office at Stockton, in which district the land in suit was included, on the first of July, 1864. This copy was afterwards, on or about July 15, 1865, withdrawn from the office by the surveyor general, above mentioned, by order of the commissioner of the general land-office, and was never returned to that office, but an exact copy of it was subsequently filed in the United States land-office for the district then embracing, with other lands, the land in controversy. We think it clear from the above that the plat must be considered as approved at least as soon as when first filed in the land-office in Stockton.

From the day of filing an approved township plat in the proper land-office the time for making applications to enter and purchase commences to run. From such date rights may attach in favor of those applying to enter and purchase under the laws of the United States, and certainly such rights would not be allowed to attach unless upon a township plat approved by the proper au-

thority. Under these circumstances the township plat may be considered as approved at latest as of July 1, 1864.

Under such a state of facts, what effect on the title to this land has the above-quoted portion of the act of July 23, 1866? We are of opinion that the plat of the survey of the township, including the lot in controversy approved by the United States surveyor general for California, was conclusive between the state and the United States, and vested the title in the state of California as of the twenty-eighth of September, 1850, the date of the passage of the swamp-land act.

This conclusion is, in our opinion, sustained by the recent decision of the supreme court of the United States in *Wright v. Roseberry*, above cited. This case went to the court above mentioned by writ of error to this court. The action was ejectment. The plaintiff contended that by virtue of the provisions of section 4 of the act of July 23, 1866, there having been an approved plat of survey, the title to the land in suit, claimed by plaintiff to be swamp and overflowed land, vested in the state, though the commissioner of the general land-office had never certified the land over to the state, as required by the act above mentioned. The defendants, who claimed as pre-emptors under the laws of the United States, and to whom patents had been issued by the United States upon declaratory statements made in 1864, combatted this view, and the state court sustained the contention of defendants, holding that until the commissioner had made the certificate required by the act the title did not vest in the state. The supreme court of the United States held that this was erroneous, and for this error reversed and remanded the cause. Its ruling is that the township plat having been returned to the general land-office after the patents to the defendants were issued, was not conclusive against the United States that the land was swamp and overflowed; but, if the township plat had been approved before the patents were issued, it would have been conclusive that the lands sued for were of that character, and that the certificate of the commissioner is only an official recognition that the lands are of the character designated, and of the completeness of the segregation. We understand this ruling of the highest court of the United States to be that, when the plat of the township representing lands upon it to be swamp and overflowed is approved, the title to such land vests in the state, though the commissioner has not made the certificate required by the act.

Though, in the case of *Wright v. Roseberry*, the plat of the township survey was required, under another section of the act of 1866, to be approved both by the United States surveyor general for California and by the commissioner of the general land-office, still, when it was approved, the same effect resulted; that is to say, when the plat of survey with the representation on it required by the act had been approved, the title to the land designated on it as swamp and overflowed vested in the state. In the case before us the approval was only required to be made by the United States surveyor general, and when this was done the result followed as above pointed out. In this view we think the ruling of the supreme court in *Wright v. Roseberry* sustains the conclusion here reached. In this cause nothing had occurred by which the plaintiff could have acquired a semblance of right until long after the plat of the township survey had been approved, and the title had vested in the state. Therefore, in accordance with the ruling of the United States supreme court, when the patent herein was issued, the United States had nothing which it could grant to the plaintiff. The patent to the plaintiff was, then, issued without authority of law, and, as against the defendants and their testator, was of no validity whatever.

In the conclusion here reached we have followed the decision of the supreme court in *Wright v. Roseberry*, overruling the decision of this court in the same case. As the question involved is a federal one, depending on the construction of an act of congress, we are bound to follow the decision of the

federal court on the points in controversy, and to disregard the decision of this court on the same points.

There is nothing said in *Heath v. Wallace*, 11 Pac. Rep. 842, which is not in accord with what is said herein. In that case the land was not represented on the approved township plat as *swamp and overflowed*, but "*subject to periodical overflow*." We held that this was not representing the land as swamp and overflowed. There are in this state, and it may be presumed in every other state, lands which are subject to periodical overflow, but which are eminently fit for cultivation, and on which valuable crops of cereals are grown. Such lands are not swamp and overflowed, as has been held by this court. See *People v. Morrill*, 26 Cal. 336; *Keeran v. Griffith*, 31 Cal. 461; *Keeran v. Allen*, 33 Cal. 542.

We add here that it appears from the findings herein that a hearing was in 1874 ordered by the commissioner of the general land-office as to whether the land involved in this case was or not swamp and overflowed, and that such hearing was subsequently had, on which it was determined that it was not swamp and overflowed. But the order for a hearing was made after the title had vested in the state, and therefore the decision of the federal land department, that the land was not swamp and overflowed, was of no validity whatever. Had any right been claimed by a pre-emptor prior to the approval of the township map, such hearing might have been ordered and had by the commissioner, but certainly this cannot be so when all right had passed from the United States to its grantees. The title to the land, under such circumstances, had passed entirely beyond the control of the United States land department, and beyond the power of the federal government, unless the title had been procured by fraud, to redress which resort must be had, not to the land department, but to the judicial courts.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment for the land in suit, and the rents and profits, in favor of the defendants. So ordered.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(73 Cal. 68)

CULBERTSON v. KINEVAN. (No. 12,046.)

(Supreme Court of California. July 1, 1887.)

1. TURNPIKES—EXCESSIVE TOLL—PENALTY.

It is only when a toll-gatherer demands and receives more than he is authorized to collect that he incurs the penalty prescribed by the California act of May 12, 1853, providing (section 31) that every toll-gatherer who demands and receives from any person more than he is authorized to collect shall forfeit to the person aggrieved \$10 for each offense.

2. SAME.

The California act of April 28, 1857, amending the act of May 12, 1853, which authorizes the formation of corporations for the construction of plank and turnpike roads, provides that the supervisors of the counties through which such roads pass shall fix the rate of tolls from year to year; and that any company which takes toll, "except as may be fixed and prescribed by such * * * supervisors," shall forfeit its corporate rights. Held, in a case where the county had not fixed any rates since 1869, that the failure of the supervisors to fix rates for 1883 did not subject a toll-gatherer who then took toll at the rates prescribed in 1869 to the penalty denounced by the act of 1853.

Department 2. Appeal from superior court, Santa Barbara county; JOHN HUNT, Judge *pro tem*.

W. C. Stratton, for plaintiff. Fernald, Cope & Boyce, for Kinevan, respondent.

SHARPSTEIN, J. This action is brought under section 31 of "An act to authorize the formation of corporations for the construction of plank and turnpike roads," passed May 12, 1853, which provides that every toll-gath-

ever who demands and receives from any person more than he is authorized to collect, for each offense forfeits the sum of \$10 to the person aggrieved.

The case was tried by the court, which found that in 1868 a corporation called the Santa Barbara and Santa Ynez Turnpike Road Company, to continue for 20 years, was formed under the act of the legislature of May 12, 1853, and that said corporation, in 1869, constructed and opened its road to the public for travel, and it has been kept up and used for that purpose ever since; that for more than 15 years the defendant has been and still is the authorized toll-gatherer on said road; that on the thirtieth day of November, 1883, the plaintiff passed over said road with two horses and a wagon, and at the "San Marcos Pass," or "Pat's Station," so called, at the toll-gate on Santa Ynez mountains, on said road and in the county of Santa Barbara, paid to the defendant, as toll-gatherer of said road, \$1.50 for toll for passing over said road, without any objection whatever; that plaintiff knew then, and had long known, the toll-road, and had frequently passed over it before, and had paid the accustomed rate of toll according to the rate of toll which he saw posted up at the gate; that defendant then appeared at the toll-gate, and received said toll as toll-gatherer for said corporation, as he had been accustomed to do in all other cases, and in the belief that he had good right to collect and receive the same; that said sum so paid by plaintiff for toll was the exact amount which plaintiff and others had theretofore paid defendant for toll for the same team, to-wit, two horses and a wagon, and the same amount which defendant had collected for such teams during all the time he had been such toll-gatherer on said road, and the exact amount prescribed and fixed by the board of supervisors of Santa Barbara county for toll on said road, by its order made on the fourth day of August, 1869, and entered on the minutes of said board on that day; that no other order relating to any of the matters mentioned in said order, or to the tolls to be charged by said turnpike company, was passed by said board of supervisors before the commencement of this action, to-wit, on the twenty-eighth day of September, 1884. And, as a conclusion of law from the foregoing facts, this court finds, separately, that no action has accrued for a forfeiture, and that plaintiff is not entitled to recover any penalty from defendant in this action, and this cause ought to be dismissed, and that defendant recover his costs and disbursements in this behalf laid out and expended; and it is hereby so ordered and adjudged, and that judgment be entered in this court accordingly. Judgment was so entered, and this appeal is from the judgment.

The appellant insists that the judgment is not justified by the findings, and cites an act to amend the act of 1853 above referred to, approved April 28, 1857, which provides "that such companies as have already organized, or that may hereafter organize, under the provisions of this act, and the act of which this is amendatory, shall only be allowed to put up and keep such toll-gates, demand, collect, and receive such tolls, as may be fixed and prescribed by the board of supervisors of the county or counties through which such road or roads may pass; such gates and tolls to be fixed and prescribed by such board of supervisors as aforesaid from year to year. And if any company or companies shall violate the provisions of this act, by putting up any toll-gate or gates, or by collecting any toll or tolls, except as may be fixed and prescribed by such board of supervisors, as aforesaid, such company or companies shall forfeit all their corporate rights in such road or roads, turnpike or turnpikes, bridge or bridges, ferry or ferries, to the counties in which the same may be situated. Such company or companies may be prosecuted for such violation as aforesaid before any justice of the peace in any township through which said road passes." St. 1857, p. 280. It is claimed that the failure to find that this law in all respects had been complied with, and the finding that, in some respects, it had not been, is fatal to the judgment.

It is apparent at a glance that the penalty prescribed by that act is not the

one sued for in this action. The statute does not make the toll-gatherer liable for acts or omissions of the board of supervisors, or of the corporation which employed him. It is when he demands and receives more than he is authorized by law to collect that he becomes liable to the party aggrieved. In this case it is claimed that the corporation was not entitled to demand and receive anything, and, therefore, that any sum whatever was more than the toll-gatherer was authorized to collect. We think section 81 of the act of 1853 does not apply to such a case, but to a case where the law authorizes the collection of some amount of toll, and the toll-gatherer demands and receives *more* than that amount. If the defendant in this case was authorized to collect anything, he collected no more than he was authorized to collect. If he was not authorized to collect anything, and did collect something, it would not be construing the word "more" according to the context and the approved usage of the language to say that he collected *more* than he was authorized to collect. It is only when a toll-gatherer demands and receives more than he is authorized to collect that he incurs the penalty prescribed. In this case it is not found that anything was *demanded* by the defendant. The finding is that plaintiff paid, and the defendant received, the amount of the toll, and that the plaintiff paid that amount "*without any objection whatever*," as he had frequently done before. The court does not distinctly find that the defendant made no demand, but the facts found negative the idea that any was made; and, if none was made, no penalty was incurred, for there must be a demand, as well as a receipt, of toll to constitute the offense. Judgment affirmed.

We concur: MCFARLAND, J., THORNTON, J.

73 Cal. 8

LUCCO v. BROWN and others. (No. 11,839.)

(Supreme Court of California. June 29, 1887.)

JUDGMENT—VALIDITY—DEFECTIVE SUMMONS.

In California an injunction will not issue to restrain a levy of execution on a justice's judgment docketed in the superior court, when the relief sought is based on the ground that the judgment is void because the summons was fatally defective. Under the law of that state the judgment debtor has ample remedy at law, by motion in the justice's court, to arrest the execution.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Thos. J. Arnold, for Lucco, appellant. Edward J. Linforth, for respondents.

BELCHER, C. C. This action was commenced in the superior court of San Diego county to obtain an injunction restraining the defendants "from levying upon or attaching plaintiff's property, or any part thereof," under an execution issued upon a judgment rendered against plaintiff in a justice's court in Tuolumne county.

The facts set up in the complaint may be briefly stated as follows: On the fourteenth day of August, 1885, the defendant Brown filed a complaint in a justice's court in the county of Tuolumne against the plaintiff here and two other persons, in which he alleged that the defendants were indebted to him in a certain sum of money for labor and services done and performed by plaintiff for defendants at their special instance and request. On the twenty-sixth of September following, Brown caused a summons to be issued by the justice upon his complaint, which was served upon plaintiff in the city and county of San Francisco, where he then, and has ever since, resided, and was never served upon him in the county of Tuolumne. The summons so served was defective and void, because there was not attached to it a certificate under seal by the county clerk of the county of Tuolumne, to the effect that the person issuing

the same was an acting justice of the peace at the date of the summons, as required by section 849 of the Code of Civil Procedure. On the ——— day of November, 1885, Brown caused the default of plaintiff for not answering to be entered in the cause, and thereupon judgment was made and entered against him for the sum of \$252.74. Thereafter Brown caused an abstract of the judgment to be filed in the office of the county clerk of the county, and an execution thereon, under the seal of the superior court, to be issued to the sheriff of San Diego county. The defendant Bushyhead is the sheriff of San Diego county, and the execution so issued has been placed in his hands, and under it he is about to levy upon, advertise, and sell the plaintiff's property, situate in his county. It is then alleged that all the allegations in the complaint filed in the justice's court, so far as the plaintiff here is concerned, are untrue; that Brown never at any time performed any work or labor for plaintiff, at his instance or request or otherwise, and that plaintiff is not and was not, either individually, or in connection with his co-defendants, indebted to Brown in the sum named in his complaint, or in any sum of money whatever, and that he never agreed to pay him the sum alleged in his complaint, or any other sum whatever; that plaintiff never had any notice or knowledge of the commencement of the action in the justice's court, (except from the service of said void summons upon him;) or of the default taken, or of the judgment rendered therein, or of the issuance of the execution, until demand was made upon him by defendant Bushyhead, for payment and satisfaction of the same; and that the levy upon and sale of the plaintiff's property, under the execution, will cloud his title and do him irreparable injury. This action was commenced on the ninth day of February, 1886, and on the same day a temporary injunction was granted. The defendants demurred to the complaint, and, on coming on to be heard, their demurrer was sustained and the injunction dissolved. The plaintiff excepted to the rulings of the court, and now prosecutes this appeal therefrom.

Assuming, as claimed by the appellant, that the judgment rendered against him in the justice's court was void, for the reason that the court never acquired any jurisdiction of his person, still it does not follow that he can maintain this action. The same question was involved in *Comstock v. Clemens*, 19 Cal. 77, in which the court, by FIELD, C. J., said: "The plaintiff seeks to enjoin the sale of certain personal property under an execution issued upon a judgment recovered against him in a justice's court, and bases his claim for relief upon the ground that the court never acquired any jurisdiction of his person. He avers that the summons issued in the action, in which the judgment was entered, was never served upon him. If this averment be true, he has an effectual remedy by motion to the court to set the execution aside. The justice possesses the power at all times to arrest process issued upon judgments entered in his docket which are void." And in that case the judgment in favor of the defendants was affirmed.

The same question was again presented in *Gates v. Lane*, 49 Cal. 266. There the plaintiffs sought to enjoin the enforcement of an execution issued on a judgment rendered against them in a justice's court, upon the ground that the summons had never been properly served upon them. The defendants demurred to the complaint, and this court said: "The demurrer was properly sustained. If the judgment obtained against the plaintiffs was void on the face of the proceedings in the justice's court for want of jurisdiction, as the complaint avers it to have been, these plaintiffs had an adequate remedy by motion in that court, to arrest the execution and stay further process on the judgment; citing cases. Nor did the fact that the execution was issued by the county clerk, on a transcript of the justice's docket filed in his office, obstruct the remedy by motion in the justice's court. Though issued by the clerk, the execution was subject to be recalled by the justice who rendered the judgment."

In *Ede v. Hazen*, 61 Cal. 360, it is said: "As appears upon the face of their complaint, the plaintiffs discovered within forty days after the entry of the judgment, and within six months after the entry of their default, all the facts upon which they now base their right to have it set aside; and if it be conceded that, upon those facts, they are entitled to the relief they now claim, it is clear that they had a speedy, complete, adequate, summary remedy in the same proceeding, and that the complaint shows no circumstances which entitle them to maintain a separate and distinct equitable action."

Upon the authority of the foregoing cases we think the demurrer was properly sustained, and that the order dissolving the injunction should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

LUCCO v. BUSHYHEAD and others. (No. 11,840.)

(Supreme Court of California. June 29, 1887.)

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Thos. J. Arnold, for Lucco, appellant. Edward J. Lin, for respondents.

BELCHER, C. C. There is no material difference between this case and the case of *Luco v. Brown*, ante, 366. Upon the authority of that case the order dissolving the injunction should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

73 Cal. 9

ROSENTHAL and others v. LEVY, Assignee. (No. 12,016.)

(Supreme Court of California. June 29, 1887.)

APPEAL—FINAL ORDER—INSOLVENCY.

An order directing an accounting by the assignee of an insolvent debtor, who has qualified, but who has failed to render an account within the three months prescribed by section 29 of the California insolvent act, is not a final order, and is not appealable.

Department 1. Appeal from superior court, Nevada county.

Complaint by Rosenthal, Feder & Co. and B. Blumenthal & Co., respondents, to compel Marcus Levy, assignee of L. Hyman, to file his account. There was a decree for the complainants, ordering the account to be filed, and Levy appealed.

Thornton & Merzbach and A. Burrows, for appellant. John Caldwell and A. D. Mason, for respondents.

TEMPLE, J. The order appealed from in this case is in no sense a final order, and is not appealable. Furthermore, it is one the court should have made of its own motion, upon mere suggestion. The assignee was apparently in default, as he had not complied with section 29 of the insolvent act, which required him to render an account at the expiration of three months. The assignee cannot at any time be heard to object to an order requiring him to render an account. The court may require it as often as occasion seems to require. Appeal dismissed.

We concur: PATERSON, J.; MCKINSTRY, J.

72 Cal. 577

ROSE'S ESTATE. (No. 12,160.)

(Supreme Court of California. June 24, 1887.)

APPEAL—TIME OF TAKING.

Code Civil Proc. Cal. § 1704, provides that in probate cases "all orders and decrees of the court or judge must be entered at length in the minute-book of the court;" and section 1715, that "the appeal must be taken within 60 days *after* the order * * * is entered." *Held*, that an appeal from an order settling the account of an administrator, taken before the order had been so entered, was premature, and should be dismissed.

In bank. Appeal from superior court, Tulare county.

Wal. J. Tuska, for appellant. *Stetson & Houghton*, for respondent.

SEARLS, C. J. This is a motion to dismiss an appeal upon the ground that it was prematurely taken. It appears from the affidavits on file that on the twelfth of March, 1887, findings of fact and an order or decree were signed and filed with the clerk, settling the account of H. Hirshfield, the administrator of the estate of Rose, deceased. Afterwards, and on the twenty-seventh day of April, 1887, the administrator perfected an appeal to this court from such order or decree. At the time of taking such appeal the decree appealed from had not been entered in the minute-book of the superior court of Tulare county, where the proceedings were had where the cause was pending. In probate cases it is provided by section 1704 of the Code of Civil Procedure that "all orders and decrees of the court or judge must be entered at length in the minute-book of the court." If an appeal is taken in such a case, it "must be taken within sixty days *after* the order, decree, or judgment is entered." The appeal in this case was premature. *People v. Center*, 66 Cal. 570, 5 Pac. Rep. 263, and 6 Pac. Rep. 481; *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43.

The motion is granted, and the appeal dismissed.

We concur: MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.; TEMPLE, J.; MCFARLAND, J.; PATERSON, J.

74 Cal. 250

LOUGHBOROUGH, Adm'r, etc., v. McNEVIN and others. (No. 9,520.)

(Supreme Court of California. June 27, 1887.)

1. PLEDGE—LIEN—EXTINGUISHMENT—TENDER.

The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law, and is refused by the pledgee.

2. SAME—REFUSAL TO DELIVER—CONVERSION.

A refusal by a pledgee to deliver up the pledge to an assignee of the pledge, upon a sufficient tender being made by the assignee of the amount due him, is conversion, and the fact that the property pledged had been attached by a third person, with whom the assignee had no privity, is no justification.

3. SAME.

In an action of trover to enforce the redemption of a pledge, the pledgee will be held responsible for any depreciation in the value of the pledge, after the tender of the amount due, and refusal by the pledgee.

4. SAME—INTERVENING CLAIMANT.

One to whom a pledge has been assigned pending litigation concerning it, may file a complaint in intervention, under section 388, Code Civil Proc. Cal., which provides for order of substitution.

5. TENDER—SUFFICIENCY.

Where one who held certain shares of stock as security for money loaned, demanded payment of the debtor, which was refused, and afterwards an assignee of the stock tendered to the pledgee the whole amount due him, with interest, held a sufficient tender, under section 1492, Civil Code Cal., which provides that where delay in the performance of an obligation is capable of exact and entire compensa-

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tion, and time has not been declared to be of the essence of the contract; an offer of performance, accompanied by an offer of such compensation, may be made at any time after the obligation is due.

6. **SAME.**

A tender to a pledgee of the amount secured by the pledge is not vitiated by a condition that the pledge be delivered to the one tendering payment.

7. **SAME.**

A tender of the amount due a pledgee by an assignee of the pledge is sufficient, without bringing the money into court.

Department 2. Appeal from superior court, San Francisco.

Wilson & Wilson, for appellant. *D. L. Smoot, Ogden Hiles, M. N. Stone*, and *B. B. Newman*, for respondents.

THORNTON, J. The plaintiff's intestate, some time prior to October, 1876, lent defendant Henry P. McNevin a sum of money for which he received as security some shares of stock. On the nineteenth of July, 1877, McNevin assigned to defendant L. P. Drexler his interest in the stock above mentioned, in consideration that Drexler would assume the payment of his debts due to Casserly on said stock. This assignment Drexler accepted, and on the twenty-first of the same month informed Casserly of such assignment. On receiving this notice, Casserly, on same day, declared his willingness to deliver the stock to Drexler upon receiving the money secured by it. On the twenty-second of September, 1877, Drexler made a legal tender to Casserly of the amount due to him on the stock, and demanded a delivery of it. Casserly made no objection to the tender, admitted that it was correct and sufficient, but refused to accept the money and deliver the stock, on the ground that process of garnishment in the matter of an order for money against Henry P. McNevin in favor of defendant Teresa E. McNevin had been served on him on September 1, 1877. On the twenty-eighth of September, 1877, six days after the tender was made and refused, this action was commenced by Casserly. Henry P. McNevin, Teresa E. McNevin, and Drexler were made defendants to the action. The object of the action was to have an account taken of the amount due by McNevin to him; that the money found due him be adjudged to be paid him by Teresa E. McNevin or Drexler, as either shall be found entitled thereto; and in default of payment that the defendants be foreclosed of all right of redemption, etc., for a sale, etc. H. P. McNevin answered, stating that he had, on the nineteenth of July, 1877, sold and assigned the stock to Drexler in good faith, for the consideration of \$11,000 paid him by his vendee. T. E. McNevin answered, denying that Drexler ever purchased the stock of Henry P. McNevin; denied that there was due to Casserly from H. P. McNevin any sum greater than \$9,837.27, secured as above mentioned; and stated that she claimed a lien upon the stock under executions issued in the action brought by her against Henry P. McNevin, by means of which the stock was attached. The executions mentioned were issued on orders made in the action just above mentioned. In the same action an order was made, which was served on Casserly on the sixteenth day of September, 1877, directing him not to pay over or transfer any property held by him belonging to H. P. McNevin. Drexler in his answer set up the assignment to him; the notification to Casserly of this assignment; the tender to Casserly, and its refusal by him, as they are set forth herein; and averred his willingness and readiness to pay, and then offered to pay, into court the amount due Casserly, as the court should direct, upon Casserly's delivering to him the stock held by him as security.

J. F. Eagan, on the eighteenth of February, 1879, filed a complaint in intervention, in which he averred an assignment to him by Drexler of the stock held by Casserly as security, and also of all claim for damages by Drexler for the conversion of the stock thereafter mentioned. He then goes on to aver the facts showing a conversion by Casserly, which are the facts above set

forth by Drexler in his answer, and the further fact that Casserly refused, upon the tender made him in September, 1877, to accept the said amount tendered, and deliver the stock to Drexler. Casserly demurred to the complaint of Eagan, which was overruled. He then answered the complaint last mentioned, denying the conversion averred. The cause was tried and judgment rendered against Casserly in favor of Eagan for the sum of \$15,225 and costs. Casserly moved for a new trial, which was denied. This appeal is prosecuted from the judgment and order above mentioned.

Casserly held the stock as a pledge. He so states in his complaint, and under section 2924, Civil Code, having it in his possession, as it was personal property, it was a pledge whether the title passed to him or not. The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law, and its refusal by the pledgee. *McCalla v. Clark*, 55 Ga. 53; *Ratcliff v. Vance*, 2 Const. (S. C.) 239. Upon such tender being made and refused, the pledgeor is entitled to the property pledged, and certainly, when on or after such tender a demand is made for the pledge, which is refused, a conversion takes place. See cases just above cited. The refusal to deliver the pledged property on demand is an exercise of dominion over the property of another in defiance of the other's right, which is a conversion. *Dodge v. Meyer*, 61 Cal. 420, 421. Such conversion is wrongful, and extinguishes the lien under section 2910, Civil Code. See *Rodgers v. Grothe*, 53 Pa. St. 414; *Davis v. Bigler*, 62 Pa. St. 242; *Lawrence v. Maxwell*, 53 N. Y. 19.

Was the tender in this case made in accordance with law? It was of the whole amount, principal and interest, due to Casserly. The demand made at the same time that the stock pledged be delivered to him, conceding it to be a condition, was one which he had a right to impose, as it was concurrent with the payment of the money in accordance with Casserly's promise in his letter of July 21, 1877, to Latham & King, the agents of Drexler, that on payment of the money he would transfer the stock, which latter was communicated by Latham & King to Drexler. The announcing of such condition did not vitiate his tender. It is so declared in section 1498, Civil Code. See *Wheelock v. Tanner*, 39 N. Y. 481.

The tender was made in time. The Code (section 1490, Civil Code) provides that, where an obligation fixes the time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before nor afterwards. But, where an obligation does not fix the time of performance, an offer of performance may be made at any time before the debtor, upon a reasonable demand, has refused to perform. Section 1491, Civil Code. The obligation of McNevin was to repay the advances after a reasonable time, whenever he should be thereunto requested by the plaintiff. This was averred in the complaint, and not denied in the answer. The time of performance was not then fixed by the obligation. A request to pay, which is tantamount to a demand, was made by Casserly of McNevin on or about the twenty-sixth of June, 1877, and refused. The tender could not have then been made after this demand, except for section 1492, Civil Code, which provides as follows: "Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditors, or by any other person in the meantime."

We are of opinion that the tender is good under this last section, as the interest offered was compensation for the delay. It is said that the plea of tender by Drexler is insufficient, for the reason that he did not bring the money into court. We think the plea is sufficient without bringing the money into court. This is so held in *Kortright v. Cady*, 21 N. Y. 343, 354, 366. The authorities referred to in the cases just cited in the opinions of DAVIES, J., and COM-

STOCK, C. J., sustain this rule. The plea here is in accordance with section 1495, Civil Code, and it is expressly provided by section 1504, Civil Code, that an offer of payment, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. One of these incidents is the discharge or extinction of the lien. The rule laid down in *Kortright v. Cady* is the same. 21 N. Y. 353, 366.

The tender was not objected to by Casserly when made. The lien having been extinguished, Drexler was entitled to the possession of the stock. Casserly then had no right to withhold it from Drexler. We cannot see how an attachment by Teresa McNevin, a third person, with whom Drexler had no connection or privity, could justify the plaintiff's intestate in his detention of the stock. The stock was the property of Drexler when it was attached, subject to the lien for the debt due to Casserly, and the attachment of it, as the property of H. P. McNevin, gave him no right to detain it from Drexler, when a proper tender had been made and refused.

The answer of Drexler was, in effect, an action to redeem. In such action, whether the right is enforced by an action of trover or by a bill pure and simple to redeem, the pledgee will be responsible to the pledgeor for depreciation in the value of the pledged property, after a tender of the amount due and the refusal by the pledgee. *Griswold v. Jackson*, 2 Edw. Ch. 461, 4 Hill, 522; *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155. Eagan's complaint in intervention set forth the right to redeem, as well as did the answer of Drexler, and in fact more fully, by stating a case of conversion. The action of trover is a very usual mode of enforcing a redemption of a pledge. See Jones, Pledges, § 561.

We are of opinion that the complaint in intervention by Eagan was regular, and within the statute. Code Civil Proc. § 386.

We find no error in the record, and the judgment and order are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 1

PEOPLE v. BITANCOURT. (No. 20,324.)

(Supreme Court of California. June 23, 1887.)

EXCEPTIONS, BILL OF—SERVICE OF NOTICE.

Under Pen. Code Cal. § 1174, which provides that if the trial court, in settling a bill of exceptions, refuses to allow an exception in accordance with the facts, application by petition may be made to the supreme court for leave to prove exceptions, notice of such application must be served on the court below and on the adverse party.

In bank. Appeal from superior court, San Francisco.

Geo. H. Perry, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

MCKINSTRY, J. A petition on behalf of defendant was presented to this court on the seventh day of June, 1887, for leave to prove exceptions, which the petitioner alleged the learned judge of the court below had refused to allow. Pen. Code, 1174. Notice of the application to prove the exceptions was not served on the judge below, nor was it served on the district attorney. The provision in section 1174 of the Penal Code is like that in section 652 of the Code of Civil Procedure.

In *Re Estate of Hawes*, 68 Cal. 413, 9 Pac. Rep. 456, this court was of opinion that notice of the application should be given the judge, and that the petition should set forth the exceptions taken, and the evidence in support thereof. We understand this only requires a general statement of the *tendency* of the evidence, so that the materiality of the ruling alleged to have been excepted to may appear. The attorney for the adverse party to the action should also be notified of the intended proceeding.

On the presentation of the petition of the seventh of June this court appointed the Hon. W. T. WALLACE, superior judge, to take proofs, and settle a bill of exceptions in accordance with the facts. June 13, 1887, a bill of exceptions, duly certified by the judge who tried the cause, was filed in this court. On the fifteenth of June, 1887, a supplemental petition was filed by counsel for defendant herein, setting forth the filing of a settled bill on the thirteenth of June as aforesaid, averring that the bill, as settled, "does not conform to the truth," and praying that the Hon. W. T. WALLACE be directed to proceed to the taking of proofs and settlement of a bill of exceptions. The last petition is clearly insufficient.

The order of the seventh June, 1887, is set aside and annulled, and the application based on the petition filed in this court on the fifteenth June, 1887, is denied without prejudice.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

73 Cal. 7

PEOPLE v. MONTEITH. (No. 20,271.)

(Supreme Court of California. June 29, 1887.)

1. LARCENY—INDICTMENT.

An indictment, in California, first charged clearly and specifically that one A. M., the defendant, committed the crime of grand larceny in stealing a horse of the value of \$200, together with a saddle, bridle, and blanket of the value of \$25. That all of said personal property was the property of Gardner F. Williams, and was stolen, taken, and carried away, as aforesaid, by the said Gardner F. Williams, etc. *Held*, that such indictment clearly charged the offense against defendant, and the insertion of the name of Gardner F. Williams in the last clause was evidently a mere clerical error, and at most only a defect of form which could not be taken advantage of after verdict.

2. SAME—VARIANCE.

An indictment charged the stealing of a horse. *Held*, evidence of the stealing of a gelding is not a variance.

3. EVIDENCE—EXPERTS.

A witness need not be an expert to testify as to a person's intoxication.

Commissioners' decision. Department 1.

Appeal from superior court, Alameda county.

Geo. A. Johnson, Atty. Gen., for the People. A. P. Hall and Wells, Whittman & Havens, for appellant.

HAYNE, C. The appellant, Albert Monteith, was convicted of the crime of grand larceny and sentenced to four years in the state prison. Several points are made on the appeal.

1. It is contended that the information is not sufficient to support the judgment. The information first charges, clearly, specifically, and in formal phrase, that Albert Monteith committed the crime of grand larceny in stealing a horse of the value of \$200, together with a saddle, bridle, and blanket of the value of \$25. It then proceeds as follows: "All of said personal property was then and there the personal property of Gardner F. Williams, and was of the aggregate value of \$225, and was stolen, taken, and carried away as aforesaid by the said Gardner F. Williams, contrary to the form, force, and effect of the statute," etc.

The argument is that this charges an offense against Gardner F. Williams, and not against the prisoner. But it is apparent that the insertion of the name of Williams was a mere clerical error. The information first distinctly states that the prisoner stole the property, and that it was the property of Williams; and it cannot be that Williams stole his own property. Moreover, the statement in question is that the property was "stolen, taken, and carried away, as aforesaid, by the said Gardner F. Williams," which clearly refers

to the first part of the information, and shows that the name of Williams was not intended to follow. The words last quoted may be stricken out altogether, without in any degree impairing the sufficiency of the information. We think that, taking the whole information together, it sufficiently charges the prisoner of the crime of which he was convicted. Very probably there was a defect of form. But defects of form must be taken advantage of by demurrer. A defendant cannot be allowed to take his chances of a favorable verdict, and hold in reserve the power to have an unfavorable one set aside for a defect of form which could easily have been rectified if attention had been called to it at the proper time.

2. Part of the defense was that the prisoner was intoxicated when he took the horse. With reference to this a witness for the prosecution, who saw the prisoner a short time before he took the horse, was asked what appeared to be his condition as to sobriety. It is urged that, since the witness was not an expert, she was not competent to testify on this point. But drunkenness is unfortunately of such common occurrence that it does not require an expert to pronounce upon it. We think the case falls within the principle of *People v. Sanford*, 49 Cal. 32, 33.

3. The fact that the information charged the stealing of a horse, whereas the evidence showed the stealing of a "gelding," does not constitute a variance. *People v. Pico*, 62 Cal. 52.

The other points made do not require special notice. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order affirmed.

73 Cal. 11

SCOTT v. SUPERIOR COURT OF YOLO CO. (No. 12,138.)

(*Supreme Court of California. June 29, 1887.*)

APPEAL—COMPROMISE.

An entry in the docket of a justice of the peace, after judgment rendered, that plaintiff and defendant came into court and settled on a certain basis, is not conclusive; and the payment of the amount of the judgment into court by defendant cannot deprive plaintiff of his right to appeal to the superior court.

In bank. Appeal from superior court, Yolo county.

J. Lambert, for petitioner. *G. P. Harding* and *R. Clark*, for respondent.

TEMPLE, J. One Hayes sued H. H. Scott before a justice of the peace in Yolo county, to recover a sum of money. Defendant answered, offering to permit judgment to be entered against him for a specified sum. The plaintiff declining to accept the offer, a trial was had, in which the plaintiff recovered less than had been offered. Judgment was entered for plaintiff for the amount, and also for defendant for costs. Defendant paid the amount of the judgment into court. Afterwards plaintiff also paid to the justice all of the costs which accrued at the trial. The justice's docket states, after showing the entry of payment and filing defendant's cost-bill: "January 17th. Plaintiff and defendants came into court and settled on the above basis. Plaintiff paid witness fees for himself, \$14.60." It does not appear that satisfaction of the judgment was entered by the justice. The plaintiff appealed to the superior court, where a motion was made to dismiss the appeal on the ground that the judgment appealed from had been satisfied. Upon the hearing of this motion, affidavits of various parties were read, tending to show whether the judgment had been satisfied or plaintiff had received the money paid into the justice's court.

There is here no question of jurisdiction. The entry of the justice that the parties appeared and settled upon the basis is not one which he was required to make officially; and, if required to be made, was not conclusive. If it is to be considered a jurisdictional question, however, it was one to be determined by an inquiry into facts *dehors* the record. That investigation was one which the superior court had jurisdiction to make, and its conclusion upon that matter is conclusive in this proceeding. If the plaintiff received the money, ordinarily the superior court should dismiss the appeal; but this fact, if it existed, did not deprive the court of jurisdiction. The mere payment of the money into court by the defendant, under such circumstances, could not deprive the plaintiff of his right to appeal if he was dissatisfied with the judgment. Writ denied.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

73 Cal. 21

DOE v. TYLEY and others. (No. 11,990.)

(Supreme Court of California. June 30, 1887.)

MINES—LOCATION.

Where, in making a location of a mining claim in the night-time, by mistake all but one or two of the monuments erected to mark its boundaries are placed over upon adjoining claims, such location, if otherwise sufficient, will be held valid to the extent to which the claim was subject to location.

Commissioners' decision. Department 1.

Appeal from superior court, San Bernardino county.

Action to settle title to mining claim. Findings and judgment were for defendants. Plaintiff appeals.

H. C. Rolfe and *J. C. Perkins*, for appellant. *Harris & Allen* and *Paris & Goodcell*, for respondents.

BELCHER, C. C. The contest in this case is about a piece of mining ground in San Bernardino county. The plaintiff claims the ground under a mining location made by W. C. Stoughton on the twenty-fourth day of June, 1885, and the defendants claim it under a location made by the defendant Foster, on the eighteenth day of July, 1885. The ground in question appears to have been a piece of vacant ground lying between other claims, having a width at its northerly end of about 14 feet, and at its southerly end of about 235 feet, and a length of about 700 feet. It was bounded on the easterly side by a claim known as the "Thunderer," on the westerly side by a claim known as the "Veto," on the northerly end by two claims known as "Occidental No. 1" and "No. 2," and on its southerly end by a claim known as the "Invincible." The principal question in the case relates to the validity of Stoughton's location. The court below held the location invalid, because all but one or two of the monuments erected to mark its boundaries were placed over upon the adjoining claims.

Stoughton made his location in the night-time. He was told by one Tucker that the ground was vacant, and advised to locate it. He went out with Tucker and marked off a claim, extending in length from the Invincible to the Occidental, and having a width of about 200 feet at its north end, and of a little more than that at its south end. He erected a monument at each of its four corners, and at about the center of each of its end lines. He also placed a notice of location at the monument at the center of the south line. The north-east corner monument was over on the Thunderer claim, the north-west one was on the Veto claim, the center one at that end was on one of the Occidental claims, and the south-east and south-west ones may have been slightly over on the Thunderer and the Veto.

It seems to be admitted that the location would have been a good one if all the ground covered by it had been vacant, as then it would have been so marked out that its boundaries could be readily traced. But it is insisted that when Stoughton placed his monuments upon adjoining claims, which were held under valid locations, he was a trespasser, and could acquire no rights by such trespassing; that his acts were void, and he could claim nothing by reason of the monuments so placed; that the parcel of land in controversy was not so marked on the ground that its boundaries could be readily traced, and therefore his attempted location was wholly invalid. If this be so, then it must follow that if the locator of a mining claim should happen, through mistake or otherwise, to place some of the monuments, necessary to mark out his boundaries, upon another's claim, though they might be over the line only a yard or a rod, still his location must wholly fail.

We do not think this is or ought to be the law. It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by two locations has been, which location was prior in time and superior in right? And it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient.

We know of no case where the exact point presented here has been decided. In *Richmond Mtn. Co. v. Rose*, 114 U. S. 576, 5 Sup. Ct. Rep. 1055, it appeared that 140 feet of the east end of the plaintiffs' location was lost to them by the superior right of the Tip Top claim, and yet, so far as the record shows, it was not even suggested that the balance of the location was affected thereby. If the point made here is good, it would seem that it might have been, and would have been, made there. In that case the principal objection to the right of the plaintiffs to hold the ground in controversy was that the claim covered 800 lineal feet of the lode when there were only three locators; and, under the act of congress and the local laws of that mining district, only 200 feet could be appropriated to each locator. It was claimed, therefore, that the excess of 200 feet over the 600 which the three could locate rendered the whole claim void. But the court said: "We hardly think it needs discussion to decide that the inclusion of a larger number of lineal feet than two hundred, renders a location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, when there exists no intention to claim more than the two hundred feet. Must the whole claim be made void by this mistake which may injure no one, and was without design to violate the law? We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim be held good for the remainder, unless it interferes with rights previously acquired."

So, in *Jupiter Min. Co. v. Bodie Con. Min. Co.*, 11 Fed. Rep. 666, it was ruled that where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the balance. Why should not the law, thus declared, apply here? We think it does, as "we can see no reason, in justice or in the nature of the transaction," why a different rule should be adopted.

In support of their views, counsel for respondent cite several cases, but in none of them was the question presented here involved. They are chiefly cases where one of the parties was claiming the ground in controversy under a relocation, and insisted upon his right to do so because the first locator had failed to do the necessary work upon his claim, and had thereby forfeited his right to hold it. *Belk v. Meagher*, 104 U. S. 279, is the principal case cited, and in that the court, using the language quoted by counsel, said: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public

lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this, not only against the prior locator, but all the world, because the law allows no such thing to be done." While this is undoubtedly sound law, it evidently has nothing to do with the matter in hand.

The other points do not require special notice.

In our opinion, the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

78 Cal. 17

PICO v. WARNER and others. (No. 11,961.)

(Supreme Court of California. June 30, 1887.)

TRUSTS—EXTINGUISHMENT.

The owner of one of two conflicting land grants gave to the owner of the other, one Warner, a power of attorney to dispose of the land granted to him. This grant was rejected by the board of land commissioners. Warner's was confirmed. *Held*, that Warner, upon the rejection of said grant, ceased to be a trustee for its owner, and was free to take, under his grant, the land covered by both grants.

Commissioners' decision. Department 1.

Appeal from superior court, San Diego county.

Leach & Parker and *Byron Waters*, for appellants. *Bicknell & White, Levi Chase*, and *T. V. O'Brien*, for respondents.

BELCHER, C. C. This action was brought to quiet the plaintiff's title to a tract of land in San Diego county, containing 26,688 acres. The plaintiff claims title to the land under a Mexican grant made to Jose Antonio Pico in 1840, and the defendants claim under a like grant, made to the defendant Warner in 1844. In the court below the findings and judgment were in favor of the defendants. The plaintiff appealed, and the case comes here on the judgment roll.

The findings are in substance as follows: On the eighth day of June, 1840, the governor of California granted to Jose Antonio Pico the tract of land known as "Agua Caliente," to the extent of four square leagues, the same being a part of the Valle de San Jose, which contained about ten square leagues, and is now situated in San Diego county. On the twenty-eighth day of November, 1844, the governor of California granted to the defendant J. J. Warner the tract of land known as the "Valle de San Jose," to the extent of six square leagues.

In January, 1852, Pico executed to Warner an instrument in writing, which reads as follows: "Know all men by these presents that I, Jose A. Pico, resident of the city and county of San Diego and state of California, do hereby make and nominate my trusty friend, Hon. J. J. Warner, my attorney in fact, for me and in my name to sell and dispose of a tract of land situated in San Diego county, being part of said Warner's ranch; and I hereby do give, grant, and convey the same unto him, so that he can convey the same in as ample a form as I can. The same is situated, as aforesaid, at Agua Caliente as per title granted me by Juan B. Alvarado, governor of California, dated

eighth day of June, 1840, and registered on the second leaf of the archives of the Book of Records of Unoccupied Lands, dated at Monterey, hereby ratifying all that he may lawfully do in the premises. Given under my hand and seal," etc.

In May, 1852, Warner duly presented to the board of land commissioners, appointed under the act of March 3, 1851, to ascertain and settle private land claims in the state of California, both of the grants before named for confirmation. Thereafter the Pico grant was rejected, and the Warner grant was confirmed, by the board, and on appeal to the United States district court for California the action and decision of the board in regard to each of the grants was duly affirmed. In pursuance of the confirmation of the Warner grant, the United States, on the twentieth day of February, 1880, issued to Warner its patent for the premises described in the complaint, including the Agua Caliente tract and other lands not embraced in the Pico grant. Prior to the commencement of this action, Jose Antonio Pico conveyed to plaintiff, by deed duly executed, all his right, title, and interest in and to the lands embraced in the patent to Warner.

Upon these facts counsel for appellant insist that the judgment was wrong, and should be reversed. Their contention seems to be based upon the theory that the instrument executed by Pico to Warner in January, 1852, was a power of attorney, and that under it Warner became the agent and trustee of Pico; that having, as such agent and trustee, presented the Pico grant for confirmation, and having prosecuted the claim until the grant was found to be invalid and was rejected, Warner could not afterwards take the land covered by it under his own grant, and, having done so, must be deemed to hold the title to the land in trust for Pico, and the plaintiff, as his grantees.

We do not see how this theory can be supported. It is not alleged or claimed that Warner was an unfaithful agent, or that the grant was rejected because of any want of diligence on his part in seeking its confirmation, and the contrary must therefore be assumed. Conceding, then, that he was the trustee of Pico, still when the grant was rejected, without his fault, the object of the trust became impossible, and his duties under it were completed. The trust was therefore extinguished, and he was discharged from all its obligations. Sections 2279, 2282, Civil Code. Whether the grant to Warner was properly located or not on land previously covered by the grant to Pico is a matter which does not concern the plaintiff. When that grant was confirmed it became the duty of the government to locate it, and it must be presumed to have performed that duty properly. The plaintiff had no interest in the grant, or in the land selected under it, and he cannot, therefore, be heard to question the government's action.

In our opinion, the judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 26

STEPHENS v. DOE. (No. 11,533.)

(*Supreme Court of California.* June 30, 1887.)

MASTER AND SERVANT—NEGLIGENCE—FELLOW-SERVANT.

The case of a mining employe, who is injured by rock falling upon him while he was engaged in investigating the result of a recent blast, at the direction of the foreman, is within Civil Code Cal. § 1970, which declares that an employer is not liable for the injury of an employe caused by the negligence of a co-employe engaged in the same general business with him, unless the employer neglected to use ordinary care in the selection of the foreman.

Commissioners' decision. Department 1.

Appeal from Superior Court, San Bernardino county.
Rowell & Rowell, for appellant. *H. C. Rolf* and *J. C. Perkins*, for respondent.

FOOTE, C. This was an action for the recovery of damages caused, as is alleged, by injuries received by the plaintiff while employed as a miner by the defendant. The court below, after the evidence for the plaintiff had been introduced before the jury, granted a nonsuit, and from the judgment rendered in the premises this appeal was taken.

From the record it appears that the plaintiff sought employment from the defendant as a miner, and was engaged and put to work as such; that under the orders of defendant's foreman the plaintiff set off a blast in a stope or sort of chamber dug into the earth and rock, and proceeded to inspect the result of the blast in order to discover if any ore had been thrown down thereby, and that, while in the act of doing this, rocks which had been loosened at the top of the chamber just alluded to fell upon him, crushing the bones of one of his legs, and otherwise injuring him.

The plaintiff contends that the judgment should be reversed, for the reason, as he alleges, that the carelessness of the defendant was the proximate cause of the injury, and that he (the plaintiff) was not guilty of contributory negligence in obeying the order of the foreman, and approaching the spot where the blast had been set off before sufficient time had elapsed to permit all loose earth and rocks to fall from the place blasted, and its vicinity, because, as he claims, he was an inexperienced miner, and did not know and appreciate the danger into which he ran in acting as he did. But the facts as disclosed in the record go conclusively to show that the injury to the plaintiff happened by reason of the blast being set off, and there is no evidence of any carelessness on the part of the defendant prior to that time which contributed to the plaintiff's injuries. If there was any carelessness, it was by the foreman who ordered him to inspect the place where the blast had occurred, and the plaintiff who incautiously approached it. But under our statute, (section 1970, Civil Code,) as interpreted by this court, the defendant would not be responsible for the careless acts of a person such as the foreman, who was employed in the same general business with the plaintiff, unless the defendant is shown to have neglected to use ordinary care in the selection of the foreman. *McLean v. Blue Point Gravel M. Co.*, 51 Cal. 257.

There is nothing in the record which tends to show that the defendant was guilty of any such negligence, and therefore he is not responsible for the injuries which the plaintiff received, even if, not appreciating the danger, the latter nevertheless obeyed the foreman's instructions. For these reasons we are of opinion that the judgment of the court below should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 598

ALHAMBRA ADDITION WATER CO. v. RICHARDSON and others.
(No. 11,502.)

(Supreme Court of California. June 27, 1887.)

1. WATERS AND WATER-COURSES—RIGHT TO DIVERT WATER—PRESCRIPTION.

In an action to maintain a riparian right to water, where the defense was a prescriptive right of diversion, the effect of the findings, taken together, was that defendants' user was actual, open, notorious, exclusive, continuous, and uninter-

rupted, under a claim of title as defendants' own, in hostility to plaintiff's title, and with plaintiff's knowledge and acquiescence. *Held*, that the findings sufficiently set out the elements of a prescriptive title.¹

2. **SAME.**

Findings of a jury which set out that, "for five years before action, and during all seasons, excepting when the soil was moistened by rain, defendants had used for irrigation and domestic purposes 2½ inches of water," and that defendants were owners of a quantity of said water equal to a constant flow of the waters of said canon of 2½ inches, measured under a 4-inch pressure," sufficiently set forth a prescriptive right in defendants to a *definite* portion of the water.

3. **LIMITATION OF ACTIONS—PLEADING.**

A right to property founded upon the statute of limitations is a prescriptive right, and under section 458, Code Civil Proc. Cal., is sufficiently pleaded as a defense by reference to those sections of the Code which bar the cause of action, without setting out any of the facts relied on.

4. **TRIAL—SPECIAL FINDINGS.**

Facts found by the jury need not be set out in the precise language of the pleading, if the ultimate facts sustaining the verdict necessarily result from those stated in the findings.

5. **SAME.**

Where there is no necessary conflict between the several findings of a jury, the court will not strain the language of a finding to make out a case of conflict.

6. **APPEAL—OBJECTION NOT RAISED BELOW.**

The rule that an appellate court will not entertain an objection to the sufficiency of a pleading, when such objection has not been raised before the court below, applies whether the defense is by way of denial, or is an affirmative defense.

7. **SAME—REVIEW OF EVIDENCE.**

The findings of a jury will not be set aside on the ground that they are unsupported by evidence, where there is a substantial conflict in the evidence.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Chapman & Hendrick and Glassell, Smith & Patton, for appellant. *Wells, Van Dyke & Lee and Bicknell & White*, for respondents.

HAYNE, C. Action to maintain a riparian right to water; defense, a prescriptive right of diversion. The first point made on behalf of the appellant is that the answer does not sufficiently set forth the prescriptive right relied on. We think the point cannot prevail for two reasons.

In the first place, if it be conceded that the answer is defective, it is a case of mere defects, and not of total absence of averment; and the pleading was treated as sufficient at the trial. Nearly all the defendants' evidence bore more or less directly upon the question of prescriptive right. It was the main question litigated, and in all the voluminous record before us there is not a single objection raising the question of the insufficiency of the pleading. The case was evidently tried on the theory that it was sufficient, and the plaintiff cannot be permitted to raise the question for the first time in the appellate court. *White v. San Rafael & S. Q. Co.*, 50 Cal. 419. It is argued that this decision relates to denials only; but the rule extends to affirmative defenses as well. *King v. Davis*, 34 Cal. 106; *Hutchings v. Castle*, 48 Cal. 153; *Pacific Bridge Co. v. Kirkham*, 54 Cal. 561.

But we think the answer is sufficient on another ground. It set up the statute of limitations by reference to sections of the Code of Civil Procedure,

¹ Respecting rights in waters and water-courses acquired by prescription, see *Dority v. Dunning*, (Me.) 6 Atl. Rep. 6; *McConnell v. American Bronze Powder Co.*, (N. J.) 5 Atl. Rep. 785, and note; *Mueller v. Fruen*, (Minn.) 30 N. W. Rep. 886; *Ware v. Walker*, (Cal.) 12 Pac. Rep. 475; *Cagle v. Parker*, (N. C.) 2 S. E. Rep. 76; *Levet v. Lapeyrolerie*, (La.) 1 South. Rep. 672.

in accordance with the provision of section 458 of that Code. This was a sufficient pleading of the prescriptive right claimed. The Code expressly provides that the statute of limitations may be pleaded in that manner, and a right to property founded upon the statute of limitations is a prescriptive right. According to some writers, the term "prescription" covers both senses in which the word "limitation" has been used; that is to say, as conferring a right and as taking away a remedy merely. See *Ang. Lim. c. 1*. In the case of *Billings v. Hall*, 7 Cal. 4, Chief Justice MURRAY, delivering the opinion, said: "Statutes of limitation are designed to affect the remedy, and not the right or contract. * * * Prescription is defined by civilians to be a right by which a mere possessor acquires the property of a thing which he possesses, by the continuance of his possession during the time fixed by law. * * * So that the difference between statutes of limitation, as they are known to the courts of common law, and the law of prescription, consists in this: that the one confers a right and the other takes away a remedy." But, while this doctrine as to the effect of statutes of limitation still obtains with respect to rights resting in contract, (*McCormick v. Brown*, 36 Cal. 184; *Grant v. Burr*, 54 Cal. 300,) it has been the settled rule ever since the case of *Arrington v. Liscom*, 34 Cal. 365, that the possession of property of the requisite character and time confers a title to the property. *Cannon v. Stockmon*, 36 Cal. 540; *San Francisco v. Fulde*, 37 Cal. 352; *Williams v. Sutton*, 43 Cal. 73; *Sharp v. Blankenship*, 59 Cal. 289; *Johnson v. Brown*, 63 Cal. 393. So far, therefore, as the title to property is concerned, or, at all events, so far as the title to real property is concerned, prescription and limitation are convertible terms; and a plea of the proper statute of limitations is a good plea of a prescriptive right. The language of decisions with reference to water-rights has been in accordance with this view. See *Crandall v. Woods*, 8 Cal. 144; *Campbell v. West*, 44 Cal. 646; *Cave v. Crafts*, 53 Cal. 135.

But it is contended that there is no finding upon this plea of the statute. There is no finding in the words of the plea. But it is not necessary that the facts should be stated in the finding in the language of the pleading. *Clary v. Hazlitt*, 67 Cal. 286, 7 Pac. Rep. 701. Where "probative facts are found, and the court can declare that the ultimate facts necessarily result from the facts which are found," the finding is sufficient. *Coveny v. Hale*, 49 Cal. 555; *People v. Hagar*, 52 Cal. 189; *Osborne v. Clark*, 60 Cal. 623.

Then, do the findings sufficiently set forth the elements of the prescriptive right relied on? The jury returned answers to various questions put to them in relation to the defendants' use of the water, among which are the following, which, for convenience of reference, we will number as follows, viz.:

"(1) Have the defendants uninterruptedly used any waters from the Kewen canon for any period of time? If so, for how long a time, and from what time to what time? *Answer*. Yes, during the time of the occupancy of the defendants.

"(2) Have the defendants used any of the waters of the Kewen canon under a claim of right? If so, for how long a time, and from what time to what time? *A*. Yes; from 1867 to the present time.

"(3) Have the defendants peaceably used any of the waters of the Kewen canon under a claim of right? *A*. Yes.

"(4) Did the plaintiff, or its grantor, the Lake Vineyard Land & Water Association, know that the defendants were using any of said waters under a claim of right or adversely? *A*. Yes.

"(5) Have the defendants exclusively, continuously, and uninterruptedly used any portion of the waters of the Kewen canon? If so, from what time to what time? *A*. Yes; from 1867 to the present time.

"(6) Has the plaintiff and its grantor, the Lake Vineyard Land & Water Association, knowing that the defendants claimed to use any of the waters of the Kewen canon adversely, acquiesced therein. *A*. Yes.

"(7) Did said Wilson [one of plaintiff's predecessors] at all times during his life-time, acquiesce in defendants' use of said water on their said lands? A. Yes.

"(8) Has not the plaintiff and its predecessors known for more than five years prior to the commencement of this action that defendants claimed the water-rights, easements, and privileges asserted and claimed in the answer? A. Yes.

"(9) Have or have not defendants and their predecessors, for more than twenty years, made such claim, and asserted and maintained it? A. Yes, they have.

"(10) Has or has not such use, during said time, been made by defendants openly, notoriously, and under a claim of right, and adversely to all the whole world? A. Yes; it has.

"(11) Have or have not defendants, for more than five years prior to the commencement of this action, continuously, notoriously, under claim of right, and adversely to the whole world, used and appropriated upon their said land the water in controversy herein? A. Yes; they have.

"(12) Did defendants, or either of them, ever admit to B. D. Wilson, or to his successors, that their rights to the use of the water of the Kewen, or Mill canon, was dependent upon the wishes of Wilson, or his successors, or was otherwise than absolute? A. No."

Do these findings sufficiently set forth the elements of a prescriptive right to any portion of the water of Kewen canon? The appellant cites the case of *Unger v. Mooney*, 63 Cal. 595, as correctly laying down the requirements of an adverse possession. Accepting the statement in the opinion in that case as correct, and applying it to the above findings, we think they are sufficient. (a) The user was actual, open, and notorious. See findings 11, 10, 5, 2, and 1. Being open and notorious, it could not have been secret and clandestine. Moreover, it is expressly found that the plaintiff and its predecessors knew of the adverse use, (see findings 8, 6, and 4,) and acquiesced in it. See findings 7 and 6. (b) It was in hostility to the plaintiff's title. The word "hostility" is not used. But it is found that the use was "adversely to the whole world," (see findings 11 and 10,) and "under a claim of right." See findings 11, 10, 9, 4, 3, and 2. (c) It was under a claim of title as defendants' own. See finding 11, 10, 9, 4, 3, and 2. (d) It was exclusive of any other right. This seems to us to follow from the fact that it was under a claim of right, and adversely to the whole world, as shown above. But in addition to this the word "exclusively" is used. See finding 5. (e) It was continuous and uninterrupted. See findings 11, 5, and 1.

The fallacy of the argument of the ingenious counsel for the appellant is in assuming that each finding must be considered separately, and that one cannot be "helped out" by the others. The counsel treats the findings as if they were dug up from the ruins of ancient cities at different epochs. But we think they must be read together. That is the rule with reference to the findings of a judge. "The findings of a court cannot be altogether detached from each other, and considered piece-meal. If a particular finding be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning." *Millard v. Hathaway*, 27 Cal. 140, 141; *Kimball v. Lohmas*, 31 Cal. 156; *Polack v. McGrath*, 33 Cal. 669. And we see no reason why the same rule should not be applied to a special verdict.

Reading these findings together, we think they sufficiently show an adverse user of some portion of the water of Kewen canon. What portion? This question is answered by other findings, which we will designate as follows:

"(a) Did the defendants since the year 1870 use the water in question for the purpose of irrigation, domestic use, and stock purposes, at all times when the same was necessary for such purposes, under a claim of right? Answer. Yes. (b) What quantity of water is required to irrigate defendants' premises, and

for their domestic purposes, in the same manner as has been used by them for the five years immediately before the commencement of this action? A. Two and one-third inches. (c) During what seasons of the year is water required upon defendants' lands for irrigating purposes, and what quantity of water is required for irrigating purposes only? A. During all seasons, excepting when the soil is moistened by the rains. Two and one-fourth inches. (d) What quantity of water is necessary for the domestic use of the defendants? A. One-twelfth of an inch." And in its supplementary findings the court found that the defendants are the owners of a quantity of said water "equal to a constant flow of the waters of said canon of two and one-third inches, measured under a four-inch pressure."

Reading all these findings together, we think they sufficiently set forth a prescriptive right in defendants to a definite portion of the water.

But it is earnestly contended that the findings are contradictory. It is said that the findings as to an adverse user by the defendants are in contradiction of the following findings, viz.: "Did J. H. Carpenter, during the time he occupied the place known as the Richardson place, assert any ownership in any portion of the waters of Keweenaw canon? *Answer.* Yes. Did said Carpenter use any of said waters by the permission of and under license from B. D. Wilson? A. Yes."

The argument is that if Carpenter's use was by the permission of Wilson, it could not have been adverse to him. But who is Carpenter, and when did he occupy the place "known as the Richardson place?" There is nothing in the findings, or in any other part of the judgment roll, which enlightens us as to these points. It does not help the appellant that the evidence shows who Carpenter is, and when he occupied the place; for the point relates to the findings, and, for anything they show to the contrary, Carpenter is an entirely irrelevant personage.

It is next urged that the findings as to the adverse user by the defendants, and the acquiescence of the plaintiff and its predecessors, are in contradiction of the following finding: "Have the employes of the plaintiff and its grantors, since the pipe was laid through the Richardson place, claimed and exercised the right to turn the water out of the pipe conveying the same by shutting it off at the head of the pipe? *Answer.* Yes."

When was the pipe "laid through the Richardson place?" The findings are silent upon this point; and, unless we can know the time, we cannot say the shutting off of the water had anything to do with the defendants' case. But on looking into the answer we see that the pipe was laid in 1875. But, nevertheless, we do not think a contradiction in the findings is made out. It would be straining the finding to say that it means that the employes of the plaintiff and its grantors claimed and exercised the right of shutting off the water ever since the pipe was laid. The finding would be true if they claimed and exercised the right for a single day. Now, since 1875, when, according to the answer, the pipe was laid, a period of more than eight years elapsed before the filing of the complaint; and therefore there was ample time for whatever the above finding means to have happened before the defendants' adverse user need commence. There is therefore no necessary conflict between the findings. And we do not think the court should strain the language of a finding to make out a case of conflict. The findings should be reconciled, if it can be reasonably done and be so construed *ut res magis valeat quam pereat*.

The findings, therefore, dispose of the issues, and sufficiently set forth the elements of an adverse user, and are not contradictory. It is contended, however, that they are not supported by the evidence. But the conflict in the evidence was extremely substantial, and therefore the findings cannot be set aside on this ground, although it be conceded that the user did not commence to be adverse until the Wilson deed, in 1873. Many of the arguments on be-

half of the appellant are merely reasons why the verdict should have been the other way, and were eminently proper to have been addressed to the jury, but, in view of the conflict in the evidence, cannot be entertained on appeal. Thus, when it is said that a party cannot acquire a right by the use of surplus water which is not needed by the owner, the answer is that the jury did not believe it was a case of the use of surplus water, and it cannot be said, upon the record, that they were not justified in so finding. So, when it is said that there was no use of a definite quantity of water, the answer is that the jury and the judge evidently thought that there was, and it cannot be said that there was no evidence upon the point. There was much testimony to the effect that they used what was necessary, and some testimony as to how much was necessary. Part of this was in relation to measurement by inches and pressure.

It must be remembered that the case does not admit of the nicest accuracy of measurement, and the question must be looked at from a practical point of view. Pushed to its logical conclusion, the argument of appellant would prevent the acquirement of a water-right by adverse user, except when the party diverted the whole stream, or measured what he used by a meter,—cases which very rarely occur in those parts of the state where irrigation has been practiced, at least until very recently. So with reference to the argument that where a permissive use is once established some point at which it became adverse must be shown. The occupation of Carpenter was before 1867. The defendant Hutchinson bought out his possessory claim to the land, and, assuming that Carpenter's use of the water was permissive, there was ample testimony from which the jury were authorized to infer that the use of the subsequent occupants was adverse. With reference to the shutting off of the water subsequent to the laying of the pipe, the defendants' evidence shows that it was done on but a single occasion, and on that occasion Mrs. Richardson went out to the man who did it, and "asked him what in thunder he was meddling with that hydrant for," and the water was then turned on, and does not appear to have been subsequently interfered with. This does not seem to us to have interrupted the defendants' user.

We do not attach much importance to the change in the mode of conducting the water across the defendants' land. At first it was brought through a ditch. Then the parties agreed to substitute an iron pipe, which naturally changed the route to some extent. The change was beneficial to all parties, and the arrangement has taken place between persons whose title to water was absolute and undisputed, without in any degree interfering with the *status* of either. The material thing was the flow of water, and whether it flowed through a ditch or a pipe, or by a direct or circuitous route, does not matter. The evidence as to a license being established on that occasion is negated by the verdict.

The appellant contends, however, that the court committed an error in law in excluding the declarations of B. D. Wilson, who formerly owned the land of defendants, with reference to the water, and the nature of the defendants' use of it. If the controversy had been concerning the land which Wilson had conveyed, the declarations of the grantor would probably have been admissible. But the controversy is not concerning that land. It is concerning water. The defendants cannot claim the water by virtue of the conveyance of Wilson. Their right to it arises from their use of it, which was a right acquired adversely to Wilson, and not through him. Where a right rests upon the statute of limitations, "the disseizor acquires a new title, founded on the disseizin. He does not acquire or succeed to the title and estate of the disseizee, but is vested with a new title and estate, founded on and springing from the disseizin." *Williams v. Sutton*, 43 Cal. 73. This being the case, the declarations sought to be proven were mere declarations of a party in his own favor, and were properly excluded.

We do not think the appellant's criticisms upon the form of the judgment are well founded.

The foregoing disposes of the main points made. In the 240 pages of argument filed on behalf of appellant many points are made which do not require special notice. Many of them are arguments as to the weight of evidence; some are objections to the form of the verdict, which should have been taken before it was received and recorded, (*Algier v. Steamer Maria*, 14 Cal. 170,) and some have no support in the record.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion judgment and order affirmed.

73 Cal. 25

MURDOCK v. CLARKE. (No. 11,866.)

(Supreme Court of California. June 30, 1887.)

APPEAL—SERVICE OF NOTICE.

An appeal was taken to the California supreme court in a case tried in Oroville, Butte county, and notice of appeal was served by depositing it in the mail, at Oroville, directed to respondent's counsel in Sacramento, where he resided. Appellant's counsel resided, one at Quincy, Plumas county, the other at Alturas. There was regular communication by mail between Oroville and Sacramento, and between both Quincy and Alturas and Sacramento. *Held*, that the notice of appeal was not served as required by law, and that the appeal should be dismissed.

Department 1. Appeal from superior court, county of Butte.

J. D. Goodwin and *D. W. Jenks*, for appellant. *A. L. Hart* and *D. Solon Holl*, for respondent.

By THE COURT. Motion is made to dismiss this appeal on the ground, among others, that the notice of appeal was not served as required by law. Appellant's attorneys resided, one at Quincy, Plumas county, the other at Alturas. Respondent's counsel resided at Sacramento. The case was pending in Butte county, and was tried at Oroville, in that county. There was regular communication by mail between Oroville and Sacramento; also between both Quincy and Alturas and Sacramento. The notice of appeal was served by mail from Oroville. The objection seems to be sustained by the case of *Reed v. Allison*, 61 Cal. 461; also by *Moore v. Besse*, 35 Cal. 184; and *Cunningham v. Warnekey*, 61 Cal. 507.

If we were to adopt the view of appellant, that it would be a sufficient answer to the objection to show that the notice of appeal was actually received by respondents' counsel in due time, that fact is not made to appear here. Manifestly, under such view, this should appear by express and positive evidence. It could not be shown by a presumption as to the regularity of the mails. The alleged stipulation to extend the time for filing transcript is denied, and is not produced. If it were admitted, however, it would be difficult to see how it could constitute a waiver of the notice of appeal.

The motion must be granted. Appeal dismissed.

73 Cal. 48

CADWALADER v. NASH. (No. 11,600.)

(Supreme Court of California. July 1, 1887.)

1. DEED—DESCRIPTION—EVIDENCE.

In an action to quiet title, *held*, that where the land in controversy described in a sheriff's deed was incapable of identification without reference to some map, and there were two maps which answered the description equally well, neither of which was ever filed with the county recorder, testimony of the sheriff as to which map he referred to in the deed was inadmissible.

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2. JUDICIAL SALE—DEED—DESCRIPTION.

An insufficient description in a notice of sale and in a sheriff's deed, of property sold at execution sale, is not waived by the failure of the judgment debtor to apply to the court to have the sale set aside.¹

3. TAXATION—ASSESSMENT—VALIDITY.

Under section 3650, Pol. Code Cal., which provides that the assessor must list, in separate columns, under the appropriate head, city and town lots, naming the city or town, and the number of the lot and block, according to the system of numbering in such city or town, an assessment of taxes on one half of a pueblo lot, which is subdivided into a large number of smaller lots, as one undivided parcel, is void, no return having been made by the owner, and nothing appearing in the record to show that he refused to make a return.

Department 1. Appeal from superior court, San Diego county.

M. A. Luce, Works & Titus, and Philip A. Galpin, for appellant. Levi Chase, for respondent.

PATERSON, J. Action to quiet title. Plaintiff is the executrix of the last will and estate of George Cadwalader, deceased. On July 25, 1877, and thereafter, to December 20, 1877, defendant, Nash, was the owner of the property in controversy, except a few lots that he had conveyed to Phillips. In July, 1877, Frank Johnson commenced an action against Nash, and on July 25, 1877, caused an attachment to be levied on the property mentioned in the complaint. Thereafter Johnson recovered judgment therein, execution was issued, and certain property sold thereunder, which plaintiff claims included the property in controversy. Some of the lots numbered in the complaint are described as being in the "right of way through Middletown, all according to a map filed on the partition of said Middletown property, in the case of *Baldwin et al. v. Coutts et al.* Decree recorded October 24, 1874, in Book 4 of Miscellaneous Records of said county." And in the findings they are described substantially in the same way.

The return of the sheriff on the execution, and also the sheriff's deed, admitted in evidence against the objections of appellant, describe the premises sold as follows: "Lots number [giving the numbers] and blocks number, [giving the numbers,] all described according to the commissioner's map of Middletown, on file in the office of the recorder of San Diego county," etc. The respondent, in order to identify the property described in the sheriff's deed, introduced in evidence a map marked "Exhibit A," and commonly called the "Referee's Map," or "Jackson Map." This map is designated as "Referee's Map," and not a "Commissioner's Map," and was filed in the county clerk's office, and not in the recorder's office, and was indorsed, "Filed by the clerk of the district court." At that date, and for a long time thereafter, the office of clerk and recorder was held by the same person, to-wit, A. S. Grant. He was clerk and *ex officio* recorder of the county. The business of the two offices was done in the same room in the court-house, and the maps were kept together in the same drawer in that office. There was also in evidence another map of Middletown, known as the "Pascoe Map," and indorsed "John B. Mhoon, Referee." This map is also marked as an exhibit in *Baldwin v. Coutts*, and filed by the clerk, August 3, 1869. It was found in the recorder's office, with his tag attached to it, and was with the rest of the maps in that office. This exhibit shows the described lots and blocks to be situated in different parts of Middletown from those shown by the Jackson map.

The court being in doubt as to which map was described in the deed from the words of the deed, and consequently being uncertain what lots the deed described, permitted parol proof to be introduced. The sheriff was called to

¹An erroneous or uncertain description in the notice of a judicial sale, or in the deed given pursuant thereto, will avoid the sale. *Herrick v. Merritt*, (Minn.) 33 N. W. Rep. —; *Helmer v. Rehm*, (Neb.) 15 N. W. Rep. 344; *Burrows v. Gibson*, (Mich.) 3 N. W. Rep. 293; *Chambers v. Brown*, (Tex.) 2 S. W. Rep. 518; *Allday v. Whittaker*, (Tex.) 1 S. W. Rep. 794; *Pfeiffer v. Lindsay*, Id. 265.

testify as to the map, and under objection said: "We took a traced copy of the map before starting out with the surveyor. This is the map I referred to in the deed as the commissioner's map. This is the map we used," referring to Exhibit A. It is claimed by appellant that by parol proof the court undertook to find out where the premises were which ought to have been, but were not, described in the conveyance. This is simply to pass the title to land by *parol*, for without this proof the land could not be identified. The deed alone did not describe it, and for this error a new trial should be granted.

1. Where a deed refers in general terms to the *official* map of a town, parol evidence is admissible to identify the map which has been officially declared to be the town map, and the fact that a particular reference in the deed to the survey and to the surveyor who made the map does not literally accord with the indorsement on the map is immaterial. *Penry v. Richards*, 52 Cal. 496. In all cases where the deed refers to a map or instrument in writing, the latter is regarded as incorporated in the deed as a part thereof. *Vance v. Fore*, 24 Cal. 436. The deed and the map or instrument, however, when taken together, must be as certain in respect to the description as a description contained in the deed itself, and the identity of the map referred to must be clearly established. When the deed itself contains a sufficient description of the land, so that it can be identified without resorting to the map to ascertain its locality, it is not necessary for the party introducing the deed in support of his title to produce the map in connection with it; but when, as in the case at bar, the land is incapable of identification without reference to *some* map, the map referred to in the deed is as essential as the deed itself. Accordingly it has been held that a deed which described the land conveyed as "lot No. 1 in the subdivision of the tract of land lying on the new county road, and known as 'Foley's Tract,' the map of which is duly recorded in the recorder's office, does not, when taken alone, contain a description sufficient to attach itself to any particular tract of land without the aid of further evidence." *Caldwell v. Center*, 30 Cal. 540. In that case the court held that a map pasted between the leaves of the recorder's book was not admissible in evidence with the deed to identify the land, because not recorded. In *Brandon v. Ledy*, 67 Cal. 43, 7 Pac. Rep. 33, the deed did not show whether the lot described was north or south of the base line established by the official map; and, although it was shown that the grantor never owned any lot south of the base line, the court held that the deed itself should show the situation of the lot; and, as the ambiguity was patent, resort could not be had to parol.

In the case at bar it was not shown whether there was a base line with blocks and lots of corresponding numbers on each side of the line, but the two maps in evidence represent blocks and lots of corresponding numbers as being situated in different parts of Middletown. Thus, for instance, Exhibit A represents block 96 as situated six blocks north of California avenue, while Exhibit B shows that it is only two blocks north of the avenue; and block 150 is represented on Map A as being six blocks north of California avenue, while on Map B it is situated one block south of the avenue. Which map is correct? Both are referee's maps, in different cases it is true, but of the same title, between the same parties, and for the same purpose,—partition of lands. If it be conceded that "commissioner's map of Middletown" is equivalent to "referee's map," the fact remains that Exhibit B answers the description as well as Exhibit A. Both maps were used in suits between the same parties for the same purpose, and neither of them was ever filed with the county recorder. They were both marked as exhibits in civil cases pending in the district court, were filed therein by the clerk thereof, and the clerk did not and could not lawfully make them a record of any other office. If the fact that the clerk and *ex officio* recorder kept the records of both offices in the same room be material at all, it would tend to show that the map upon which he put a tag showing it to be among the records of the recorder (Exhibit B) was

the map referred to by the sheriff in his deed as "commissioner's map of Middletown on file in the office of the recorder of said county of San Diego."

The fact that Map B contains a plat of only a portion of the blocks and lots numbered in the deed of the sheriff, and that Map A contains what appears to be a full plat of Middletown, might, under some circumstances, be pertinent and forceful, but in view of the other facts here shown cannot avail the respondent. The deed introduced in evidence to support the title of the estate to these particular lots in controversy described the premises as above quoted, while the complaint, findings, and decree herein, in describing them, read "all according to the map filed in the partition of said Middletown property in the case of *Baldwin et al. v. Coutts et al.* Decree recorded October 24, 1874, in Book 4 of Miscellaneous Records of said county." The record shows that the description of the land intended to be conveyed is not complete and certain without reference to a map. No one could find it without the map. The sheriff himself, in making the levy, found the property only by using the map and making a survey. Against the objection of the defendant, he was allowed to testify: "We took a traced copy of the map before starting out with the surveyor. This is the map [Exhibit A] I referred to in the deed as the commissioner's map. This is the map we used." Without this testimony the court could not have found that the property conveyed, or intended to be conveyed, by the sheriff, was shown by "the map filed in the partition of the said Middletown property in the case of *Baldwin v. Coutts*, etc." That this testimony was inadmissible we think there can be no doubt. *Mason v. White*, 11 Barb. 175.

The contention of the respondent that, as Nash was a party to the proceedings in which the execution was issued, he is presumed to have known all that was done by the sheriff, and if there was any irregularity detrimental to his interests he should have applied to the court to set aside the sale, and, having failed to do so, the purchaser took all the title Nash held, cannot be maintained. Of course, in judicial sales, where the court acts directly upon the property sold, the deed can be made to conform to the true description of the thing sold, and the rules applicable to sales between man and man to a great extent apply; but not so in case of execution sales. Freeman on Executions, in section 281, says: "The object of the advertisement is to give notoriety to the proposed sale, so that all persons may understand what it is that is to be sold. No one will bid unless he can know what he is bidding for. The rights of the defendant must necessarily be sacrificed unless the thing to be sold is made certain. People may refuse to bid, or, after successful bidding, may claim more than the officer intended to sell. So the deed ought to be free from ambiguity." Id. § 330. "Hence a description from which the land intended to be transferred can be located, is indispensable to the validity of the deed."

Our conclusions upon this branch of the case therefore are—*First*, that the court erred in admitting the testimony of the sheriff; and, *second*, that without this testimony the evidence does not support the allegations of the complaint, or the findings of the court relating to the Middletown lots.

It is admitted that there is no uncertainty in the sheriff's deed as to the E. $\frac{1}{2}$ of pueblo lots 1,126 and 1,127, and the only question in relation to those lots is as to the validity of the tax deeds under which defendant claims title thereto. In June, 1873, Nash for a valuable consideration conveyed to Phillips certain lots and blocks of land, the same being a portion of the E. $\frac{1}{2}$ of pueblo lot No. 1,126, and Phillips reconveyed the same to Nash by deed dated December 13, 1883. As there was no uncertainty in the sheriff's deed so far as these two pueblo lots were concerned, the defendant's interest in every portion thereof not previously conveyed to Phillips passed to Cadwalader by virtue of the sheriff's levy, sale, and deed under execution, and defendant's title thereto, if he has any, is derived from the tax deed.

It appears from the findings of the court that these pueblo lots are large lots containing several acres, and that they are subdivided into a large number of smaller lots designated upon the map by numbers. The decree adjudges Nash to be the owner of over 150 subdivisions, being a portion of the E. $\frac{1}{4}$ of one pueblo lot alone, giving the number of each block and lot. The map showing these subdivisions was made by the city engineer in 1870.

The assessor did not assess the lots nor even the block separately, but assessed the E. $\frac{1}{4}$ of lot 1,126 as one undivided parcel. This, we think, could not under the law be done. "The assessor must prepare an assessment book, * * * in which must be listed all property within the county, and in which must be specified in separate columns, under the appropriate head, * * * *third*, city and town lots, naming the city or town, and the number of the lot and block according to the system of numbering in such city or town, and improvements thereon; *fourth*, all personal property showing the number, kind, amount, quality; but a failure to enumerate in detail such *personal* property *does not invalidate the assessment*." Section 3650, Pol. Code. Under the revenue act of 1861 it was held that, where *one man owned and returned* a whole block or half block, the assessor might list and value it as a whole. *People v. Morse*, 43 Cal. 541; *People v. Culverwell*, 44 Cal. 620. Since the decisions in these cases the duty of the assessor has been made more specific and imperative, as will be seen by a comparison of section 20 of the revenue act of 1861 with the provisions of section 3650 of the Political Code. Of course, where the owner himself returns the property as a whole, he cannot be heard to complain that it has been improperly listed in that manner; but where, as in this case, no return was made by the owner, and there is nothing to show that the owners of the property refused to make a return to the assessor, we are bound to say that the assessment is void, or to hold that the imperative language of section 3650 is simply directory, unimportant, and that the assessor may regard it or disregard it at will. We think that the rule prescribed is based upon reason, and should be followed. Several parties may own different portions of a pueblo lot divided into city blocks containing several hundred well-known lots. An owner of one lot who is a non-resident would be required, if his lot be assessed, as this lot was, to pay the tax on the whole property to save his own from tax sale; and this, without any fault of his own. There is no way of ascertaining what proportion of the whole tax any particular lot-owner should pay, and of course the tax collector will accept nothing less than the full amount of the tax.

That the assessor is bound to assess in subdivisions is apparent also from provisions of the Code which relate to assessment and sale. Thus he is required to exact from each person under oath a statement showing separately—"Fifth, an exact description of all lands in parcels and subdivisions." "When the assessor has not received from the owner of the tract of land the statement required by section 3629, or when such statement does not sufficiently describe a tract of land to enable the assessor to assess the same as required by law, * * * he shall cite such owners to appear," etc. Section 3634. The form of the assessment book is prescribed, in which one column is for "Real Estate other than City and Town Lots," and half columns for: "Range E. or W.;" "Township N. or S.;" "Section;" "Subdivision of Section." Also a column for "City or Town Lots," with half columns beneath for "Block," "Lot," and "Fraction." Section 3651. "The supervisors must provide for the assessor * * * maps of cities and villages." Sections 3658, 3659. The tax collector must commence the sale at the head of the list, and continue alphabetically, or in the numerical order of lots and blocks, until completed, (section 3771;) and the owner has the right to designate what particular parcel he wishes sold, if less than the whole, (section 3773.)

We think, therefore, that the court below was right in its conclusion that the assessment, sale, and deed affecting the pueblo was void.

Appellant requests that the court below be directed to enter judgment in his favor for the Middletown lots, but this request cannot be granted. The evidence on another trial may show a state of facts entirely different from those shown in this record. Judgment and order reversed and cause remanded for a new trial.

We concur: MCKINSTRY, J.; TEMPLE, J.

73 Cal. 72

SMITH v. LING. (No. 11,722.)

(*Supreme Court of California.* July 1, 1887.)

PRACTICE IN CIVIL CASES—DISMISSAL BY CONSENT.

Where the complaint is, by consent of both parties, after answer denying all the allegations therein, stricken out, the court should dismiss the action.

Department 2. Appeal from superior court, Los Angeles county.
N. Smith, appellant, *pro se*. R. A. Ling, for respondent.

SHARPSTEIN, J. The record on this appeal consists of a copy of a complaint, and of an answer denying all the allegations of the complaint, and of a judgment in these words: "WEDNESDAY, June 10, 1885.

"This cause came regularly on for trial, all parties in court with their respective attorneys. Upon motion of the plaintiff, and by consent of defendant, ordered that the amended complaint be stricken out. Defendant moved the court for judgment upon the pleadings. Motion argued, and ordered that the action be dismissed. A. BRUNSON, Judge."

The form is unique, but we gather from it that the complaint was stricken out by consent of both parties, and that the court then dismissed the action. We see no error in that. After the complaint was stricken out, there was no case to try, and it was proper to dismiss the proceeding. An action can only be commenced by filing a complaint, and when the complaint is stricken out the action is terminated.

Judgment affirmed.

We concur: MCFARLAND, J.; THORNTON, J.

73 Cal. 58

WOOSTER and others v. NEVILLS and others. (No. 11,973.)

(*Supreme Court of California.* July 1, 1887.)

FRAUD—REMEDIES—DEMAND AND TENDER.

Defendant induced plaintiffs to transfer to him their stock in a mining company, in order that he might sell the mine, and, instead of acting in good faith, proceeded in fraud of their rights to sell the mine for a very large sum of money, for which he did not account to them, except to give them \$8,000, and to have them cancel a debt due from him to them of \$3,000; retaining the stock, which was worth much more than he represented it to be, in his own name, and drawing dividends thereon. Held, that plaintiffs could maintain an action against defendant as their agent for an accounting, and to compel him to return the stock, without previously making a demand for the return of the stock, and tender of the money that they had received.

Commissioners' decision. Department 1.

Appeal from superior court, San Francisco.

Sidney V. Smith, for appellants. A. C. Adams, Curtis H. Lindley, and Lindley & Spagnoli, for respondents.

FOOTE, C. This action was for an accounting, and to compel the defendant William A. Nevills to return to plaintiffs certain mining stock a transfer of which he had fraudulently obtained from them. The complaint was demurred to, the demurrer sustained, and, the plaintiffs declining to amend

their pleading, judgment was rendered for the defendant. In support of that judgment their counsel contend that the complaint was to compel the rescission of a contract, and that, in order to obtain that right, it was incumbent upon the plaintiffs to have alleged in their pleading that they had made a demand for the return of their stock, and tender of the money they had received from Nevills prior to the institution of this suit.

But as it appears to us, from the statement of facts set out in the complaint, Nevills was not a purchaser of the stock from the plaintiffs in the proper and legal sense of that term. He never was, at any time during the transaction, so far as they were concerned, anything more than an agent or trustee, bound to act for them in the whole matter in the utmost good faith. He deceived them into the belief that he, for them, could sell the mine in which they were stockholders for a certain sum of money, if they would make him the apparent, but not the real, owner of the stock. For the purpose, not of vesting title to the stock in him, but to enable him the better as their agent to sell the mine upon which the issue of the stock was based, they transferred the stock to him as requested. Instead of acting in good faith towards the plaintiffs, Nevills proceeded in fraud of their rights to sell the mine for a very large sum of money, for which he did not account to the plaintiffs, except to give them \$8,000, and to have them cancel a debt due from him to them of \$8,000. He still retains their stock in his own name, in a mine which is worth many thousand dollars more than he falsely assured the plaintiffs was its value, and has drawn their dividends upon the stock.

We see no good reason why, under such a state of facts, Mr. Nevills should not be made to retransfer this stock to its true owners, towards whom he assumed the relation of an agent or trustee, nor why a full accounting, as between the parties, should not be had. The facts asserted as true in the complaint do not show any sale of the stock to Nevills on the part of the plaintiffs. He was to make a sale of the mine for their account. He deceived them as to the price he could obtain for the mine, and deceived them into the belief that a sale could more easily be effected if the stock stood in his name rather than in theirs. Thus, as we have before said, he was nothing more than their agent, in whose apparent ownership the stock stood. The transaction was not one of sale. It was the giving to an agent power, clothed with apparent ownership, to make a sale to third parties. In such a case, where an agent has abused his trust, and holds his principal's property in fraud, the principal can compel a return of his property, and any increase of it by way of dividends while in the agent's possession.

It was unnecessary to have made a tender of money to Nevills before this suit was instituted, for there is no contract of sale, or actual sale, alleged by the complaint to have been made to him by the plaintiffs of the stock in dispute. The plaintiffs, as one of the incidents necessary to a proper accounting between Nevills and themselves, seek to recover from him, as their trustee, property of which he has, through turpitude, gotten from them the apparent ownership, to which property he never had, nor was intended under their agreement to have had, any title. As no sale of the stock was made to him, no rescission of a sale was asked for in the complaint; and no rescission being required, no tender of any money prior to the bringing of the action was needed.

As a part of the accounting asked for from Nevills by the plaintiffs, they demand from him a return of their stock, which he obtained from them by fraudulent statements, and to which he had no shadow of claim, either in his own or their estimation, beyond its possession and apparent ownership, as their trustee. It is evident, therefore, upon the facts stated in the complaint, if they are to be taken as true, that the plaintiffs were entitled to an accounting as asked for, and the other relief prayed for therein.

The judgment and order dissolving the injunction should be reversed, and

the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and give leave to the defendants to answer that pleading within a reasonable time, upon which the cause can be tried upon its merits.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with direction to the court below to overrule the demurrer to the complaint, with leave to defendants to answer within a reasonable time.

73 Cal. 52

HANCOCK v. BURTON and others. (No. 11,599.)

(Supreme Court of California. July 1, 1887.)

1. LIMITATION OF ACTION—ADVERSE POSSESSION—PROOF.

In an action of ejectment, where the plaintiff showed clearly a chain of title to the demanded premises, reaching back to the patent from the government, and there was at least substantial conflict as to whether the defendants, who claimed by adverse occupation, had occupied for such time, and in such manner, as would enable them to set up the statute of limitations, *held*, there was sufficient evidence to support a verdict for the plaintiff.¹

2. APPEAL—REVIEW—OBJECTION NOT TAKEN BELOW.

Where, in an action of ejectment brought against several defendants, who claimed that they were severally in possession of specific portions of the land in controversy, a judgment was rendered against each of the defendants for the entire tract, *held*, on appeal from an order denying a new trial, that whether such a judgment was error could not be considered, no specification of the insufficiency of the evidence on this point having been made in the motion for a new trial.

Department 1. Appeal from superior court, San Bernardino county.

Paris, Smith & Hutton and *Paris, Goodcell & Fox*, for appellants. *Curtis & Otis* and *Barclay, Wilson & Reddick*, for respondent.

By THE COURT. The plaintiff brought this action against the appellants and one Thomas M. Agers, to recover the possession of a tract of land in San Bernardino county, containing 1,280 acres, with \$500 damages for the withholding thereof, and \$100 per annum from and after January 1, 1879, for rent and profits. The defendants denied the plaintiff's ownership or right to the possession of the land, and denied that he had been or would be damaged in the sums of money alleged, or in any sums, by reason of their withholding its possession, or on account of a loss of its rents and profits. They then set up that they were in possession of and holding separate parcels of the land, and that as to each one of them the plaintiff's cause of action was barred by the statute of limitations. The case was tried before a jury, and a verdict was returned in favor of the plaintiff, but without damages, on which judgment was entered. The appellants moved for a new trial, and now prosecute this appeal from the judgment, and an order denying their motion.

Two points only are made in support of the appeal: (1) That the verdict was not justified by the evidence; and (2) that the judgment was erroneously entered against each of the defendants for the possession of the entire tract, when it should only have been against each one for the parcel separately claimed by him.

1. We think there was ample evidence to support the verdict. The plaintiff showed clearly that he had title to the demanded premises, and there was

¹Respecting the character of occupancy necessary to constitute adverse possession, see *Cooper v. Morris*, (N. J.) 7 Atl. Rep. note, 427; *Merrill v. Tobin*, 30 Fed. Rep. 738; *Roots v. Beck*, (Ind.) 9 N. E. Rep. 698, and note; *Murphy v. Doyle*, (Minn.) 33 N. W. Rep. 220; *Murray v. Hudson*, (Mich.) 32 N. W. Rep. 889.

at least a substantial conflict as to whether the defendants had occupied and claimed and paid taxes on their respective parcels for such time and in such manner as would enable them to assert title under the statute of limitations.

2. Conceding that the court erred in rendering a joint judgment against the defendants for the whole tract, still the error cannot be considered on this appeal. Although the defendants answered severally, claiming that they were not jointly withholding the entire tract from the plaintiff, and that they were severally in possession of specific portions thereof only, the plaintiff was not precluded from proving his allegation that they were jointly in possession of the entire tract. It was so found by the jury, and there is no specification, in the statement on motion for new trial, of insufficiency of the evidence in this respect.

It follows that the judgment and order should be affirmed. So ordered.

73 Cal. 105

WHITE v. WHITE. (No. 12,144.)

(Supreme Court of California. July 7, 1887.)

DIVORCE—ALIMONY—APPEAL.

An order in a divorce suit for a payment, an account of alimony, counsel's fees, and costs, will not be interfered with unless it appears affirmatively and clearly that there has been a gross abuse of discretion by the court below in making the order.

In bank. Appeal from superior court, Mendocino county.

E. D. Wheeler and Barclay Henley, for appellant. *H. E. Highton, H. C. McPike*, and *J. A. Cooper*, for respondent.

MCFARLAND, J. This is an action of divorce brought by the husband against the wife. By her answer the wife denies the averments of the complaint, which state facts constituting a cause for divorce; and by a cross-complaint she avers causes of divorce against the husband. The action is still pending in the court below; but during its progress the court made an order directing the payment by said plaintiff to said defendant of certain sums, aggregating \$3,850, as and for costs and expenses, alimony and counsel fees, and from this order the plaintiff appeals. The only point made by appellant is that the allowance was excessive, and an abuse of discretion. The evidence upon which the order was made was conflicting as to appellant's financial ability, and as to other matters which it was the duty of the court below to consider. Of course we could not be expected, under any circumstances, to interfere with the judgment of a *nisi prius* judge in such a matter, unless it appeared affirmatively and clearly that there had been a gross abuse of discretion. No such abuse appears here, and therefore we will not stop to determine whether or not our estimates of counsel fees, costs, expenses, etc., would correspond with those of the learned judge of the court below. This view disposes of the appeal, and therefore it is not necessary to consider the other point made by counsel for respondent, viz., that an appeal does not lie from an order of this kind in a divorce case, where the marriage and the relation of the husband and wife are not denied. Order affirmed.

We concur: SEARLS, C. J.; MCKINSTRY, J.; PATERSON, J.; TEMPLE, J.

73 Cal. 97

Ex parte WILSON. (No. 20,315.)

(Supreme Court of California. July 7, 1887.)

DIVORCE—ALIMONY—CONTEMPT.

Upon the hearing of a petition for *habeas corpus*, where it appears that the petitioner was committed for contempt in not paying alimony, the fact that he has since filed his petition in insolvency, and obtained a preliminary order thereon,

does not alone entitle him to his release, where the superior court, in making the order, found as a fact that petitioner was able to comply with it; and the correctness of that finding will not be inquired into upon *habeas corpus*.

In bank. Appeal from superior court, Alameda county.

Habeas corpus.

J. H. Meredith and H. Miller, for petitioner. Wells Whitmore and Fredk. F. Whitney, for respondent.

MCFARLAND, J. The petition merely avers that petitioner was committed to the custody of the sheriff of Alameda county by an order of the superior court of said county made in a certain action therein pending, in which Jesse Wilson was plaintiff, and petitioner was defendant, and that said court did not have jurisdiction to make said order. The return of the sheriff shows that the order committed petitioner for contempt in not paying certain money ordered to be paid as alimony in a divorce case; and it is apparent that the court had jurisdiction to make the order.

The petitioner filed an answer to the sheriff's return, in which he shows that since his imprisonment commenced he filed his petition in insolvency in another department of said superior court, and obtained the usual preliminary order declaring him an insolvent, directing the sheriff to take possession of his property, etc.; and he contends that this last order entitles him to be released by this court. But we do not see how it can have that effect. The thing which petitioner seeks to have determined by this court in this proceeding is that he is unable financially to pay the alimony. But the superior court, when it made the contempt order, found as a fact that he was able to comply with the order for alimony, and we would not upon *habeas corpus* inquire into the correctness of that finding. It raises no jurisdictional question. Now, the subsequent initiation of insolvency proceedings which might turn out to be fraudulent, and which might be discontinued at any time before the appointment of an assignee, is merely additional evidence touching the question of petitioner's financial ability. If presented to the superior court on another application for the release of petitioner from custody, it might or might not be deemed by that court sufficient to warrant his discharge, but it cannot be considered here on this proceeding.

Let the petitioner be remanded.

We concur: SEARLS, C. J.; MCKINSTRY, J.; TEMPLE, J.

PATERSON, J. I concur in the judgment.

73 Cal. 99

WILLIAMS, Ex'r, v. WILLIAMS, Jr., and others. (No. 12,135.)

(Supreme Court of California. July 7, 1887.)

1. WILL—VESTED INTEREST.

A devise to a person "absolutely," to be "distributed" to him at the expiration of three years, is a vested interest in fee, postponed merely in enjoyment.¹

2. SAME—CONSTRUCTION—JURISDICTION.

A court of chancery in California has jurisdiction to construe a will, even though the doubt arising is a speculative one.

In bank. Appeal from superior court of Sacramento.

The action was brought to procure a judicial construction of certain provisions of testator's will. The main question sufficiently appears in the opinion. At the hearing, before Judge VAN FLEET, his honor is reported to have said that his impression was "that, in order to give a court of chancery jurisdiction to construe a will, there must be some question of doubt, either act-

¹See note at end of case.

ually existing, or certain to arise in the future, in order that the decree may have something to operate upon. Here the only question proposed by plaintiff * * * is as to the result of the defendant Percy dying before distribution,—a contingency not even highly probable, and at least not certain to arise. *Quære*, does not the bill then present for the determination of the court a question purely 'speculative?' " This point had not been taken by any of the parties to the suit.

C. H. Oatman, guardian *ad litem*, for appellant. *G. W. Gordon*, guardian *ad litem*, for respondent.

SEARLS, C. J. This is an action in the nature of a bill of interpleader by plaintiff, as the executor of the last will of Thomas H. Williams, deceased, to procure a judicial determination of the construction to be given to certain provisions of said last will.

The specific questions submitted by the bill relate to a devise or bequest of \$50,000, made to defendant Percy Williams, and arise under the following clause of the will:

"*Item 4.* When the term of three years after my death shall have elapsed, unless the executor herein named shall, for good cause, extend it for two years, or in case there be another executor, three of my children or representatives shall, by writing, extend it for two years, distribution of my estate shall be made as herein directed.

"*Clause 2 of Item 4. Second.* There shall be vested absolutely in Percy, property or money, fifty thousand (\$50,000) dollars."

"*Item 6.* The first fifty thousand (\$50,000) dollars given to Percy is intended to vest in him absolutely, but the remainder of the estate is only intended for the use and benefit of the children during their respective lives, with the remainder in fee to those herein named, except the fifty thousand (\$50,000) dollars absolutely given Percy, which may be given in money or property as desired."

"*Item 13.* This will is lengthy, but I hope it clearly expresses my purposes, thus: That, with the exception of fifty thousand (\$50,000) dollars, the property of my estate is to be 'set aside' in and for the benefit of my children,"—naming them, and providing that each of said children so named is to have the net income of the estate so set aside for them respectively; that the legal title is to be and remain in the executor, etc.

The complaint contains a copy of the will, and alleges, in general terms, that doubts have arisen and are entertained by the executor and those interested in the estate of the testator, as to the true intent and meaning of the will, and as to the duty of plaintiff in the proper execution of the various trusts thereby created.

The particular questions raised, however, and which the court is asked to determine, are with reference to the bequest of \$50,000 made to defendant Percy Williams, and are very clearly stated by the court below in the following language: "*First*, whether or not, said legacy or devise of \$50,000 to defendant Percy Williams is an absolute and vested estate in him, and of which the time of enjoyment only is postponed until distribution, so that on his death, before distribution, intestate, it would pass to his legal heirs, or could now be transmitted by his will or conveyed by deed, as he might desire; or, *second*, whether the scheme and design of the will was that it was so far conditional as to depend on his survival to the time of distribution, and, if not surviving, whether said \$50,000 legacy or devise does not go to and vest in those designated by the will as devisees in remainder, together with the balance of the interest devised to said Percy."

The court below answered the first of these two propositions in the affirmative, which, as may be seen, disposed of the whole matter. We think the conclusion reached by the learned judge who tried the cause was correct, and

that his reasoning in the premises clearly illustrates the questions involved.

The language used is as follows, and we adopt it as the opinion of the court:

"It will be seen by reference to the language of the will that by clause 2 of item 4, and the first clause of item 6, \$50,000 is given to defendant Percy 'absolutely,' to be 'distributed' to him at the expiration of three years (or, in a certain contingency, five years) from the date of testator's death. By the other clauses of those items, the bulk of the residue of the estate is devised and bequeathed to the children in certain proportions, for their lives, with remainders over to their descendants in a named order. The gift to Percy, it is declared, 'is intended to vest in him absolutely,' and in that respect item 6 draws a distinction between that devise and the others made to the children. Now, so far as these provisions of the will are concerned, there can be no doubt that the interest of Percy in this devise is a *vested* interest in fee, postponed merely in enjoyment. No other legal conclusion can flow from the language used. *Johnson v. Baker*, 9 Amer. Dec. 605; *Tazewell v. Smith*, 10 Amer. Dec. 533; *Reed v. Buckley*, 40 Amer. Dec. 531; *Bentley v. Long*, 47 Amer. Dec. 523; *Furness v. Fox*, 48 Amer. Dec. 593; Civil Code, § 694.

"The law favors the vesting of interests, and every interest will be presumed to be vested unless a contrary intention is clearly manifest. Civil Code, § 1341. But these provisions are free from ambiguity. The devise is made in express terms, and declared to be absolute and vested. No provision is made for any remainder over in case of the death of the beneficiary before distribution, or in any other contingency, while ample provision in that regard is made as to the various other devises. In fact, if it could be held that this devise could, in any event, fail to vest, it would result that the testator died intestate as to this portion of his estate, for there is no residuary clause in the will; the only devises or bequests being made out of the remainder of the estate after deducting this \$50,000. It would seem to follow, then, as a matter not admitting of doubt, that, under the provisions referred to, the interest of Percy in this share is a vested future interest in fee, which will pass by grant, devise, or succession, and which he may alienate at his pleasure. If he should die before distribution, without such alienation, it will vest in his heirs, devisees, or legatees. See cases cited above, and section 669, Civil Code.

"It is claimed, however, by counsel for the defendant Frank Hansford Johnson that these provisions will not bear this construction, when viewed in conjunction with items 9 and 7. But, in my judgment, the conclusions I have expressed are in no respect affected by the language of items 9 and 7, or either of them. As to item 9, it will be seen that the precedent estate thereby vested in the executor ceases immediately when the future estates vest in possession, whenever that occurs. That this is the clear intention of the testator is shown by the fact that the legacies named in item 3 also fall within the language of item 9. The position is equally untenable as to item 7. That item contains an indefinite restraint upon alienation by the children. This clause is valid as to the life-estates, because, as to them, the power of alienation is only restrained during the continuance of lives in being, but, as to this devise of \$50,000, such a restraint would be void, as the interest created therein is one in fee, and the restraint would be perpetual. Civil Code, §§ 715, 716.

"It is clear that this clause was not intended to refer to this share. It is confined, by its terms, to 'any estate left for his or her benefit,' and does not extend to anything left absolutely to a child. The expression used plainly refers to the estate vested in the executor *in trust* for 'the benefit' of the children. In fact, taking the whole will together, I think that, as to the other shares or devises, all that is left to the children is the *income*, to be paid over by the executor as it accrues, and item 7 is intended to carry out that intention. It will be seen that the last clause of item 10 also bears out my

first conclusions, and I find nothing in the will to alter them, or in any measure repugnant to the interpretation I have given. Civil Code, § 1322; 1 Redf. Wills, c. 9, § 6, art. 32; *Damrell v. Hartt*, 137 Mass. 218; *Ordway v. Dow*, 55 N. H. 15; *Quackenbos v. Kingsland*, 102 N. Y. 130, 6 N. E. Rep. 121; *Bushnell v. Carpenter*, 92 N. Y. 273; *Stuart v. Wrey*, 30 Ch. Div. 507.

"W. C. VAN FLEET, Judge."

Upon the question of the jurisdiction of the court, a question not raised by the parties in the court below, but suggested by the learned judge who heard and decided the case, we are of opinion that whatever doubts may exist as to the jurisdiction, founded upon the decisions of courts in other states of the Union, so far as the power of courts to hear and determine in proper cases questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate is concerned, this court has settled the proposition in the affirmative. *Rosenberg v. Frank*, 58 Cal. 387; *Payne v. Payne*, 18 Cal. 291; *Deek v. Gerke*, 12 Cal. 433.

The jurisdiction of the court below established, it follows that the decree in the case becomes binding upon all parties in interest, and, in the absence of all formal objection in the lower court, we do not feel called upon to scrutinize closely the case as made, for the purpose of determining the policy of hearing or refusing to entertain the action on account of the facts as stated not being as conclusive as they might have been, and perhaps would have been put, had objection appeared. In other words, we deem the case made, within the rule enunciated by this court in the cases cited, and, in the absence of a special demurrer, as sufficient to sustain the decree.

Judgment affirmed.

We concur: MCFARLAND, J.; TEMPLE, J.; PATERSON, J.; MCKINSTRY, J.

NOTE.

WILL—VESTED INTEREST. Words postponing the conveyance or division of the property to the expiration of a particular estate, or for a definite period, are presumed to relate to the beginning of the enjoyment, and not the vesting of the estate, *McArthur v. Scott*, 5 Sup. Ct. Rep. 652; *Chasy v. Gowdry*, (N. J.) 9 Atl. Rep. 580; *Parker v. Glover*, Id. 217; *Crosby v. Crosby*, (N. H.) 5 Atl. Rep. 907; *Wiggin v. Perkins*, Id. 904; *Naundorf v. Schumann*, (N. J.) 2 Atl. Rep. 609; *Pond v. Allen*, (R. I.) Id. 302; *Dodd v. Winship*, (Mass.) 11 N. E. Rep. 588; *Gibbens v. Gibbens*, (Mass.) 3 N. E. Rep. 1; *Scott v. West*, (Wis.) 24 N. W. Rep. 161; *Rood v. Hovey*, (Mich.) 15 N. W. Rep. 525; and the gift will vest at once, though the time for payment or distribution is postponed for the convenience of the fund or property, *Rubencane v. McKee*, (Del.) 6 Atl. Rep. 639; *Pond v. Allen*, (R. I.) 2 Atl. Rep. 302; *Scott v. West*, (Wis.) 24 N. W. Rep. 161; or that some one else may meanwhile have the use or the income of the corpus, *Crosby v. Crosby*, (N. H.) 5 Atl. Rep. 907; *Pond v. Allen*, (R. I.) 2 Atl. Rep. 302; *Scott v. West*, (Wis.) 24 N. W. Rep. 161; *Rood v. Hovey*, (Mich.) 15 N. W. Rep. 525; *Davidson v. Bates*, (Ind.) 12 N. E. Rep. —.

73 Cal. 106

VALENSIN v. VALENSIN. (No. 11,781.)

(*Supreme Court of California.* July 9, 1887.)

1. WITNESS—PRIVILEGE.

Where a physician called as a witness refuses to answer a relevant and material question on the ground of "privilege," and his patient waives that privilege, the court should compel him to answer.

2. SAME—EXAMINATION.

It cannot be assumed in advance that a question is improper; and an objection to its receipt ought not to be taken until the question is asked.

Department 1. Appeal from superior court, Sacramento county.

W. H. Beatty and *S. C. Denson*, for appellant. *A. P. Catlin* and *Grove L. Johnson*, for respondent.

TEMPLE, J. Action for a divorce on the ground of cruelty, which consisted in a course of treatment on the part of defendant causing grievous bodily suffering and grievous mental anguish.

On the trial, Dr. Simmons was called as a witness for plaintiff. He stated that he had attended both plaintiff and defendant professionally. He was asked as to the condition of plaintiff's health. Witness declined to answer unless he was assured by the court he would not be cross-examined, averring that he might be required to state on such cross-examination matters which had been confided to him professionally. Plaintiff was personally present in court, and her counsel then released the witness from any obligation to secrecy. Counsel then stated: "We expect to ask his professional opinion as to whether, in the condition of health in which she was, it would have been seriously detrimental to her health to be subject to annoyance, excitements, threats, and the anxiety caused by such threats. We do not propose to ask what was the cause of her ill health, but whether, in the condition in which he found her, her health was likely to be seriously injured by being subjected to the said harassing trouble that we think she was about that time subjected to." Evidence had been introduced tending to show conduct on the part of defendant of the character charged in the complaint, and that its effect on the plaintiff had been to produce nervous excitement and exhaustion.

A hypothetical question was then propounded which had reference entirely to the effect which would probably result to plaintiff, in her then condition, from the acts (which were specially recited) which plaintiff claimed to have proven. The question did not involve the statement of any matter which the witness had learned from the defendant. The witness did not in fact claim that it did. On the contrary, he would willingly consent to answer if the court would protect him from cross-examination, which might, as he thought, make it necessary for him to reveal professional secrets confided to him by defendant. The court was asked to compel the witness to answer, but declined, and plaintiff excepted. In this we think the court erred. The matter was material and relevant. The form of the final question was objectionable, but no objection was interposed. Had there been, the objection could easily have been avoided by a new question. As the matter was material and relevant, the witness should have answered, and the court erred in not compelling it.

If the defendant had insisted on cross-examination for a disclosure of matters confided by himself to his physician, that would have absolved the physician from the obligation. But in any event it would have been time enough for the witness to object when he was asked to make such disclosures. It may be true that the witness would be protected, not only from the necessity of telling what was said by his patient, but also from stating facts which would in effect amount to a betrayal of confidence. But here confessedly the answer sought was not of that character.

We think there was also error in refusing to allow the evidence offered for the purpose of impeaching the witness Moore. The attention of witness had been called to the time, the place, and the circumstances of the alleged statement. After the impeaching witness had stated that she remembered the occasion, objection was made to the testimony, and sustained before any further question was asked. It could not have been assumed in advance that the question to be asked would be improper.

Whether it was correct, as a matter of practice, to allow a supplemental complaint to be filed, is not involved on this appeal. We see no reason, however, why it may not be allowed on proper terms. It was done in this case, and the action as to the new ground of complaint set up must be considered as being commenced when the supplemental complaint was filed. Whether the false and malicious charge made after the actual separation of the parties, would be less apt to inflict grievous mental anguish for that reason, was for the trial court to determine in view of all the facts.

Order and judgment reversed, and new trial ordered.

We concur: MCKINSTRY, J.; PATERSON, J.

73 Cal. 120

In re KOWALSKY. (No. 20,245.)

(Supreme Court of California. July 12, 1887.)

1. HABEAS CORPUS—WHEN GRANTED—DEFECTIVE INDICTMENT.

Habeas corpus is not intended to review the regularity of the proceedings in any case, and a prisoner will not be discharged under it when the indictment, however defective, discloses facts sufficient to base a charge of any offense known to the law.

2. LIBEL—CAUSING PUBLICATION.

Section 9, art. 1, Const. Cal., providing that in all criminal prosecutions for libels, "indictments found or informations laid for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause," applies to a person who *causes* a libel to be published equally with the one who publishes it.

In bank. Appeal from superior court, San Joaquin county.

Habeas corpus.

Davis Louderback, W. H. L. Barnes, David McClure, and Henry J. Kowalsky, in pro. per., for petitioner. *David S. Terry,* for respondent.

SEARLS, C. J. The petitioner was indicted by the grand jury of the county of San Joaquin for an alleged libel of David S. Terry, a resident of said county. A warrant of arrest was issued under said indictment, by virtue of which petitioner was taken into custody by the sheriff, and he now sues out a writ of *habeas corpus*. The petitioner claims that he is entitled to his discharge upon the ground that the indictment does not state facts constituting a crime, or showing the superior court of San Joaquin county to have jurisdiction of the alleged offense.

The *gravamen* of the charge, as contained in the indictment, is that on or about the thirty-first day of July, 1885, at the county of San Joaquin, state of California, the defendant did willfully and maliciously, and with intent to injure David S. Terry, a resident, etc., "cause to be printed and published, and expressed by printing, in a certain newspaper called the 'Evening Post,' printed in the city and county of San Francisco, and * * * published and circulated in said county of San Joaquin, the following defamatory and libelous words of and concerning said Terry, to-wit, that 'he [said Terry meaning] had attempted to assassinate Hopkins,' contrary to the force and effect of the statute," etc.

"A libel is a malicious defamation expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation * * * of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Pen. Code, § 248.

1. The inquiry upon *habeas corpus* may extend to the question whether the indictment charges any offense known to the law; for this goes to the jurisdiction, which is always a proper subject of inquiry in a proceeding of this character. *Ex parte Corryell*, 22 Cal. 179; *Ex parte Kearney*, 55 Cal. 212.

2. Where an indictment has been found, which although defective, and subject to attack and overthrow upon a demurrer, yet if enough appears in such defective indictment to show that an offense has been committed, of which the court has jurisdiction, the party charged cannot be discharged upon a writ of *habeas corpus*, but will be remitted to the court in which the indictment is pending for such proceedings as the law may warrant by way of defense. *Ex parte Whitaker*, 43 Ala. 323.

The writ of *habeas corpus* is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law. *Ex parte Prime*, 1 Barb. 340.

We are of opinion the indictment contains such substantial statement of

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the facts constituting the alleged offense that it cannot be said of it that, if they are all taken as true, no violation of the law has been committed by defendant. The defects in the indictment, if any, are of such a character that they can only be reached in the court where the indictment is pending, or by appeal therefrom.

It is further contended, however, that neither the grand jury of San Joaquin county, nor the superior court of such county, had nor has any jurisdiction of the person of defendant, or of the crime charged in said indictment. Section 9 of article 1 of the constitution of the state provides that, in all criminal prosecutions for libels, "indictments found or information laid for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause." The contention of petitioner is that this section of the constitution applies to the publishers of libels, who alone can be tried elsewhere than in the county where the publication office of the newspaper is located; that petitioner is not charged with *publishing* a libel, but with having *caused* such libel to be printed and published.

The constitution is not limited to cases of *newspaper publishers and proprietors* alone, but applies to "indictments found or informations laid for publications in newspapers." The term used is broad enough to include a person who *causes* a libel to be published in a newspaper equally with one who publishes it. The constitution is aimed at a *class* of libels, viz., *those published in newspapers*, and any and all persons guilty of such libels are liable to be tried at the places specified in the constitution, without reference to the fact whether they are or are not editors or proprietors of the paper containing the libel.

Again, conceding the point well taken, according to the indictment, the Evening Post, in which the alleged libel was published, while it is shown to be printed in the city and county of San Francisco, is and was *published* in the county of San Joaquin, and, so far as appears in the indictment, was not published elsewhere. If, as we may suppose, the Evening Post has a publication office and is in fact published in San Francisco, the fact must be established by way of defense before petitioner can avail himself of it in bar to a prosecution in San Joaquin county.

Townsend on Slander and Libel says, at section 115: "As respects a publication by writing, a libel, not only the publisher, but all who in anywise aid or are concerned in the publication of the writing are liable as publishers; the publication of the writing is the act of all concerned in the production of the writing. Thus, if one composes and dictates, a second writes, and a third publishes, all are liable as publishers, and each is liable as a publisher."

There is still another reason why the contention of petitioner cannot avail him. Section 9 of article 1 of our constitution is a limitation upon the right to indict and punish for libel in any county of the state where the same may be published. *Com. v. Blanding*, 3 Pick. 304; Bish. Crim. Proc. § 69; 1 Archb. Crim. Pr. p. 241, and note 1.

It follows, therefore, that, if the constitution only applies to the editor and proprietor of a newspaper, those not coming within that category are still liable to punishment as at common law wherever the paper containing the libel may be circulated. We do not subscribe to this doctrine, but refer to it as a necessary consequence of assuming the position of petitioner to be correct.

The petition is denied, and petitioner remanded to the custody of the proper officer.

We concur: MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.; TEMPLE, J.

73 Cal. 109

GREGORY and another v. PERSHBAKER and another. (No. 12,105.)

(Supreme Court of California. July 12, 1887.)

1. MINES—LOCATION—"LODE."

The word "lode" is properly defined as a "zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock," and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be inclosed within defined boundaries.

2. SAME—"PLACER" CLAIMS.

"Placer" claims include all forms of deposits excepting veins of quartz or other rock in place.

3. SAME.

A location of "placer" mineral land is valid without previous discovery of valuable mineral therein.

4. SAME—LOCATION—EVIDENCE.

In an action where both parties claim to have made locations of mineral land in themselves valid, and the question is which of the two has made the prior location, the prior actual or constructive possession, evidenced by posting the notice, and by marking the boundaries in the manner required by statute, must prevail.

Department 1. Appeal from superior court, Butte county.

Plaintiffs are grantees and successors in interest of Johnson and others, who, on December 14, 1882, located the Lucretia mining claim upon gold-bearing mineral land of the United States, in Butte county, California. Defendant, on December 22, 1882, filed his application for a patent to the Howard mining claim, which included a portion of the Lucretia location. Plaintiffs brought this action, under sections 2325 and 2326, Rev. St. U. S., to have the question of right of possession of the claim determined. The Magalia Mining Company, by leave of the court, intervened, claiming an interest in the location through defendant. The court found that neither plaintiffs, defendant, nor intervenor had any title. Plaintiffs appealed. Other facts are sufficiently stated in the opinion.

A. L. Hart, Wm. Singer, Jr., and H. V. Reardon, for appellants. Hundley & Gale, W. C. Belcher, and W. H. H. Hart, for respondents.

McKINSTRY, J. 1. It is contended by the defendant and the intervenor (respondents) that the mineral, if any, found in the land claimed by the plaintiffs herein, constitutes a lode within the meaning of the acts of congress; that ledges or lodes can be located only in a manner entirely different from the mode adopted by plaintiffs' predecessors; and therefore, however regular their surface location might have been as a location of a placer claim, it is invalid because no placer exists within its limits.

Finding No. 51 of the court below is as follows: "That in the year 1856, John Barrett, and others associated with him, discovered on the westerly bank of Little Butte creek, on the south-east quarter of said section 13, a thin seam of gravel cropping out between an underlying bed of slate rock and an overlying bed of lava rock; and, finding that the said seam of gravel was gold-bearing, located the same as and for a mining claim under the name and designation of the 'Burch and Barrett Claim,' and thereupon commenced to work and develop their said claim by excavating a tunnel into the hill, following the course of the channel, and the said channel became thicker and better developed and more valuable as they pursued and explored the same into the hill, and showed that the said deposit was a well-developed channel, varying from a few inches to eight and ten feet in thickness, and from eight or ten to forty feet in breadth, with a well-defined bed and side walls of slate rock, and capped by a thin stratum of clay, with an overlying body of lava rock for hanging wall. Prior to the year 1879 the said John Barrett, by mesne conveyances from his associates in said location, became sole owner of the said Burch and Barrett location, and in that year sold and conveyed the same to

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the intervenor, the Magalia Gold Mining Company, a corporation duly formed and organized under the laws of the state of California, and the said intervenor thereupon entered into and took, and thence hitherto has kept and held, and still holds, the possession, and has ever since continued the work of exploring and pursuing and working and mining the said gravel deposit in and along the said channel or bed, and had, in the spring of the year 1882, pursued and opened and worked the said gravel channel or bed in said south-east quarter of said section 13, and in the direction of the said south-west quarter of said section, and had discovered that the said gold-bearing channel extended towards and probably into the said south-west quarter, and that the said south-east quarter of section 13 contained deposits of gold-bearing gravel in quantity sufficient, not only to pay for working and mining the same, but sufficient to render the said quarter section of great value for mining purposes. That, after the commencement of this action, the said Magalia Gold Mining Company projected and extended its tunnel, mentioned in these findings, into said south-west quarter of said section 13, following the said gold-bearing deposit or channel. That said channel in its course into the hill descends or drops at an angle on an average of about eight degrees. That the bed-rock of said channel, during its entire length so far as worked, is composed of a slate formation, and upon that slate formation said gravel rests, and over said gravel is a formation of clay gouge, overlapping said mineral deposit, and that above said clay seam is the lava which extends to the surface; and that the overlying lava rock, at the point where the said channel crosses the easterly line of the said south-west quarter aforesaid, is about six hundred feet in thickness. That said gravel is of a hard nature, and in mining and extracting the same has to be detached from its position by the use of picks and gads, and, when extracted, is taken out to the surface, and there washed, and in so washing gold is extracted therefrom. That neither gold nor any other mineral was discovered within the boundaries of said south-west quarter of said section 13 until the said tunnel of said Magalia Company penetrated therein, as aforesaid. That said pay-streak of gravel and deposit does not crop out at any other place or places than the place where the same was discovered, as aforesaid; and that the same cannot be seen or reached without entering the works of the said Magalia Gold Mining Company, and following the trend and meanderings of said channel to the present face of the mineral deposit, except by sinking a shaft or running expensive tunnels other than those run, occupied, and used by the intervenor therein."

In support of their view, counsel cite the *Eureka Case*, 4 Sawy. 302, and other decisions following and referring to that. In the *Eureka Case*, Mr. Justice FIELD of the supreme court of the United States said: "We are of opinion that the term [lode] as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." It includes, to use the language cited by counsel, "all deposits of mineral matter found through a mineralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same processes." This definition would not include a bed of gravel from which particles of gold may be washed. The words "mineralized rock" were evidently intended to qualify the last as well as the first sentence. That which in the *Eureka Case* was declared to be a "lode" was a zone of *limestone* lying between a wall of quartz and a seam of clay or shale, the one having a dip of 45 deg., and the other of 80 deg.

Section 2320 of the Revised Statutes of the United States (1873-74) treats of "mining claims upon veins or lodes of quartz or other rock in place bearing gold;" section 2322, of veins, lodes, and ledges "the top or apex of which" lies inside of surface lines extended vertically downward.

In Seane's *Neuman and Barretti* (by Valazquez) a "placer" is said to be "a place near the bank of a river where gold dust is found." In the last edi-

tion of Webster, which gives the meaning of the term as approved by usage in Mexico and California, it is defined: "A gravelly place where gold is found, especially by the side of a river, or in the bed of a mountain torrent." Whatever the origin of the subterranean channels containing gravel beds, they have long been known to exist in California, and they have been generally supposed to be, and generally spoken of as, the beds of ancient rivers in which the gravel was deposited by fluvial action, and which were either from their beginning subterranean, or upon which the superincumbent earth or rock has been buried by means of convulsion, caused by volcanic or other natural force. That the bed of gravel mentioned in the findings, to the limited extent it has been prospected by the intervenor's tunnel, "descends or drops on an average of about eight degrees," does not of itself make the gravel deposit a lode with "a top or apex," nor contradict the theory that the channel was the channel of a mountain stream or torrent.

The terms employed in the acts of congress are used in the sense in which they are received by miners. The *Eureka Case*, *supra*. Moreover, by express enactment, "claims usually called placers" are declared to include all forms of deposit, "excepting veins of quartz or other rock in place." Rev. St. U. S. § 3229. Referring to the common use of the word by miners, to the dictionaries, and to the adjudications of courts, the gravel bed with gold therein, as described in the finding, is a placer.

Other findings of the court below strengthen this conviction. The court found that for a long time the land which is the subject of this action was generally reputed and understood throughout the mining district in which it is to be valuable placer mining ground, through which ancient channels, containing gravel-bearing gold in paying quantities, extended. No. 13. While it does not appear, except inferentially, that ground like that in controversy was generally located as placer, neither does it appear that there were district laws with respect to locations of veins, lodes, or ledges; and, on the other hand, the district laws with reference to the location of flat and placer claims are set out in the findings at length. It further appears that the intervenor attempted to locate the ground as and for a placer claim, and its application for a patent was based on that location.

2. If the ground located by those under whom plaintiffs deraign was not previously located as a placer claim, and the plaintiffs or their predecessors fully complied with the acts of congress, and the local rules and regulations, the plaintiffs would seem to have the right of possession. There is no finding of any local law which provides for the location of placers, or beds of gravels containing precious metals below the surface, as tunnel claims, or of facts showing that the grantors of the intervenor, who constructed the tunnel, pursued the mode laid down by local laws in locating it. As to any claim to the possession based on occupancy by the tunnel of a portion of plaintiffs' location, such occupancy, if it would be considered at all under the statutes, would extend only to the space within the walls of the tunnel, and could not be extended beyond them by any rule of constructive possession. We are not required, therefore, to interpret the section of the act of 1872 (Rev. St. U. S. 2344) which reads: "Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws," if, indeed, that provision refers to any rights other than those acquired under the act of 1866 and under the act of 1870, "granting to A. Sutro the right of way," etc.

The claim and location of plaintiffs "was distinctly marked on the ground, so that its boundaries could be readily traced." Rev. St. 2324. The mining laws of the district provided: "A notice shall be posted in a conspicuous place on each claim, or body of claims, describing the same with convenient certainty, and shall be recorded by the district recorder in his office, or in the office of the county recorder of Butte county." "All records of mining claims

shall contain the name or names of the locators, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify them." The last requirement is substantially a transcript from the United States statute, Rev. St. 2324. The location by plaintiffs' predecessors in interest conformed strictly to the law with respect to the posting and registration of notices and their contents.

It is insisted by counsel for respondents that no location of mineral land is valid unless valuable mineral had been actually discovered in the land before the location was made. As to placer claims, we find no such condition in the acts of congress, in the local laws, or in the practice of miners; but, if the laws contemplated discovery before location, it would seem from finding 51, above quoted, that here the discovery preceded the location. Of course, a patent for mineral lands can only issue under the acts of congress relating to the disposition of mineral lands, on proof that they are such.

3. It is contended that the intervenor had already located the same ground as a placer. The intervenor's notice of location was recorded December 5, 1882. The plaintiffs' claim was marked on the ground. The marking was commenced on the thirteenth and completed on the fourteenth of December, 1882. Plaintiffs' notice was posted in a conspicuous place on their claim on the said fourteenth of December, and was recorded by the district recorder on the sixteenth and by the county recorder on the twentieth of the same month.

On the said December 14th, and after the boundaries of plaintiffs' claim were fully marked on the ground, the intervenor's notice of location (which described its claim by boundaries coterminous with plaintiffs' claim, and which had been so as aforesaid recorded on the fifth day of December) was posted on the claim. And on the said December 14th the intervenor proceeded to mark its claim on the ground in such manner as that its boundaries could be readily traced by blazing trees and driving painted stakes, along the same lines already marked by the plaintiffs.

If the rights of the parties hereto are to be determined by reference simply to what was done by them or their grantors on the surface and in the recording office, and without regard to work, if any, done in intervenor's tunnel within the limits of the claim, the plaintiffs would seem to have the better right. The facts that the intervenor recorded a notice containing a description of the claim by reference to government subdivisions, and posted a copy thereof outside of the limits of the claim as described in the notice, were not of themselves such acts as that the subsequent marking of the boundaries related to the record or posting of the notice, so as to cut out any rights of plaintiffs acquired by compliance with the statute and district laws. The local laws seem very clearly to provide that the designation of the boundaries on the ground and posting of the notice shall precede its record. In the land office, where the question between the applicant for a patent and the United States is the right of the applicant to purchase, the order in which are done the several acts which give the right to purchase may be immaterial. And so in an action in the state court, where only one of the parties claims to have complied with the laws, the order of the acts done by him may be immaterial. But in an action where both parties claim to have made locations, in themselves valid, and the question is which of the two has made the *prior* location, the prior actual or constructive possession, evidenced by posting the notice and by marking the boundaries in the manner required by statute, must prevail,—at least unless there has been unreasonable delay in recording the notice, even if it be conceded that a failure to record the notice will invalidate a location otherwise regular. It cannot be said here that the plaintiffs unreasonably delayed the record.

The act of congress does not in express terms require the posting or registration of a notice, but recognizes the power of the miners to require the registration by providing that all records of mining claims shall contain a certain

description, etc. The miners are warned that a tract of land is claimed, by the posted notice and the evidence of its boundaries made necessary by the statute. They are not required to search the records in the first instance. A recorded notice gives no information of a claim not actually located. Nor does even a notice posted on the ground, unless it appears that the party posting it is proceeding to indicate with reasonable diligence, or is about to indicate, the boundaries by marking them.

It may be asked: Suppose work is being actually prosecuted on or in the ground, and a struggle ensues between the person doing the work and another party, each striving to secure a precedence in marking out the boundaries of a claim to include the place where the work is being done, can the mere fact that he who has done nothing towards extracting ore, or developing the ground, first completes or first commences the marking of the boundaries, give to him the right of possession? In such case, would the performance of the only work done in the mine, the record of a notice defining the limits of a claim including the work, and the posting of the notice *near* the claim, as described in the record, go for naught? Although merely working at a particular place or places gives no right to patent under the statutes of the United States, and would not, under the local law, proved herein, extend by construction the actual possession, yet, as to a third person who has not complied with the statutes and local laws, the person doing work, or who has done work not abandoned, has an actual possession to the extent of the work done.

We have said that, as between two persons, neither of whom had done any work before his attempted location, and both of whom claim to have made valid locations, the issue must be determined by reference to priority in the statutory designation, on the surface, of the limits of the claim. Of course, we are not to be understood as saying that a claim can be *held*, prior to the patent, without work subsequent to the formal location within it, in case no work was done before. That is not a question involved in this case. But, in determining the question of priority in the particular referred to, it may be possible that the person doing work in the ground, and who has indicated by his acts his intention to perfect a location under the mining laws and statutes, should be held, by proper application of the doctrine of relation, to have first marked the boundaries of the claim, in legal effect, as against one who, for the purpose of depriving him of the benefit of his work, or of his discovery of mineral of value, shall intervene and mark the boundaries before the first occupant shall have completed or even commenced their alignment. But no such question is distinctly presented by the findings herein; and, as we think the interests of justice demand a new trial of the action, we decline to express any opinion upon a suppositive case.

Judgment reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; PATERSON, J.

73 Cal. 142

In re SIC. (No. 20,308.)

(*Supreme Court of California.* July 14, 1887.)

MUNICIPAL CORPORATIONS—ORDINANCE—CRIMES.

Section 3 of ordinance No. 192 of the city of Stockton, California, makes it unlawful for two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium, or inhaling the fumes thereof. Section 307 of the State Penal Code declares that every person who visits or resorts to any place where opium, or any of its preparations, is sold or given away to be smoked at such place, for the purpose of smoking opium, or its said preparations, is guilty of a misdemeanor, and punishable by fine or imprisonment. *Held*, that the ordinance, in so far as it made criminal precisely the same acts that were declared a crime by the state law, was in conflict therewith; and, under Const. art. 11, § 11, limiting the power of municipal corporations to the passage of ordinances not in conflict with general laws, was void, and that persons accused of assembling in a room for the purpose of smoking opium therein could not be prosecuted thereunder.

In bank. Application from San Joaquin county for *habeas corpus*.
Lyman J. Mourry, for petitioner. *F. H. Smith*, for respondent.

TEMPLE, J. A complaint was filed in the police court of the city of Stockton, charging Sam Lee and petitioner Sic with the crime of assembling for the purpose of smoking, as follows, to-wit, "the said Sam Lee and Sic [at a time and place specified] were willfully and unlawfully in that certain room, in that certain building, on the south-east corner of El Dorado and Washington streets, in said city, for the purpose of smoking opium, contrary to the provisions of a certain ordinance," etc. The ordinance was entitled "Ordinance No. 192. To prohibit and prevent the smoking of opium, and the inhaling of fumes of opium." The first section declared the smoking of opium, or the inhaling of the fumes of opium, injurious to public health, contrary to public morals, and against the peace and good order of the city, and prohibits the keeping of places where persons assemble for the purpose of smoking or inhaling the fumes of opium. Section 2 makes it unlawful for persons keeping certain places of resort to allow persons to smoke or inhale the fumes of opium therein.

Section 3 is the one under which this complaint is lodged, and is as follows:

"Sec. 3. It shall be unlawful for two or more persons to assemble, be, or remain in any room or place for the purpose of smoking opium, or inhaling the fumes thereof."

Section 4 makes it unlawful for any one to knowingly remain in the room or place where the offense is committed.

Section 5 is aimed at the person owning or controlling any building who permits the offense therein.

Section 6 punishes those who aid or abet the offense.

Section 7 punishes one who may stand before, upon, or in the vicinity of the building, room, or place where the offense is committed, to give warning of the approach of any person.

It is claimed that this ordinance is void because it conflicts with section 307 of the Penal Code, which is as follows: "Every person who opens or maintains, to be resorted to by other persons, any place where opium, or any of its preparations, is sold or given away, to be smoked at such place, and any person who at such place sells or gives away any opium, or its said preparations, to be there smoked or otherwise used, and every person who visits or resorts to any such place for the purpose of smoking opium, or its said preparations, is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$500, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Section 3 of the ordinance is broad enough in terms to prohibit opium smoking under all circumstances, except when the person "keeps moving." Persons may not assemble at any place for the purpose of smoking, or be at a place for the purpose, or remain at a place to smoke. The other sections of the ordinance are equally marked in this respect. They are all aimed at rooms or places where opium is smoked or inhaled. In short, the ordinance is evidently intended to prohibit opium dens or places of resort for the purpose of smoking opium. The ordinance, notwithstanding the comprehensive language used, would hardly be given a more extensive effect than that. To prohibit vice is not ordinarily considered within the police power of the state. A crime is a trespass upon some right, public or private. The object of the police power is to protect rights from the assaults of others, not to banish sin from the world, or to make men moral. It is true no one becomes vicious or degraded without indirectly injuring others, but these consequences are not direct or immediate. *In jure non remota sed proxima spectatur.*

Thus it is said it is no crime to be idle, but one may be punished for begging, for that interferes directly with the comfort of others; that it should

not be made a legal wrong for one to become intoxicated in the privacy of his room, if he does not offend others by displaying his drunkenness; yet the consequence of each of these vices may be to inflict great injuries upon others. Possibly this resulting injury to others, and to society, may justify the legislature in declaring these vices to be crimes. We are not required to pass upon that question, and we do not. It is enough to say that such legislation is very rare in this country. There seems to be an instructive and universal feeling that this is a dangerous province to enter upon, and that through such laws individual liberty might be very much abridged. Hence laws to suppress intemperance, prohibit the sale of liquor, suppress places of resort where it is drank, and punish offensive exhibitions of drunken people, but do not punish the immoderate use of spirits.

Since this whole ordinance, therefore, is evidently aimed at places of resort where opium is smoked or inhaled, we feel justified in limiting section 3 to that evil, although the natural and usual import of such words might, in the absence of a strong presumption against it, extend its effect much further. Perhaps it would be enough to say that the offense charged in the complaint, of which respondent was convicted, may be, for aught that appears, the same as that prohibited in the Code. The section plainly covers the same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code; still it denounces as criminal precisely the same acts which are attempted to be prohibited by the Code. It is admitted that no ordinance is valid which conflicts with the general laws of this state. Does section 3 of the ordinance conflict with section 307 of the Penal Code? Upon this subject there is a very great conflict of authority.

Judge Cooley says that, although the decisions are not uniform, the clear weight of authority is that the same act may constitute an offense both against the state and the municipal corporation, and both may punish it without violation of any constitutional principle. Const. Lim. 199.

In Bishop on Statutory Crimes it is said (section 24) that the true rule is: "If the statute so authorizes, it is not apparent why a city corporation may not impose a special penalty for an act done against it, while the state imposes also a penalty for the same act done against the state." This implies that to enable the city to pass such an ordinance—that is, one imposing a penalty for an act already prohibited by the general law—special authority must be found in the charter.

In Dillon on Municipal Corporations, § 68, after noticing the great conflict in the authorities, the following rules are laid down, it is said, with some distrust as to their correctness: "(1) A general grant of power, such as mere authority to make by-laws for the good government of the place and the like, should not be held to confer authority upon the corporation to make an ordinance punishing an act—for example, as assault and battery—which is made punishable as a criminal offense by the laws of the state. * * * (2) Where the act is in its nature one which constitutes two offenses, one against the state and one against the municipal government, the latter may be constitutionally authorized to punish it, though it be also an offense under the state law; but the legislative intention that this may be done should be manifest and unmistakable, or the power in the corporation should be held not to exist. (3) Where the act or matter covered by the charter or ordinance and by the state law is not essentially criminal in its nature, and is one which is generally confided to the supervision and control of the local government of cities and towns, but is also of a nature to require general legislation, the intention that the municipal government should have power to make new, further, and more definite regulations, and enforce them by appropriate penalties, will be inferred from language, which would not be sufficient were the matter one not specially relating to corporate duties, and fully provided for in general laws."

The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one, and these rules, perhaps, express the law, as we understand it, as well as any.

Section 11, art. 11, of the constitution, authorizes cities and towns "to pass and enforce within their limits such local police, sanitary, and other regulations as do not conflict with general laws." The last clause of this section must be held to be a limitation upon the power of municipalities, whether that power is derived under this provision of the constitution, or from the charter. If, as is held both by Bishop and Dillon to be the effect of authorities, a municipality can only pass ordinances punishing the same acts which are punishable under general laws when expressly authorized to do so, and that no authority to pass such laws will be presumed from grants of power general in their character, it must be because such ordinances may supersede the general law upon the subject. Here there is not only no such authority, but, if such ordinances are conflicting, there cannot be such authority.

It would seem that an ordinance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law. The constitution provides that no one shall be twice put in jeopardy for the same offense. If tried and convicted or acquitted under the ordinance, he could not be again tried for the same offense under the general law. The contrary doctrine has been held in some states, but this conclusion seems more in consonance with reason and justice. Some of these decisions apply to acts which are said to be of a dual nature, and offend at once against the general law and police regulations, which are not directed specifically at the offense denounced in the general law. If there be such acts, no question of this kind can arise with reference to them. But there are decisions, no doubt, which hold squarely the doctrine that both may punish for the same offense. In Alabama it was said (*Mayor v. Allaire*, 14 Ala. 400) that assault and battery could be punished under the ordinance and under the state law also,—the one to maintain the peace of the state and the other the peace of the city. It is difficult to see how the peace of the state is disturbed except through the disturbance in the city. The case has been said to be like that where the state punishes for an offense against its laws, and the same act is punishable under the laws of the United States. It was said by Mr. Justice GRIER that the citizen may be said to owe allegiance to two sovereigns, and the same act may be an offense against each. The United States, however, has no general criminal jurisdiction. In these cases, where the same act may be punished as criminal under such jurisdiction, it will be found that the act, besides offending the general law of the state, is an assault upon the United States in some of its functions as a government. Thus, counterfeiting is an injury to the people, for they are likely to be cheated and swindled through it. But the United States finds it necessary to punish the same act, not because of the injury to the people, but to protect itself in its function of coining money and regulating the currency. State laws and city ordinances all rest upon the same ultimate authority,—the people of the state,—and they aim at the same evil. But it is said that, even in cases where a person is punishable under both state and federal laws, the actual practice is to punish but once.

Holding these views, we think the respondent must be discharged. It will be observed that we only hold that there is a conflict where the ordinance and the general law punish precisely the same acts. We do not wish to be understood as holding that the sections of the ordinance which make criminal other acts not punishable under the general law are void because the legislature has seen fit to legislate upon the same subject.

The petitioner is hereby discharged.

We concur: SEARLS, C. J.; McFARLAND, J.

PATERSON, J., (*concurring*.) I concur in the judgment. I cannot agree with Mr. Justice TEMPLE, however, in his construction of the ordinance. It is not only intended to cover cases not provided for by section 307 of the Penal Code, but it accomplishes that end. Thus section 6 provides: "It shall be unlawful for any person to aid and abet or assist another person in the smoking of opium, or inhaling the fumes of opium." This provision has no reference to the place where the smoking is done. And section 3, under which the petitioners were convicted, is aimed more at the act of smoking than at the place where it is indulged in. I think, therefore, that the question must be met and answered in this case whether the city council has unlimited power to prohibit the smoking of opium under all circumstances. The provisions of section 3 of the ordinance upon which the complaint was made are general, universal in their operation, and present the issue squarely. Will they support a conviction? I feel bound to answer this question in the negative. However much we might prefer a different conclusion in this particular case, there are certain great principles which cannot be invaded in special cases without trespassing upon that province which Mr. Justice TEMPLE speaks of as being dangerous to enter by legislation. Every man has the right to eat, drink, and smoke what he pleases in his own house, without police interference, (unless he is trying to kill himself;) and, before the state or municipal authorities should ask the conviction of a person for smoking, eating, or drinking any particular thing, facts ought to be alleged and shown—even in cases of opium smoking—that at least it was not done in the privacy of his own house, or that he was using his house as a resort for others, or that he was in some way aiding, encouraging, or abetting others in the use of the drug,—injuring or jeopardizing the rights of others; or, in a word, that he was offending against the welfare of society in some way, beyond merely the injurious effect of the act upon himself alone.

That some of the sections of the ordinance are valid, and that section 3 of the ordinance can be so amended as to provide lawfully for conviction in the cases which it was intended to cover, I have no doubt. It is unnecessary to say, in this case, how far the local authorities may go in their legislation against gambling-houses or saloons. The legislature has recognized the opium habit as a great evil. It has, by general legislation, attempted to suppress it. Section 307 was passed and approved for that purpose. By an act entitled "An act to regulate the sale of certain poisonous substances," approved April 16, 1880, it was made a misdemeanor punishable by a fine not exceeding \$500, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment, for any person other than a physician authorized to practice medicine under the laws of this state to retail opium without distinctly labeling the box or package, and the wrapper or cover thereof, together with the word "poison," and the name and place of business of the seller; and the act further provided: "Nor shall it be lawful for any person to retail any of the substances enumerated in either of said schedules to any person, unless upon due inquiry it is found that the person receiving the same is aware of its poisonous character, *and that it is to be used for a legitimate purpose*." Section 2 of the act requires the seller to keep a book in which shall be entered the date of sale, name of the purchaser, quantity sold, purpose for which the purchaser stated it was required, etc., and that the book should be always open to inspection by the proper authorities. But all this legislation has failed to meet the exigency of affairs, and unless we close our eyes to what is taking place daily in the larger cities of the state, and becoming a part of our most deplorable police history, we must recognize the fact that those who are engaged in this nefarious traffic—especially that class who seek among the youth of both sexes for victims of the drug—are the most insidious enemies of society. For the purpose of shielding themselves and their enslaved and unhappy customers from arrest and punishment

for violation of the law, they secrete themselves and their "outfits" in deserted buildings, under bridges, and in out of the way places; thus planning in advance of arrest that which will be a defense under section 307, viz., that they were not caught in a place which was opened to be resorted to by others, and where opium is sold or given away.

They sell the opium at one place, lease their smoking outfits to be used at another place, and keep constantly moving about, with transitory "joints," thus eluding the police, and evading the operation of the statute. These are matters of common notoriety. A resort being "a place of frequent assembly, a haunt," (Webst. Dict.,) before a conviction can be secured, under section 307, it must be shown that the place where the smoking was done was opened or maintained to enable opium smokers to frequent the same for the purpose of smoking. But it is not for us to say what municipal legislation should or may be provided. What I have said is intended only in support of other provisions of the ordinance, which, though different from or the same as the state law, are, in my opinion, valid, notwithstanding the invalidity of section 3.

STATE v. CLEMENTS.

(Supreme Court of Oregon. June 13, 1887.)

1. CRIMINAL PRACTICE—CONDUCT OF TRIAL—REMARKS OF JUDGE.

A physician was on trial for manslaughter resulting from the production of an abortion. The state offered evidence of the pregnancy of deceased. Defendant objected on the ground of witness' incompetency. The court, in overruling the objection, said: "Anybody is competent to tell whether a woman is pregnant or not; at certain stages and times, by her looks,—from common observation. There is a great deal of humbug about medical science * * * and medical testimony, * * * and there is many a man practicing medicine who ought to be a second-class cook in a third-class hotel." *Held* error, especially prejudicial to defendant, and ground for new trial.

2. ABORTION—BURDEN OF PROOF.

Under an indictment for manslaughter by producing an abortion not necessary to preserve the life of the mother, the burden of proof rests upon the state to show that the abortion was not necessary to preserve her life.

3. EVIDENCE—HEARSAY.

A statement by a witness that deceased had told him the day before she died that "the doctor had used instruments upon her" is clearly hearsay, and inadmissible.

4. EXCEPTIONS, BILL OF—REQUISITES.

In Oregon a bill of exceptions, to receive the consideration of the supreme court, must be a general statement of the proceedings,—a statement of the exceptions as they occurred, with a sufficient portion of the testimony or other matter to explain them. Mere memoranda in detached parts will not be considered.

5. APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

In Oregon the order of the circuit court, upon motion to set aside the verdict for insufficiency of evidence to sustain it, will not be reviewed by the supreme court. The errors of the circuit court must be raised by motions and exceptions during the trial.

Appeal from circuit court, Baker county.

Olmstead & Snow, for appellant. *Ramsey & Bingham*, for respondent.

THAYER, J. The appellant herein was indicted, tried, and convicted, in said circuit court, of the crime of manslaughter, alleged to have been committed by producing an abortion upon one Lena Dakota, from the effects of which she died on the thirty-first day of August, 1886, at Huntington, in said Baker county. The deceased was a young unmarried woman; had been stopping for some little time at the hotel at Huntington; was taken violently sick a few days before her death, and died evidently of hemorrhage from the uterus, caused by the recent expulsion of a fetus. The appellant was a practicing physician at Huntington, and, as such was treating the deceased at the time of her death;

that on the morning of her death he locked the door of her room, passed out from the hotel, and remarked to some one that she was sleeping quietly, and that he did not want her disturbed; that a few hours afterwards, about 9 o'clock A. M., he came back to the hotel, called some one from the door of her room, and stated "that Lena was dying;" that he was immediately arrested, placed in irons, and put in charge of the constable, and, on his way from the hotel, stated to the constable in charge to come with him to his office; that he had something to show him; that they proceeded to the prisoner's room, where he exhibited to the constable a *fetus*, of which he said the deceased had been delivered. The appellant, at about the time the deceased was first taken ill, exhibited in the drug store to the druggist, a stout sharpened quill, about six inches in length, being bloody, and having the appearance of having been recently embedded in living animal tissues, which he claimed to have taken from her room, and stated to the druggist: "I want you to examine this. I may need it for my protection. I am afraid this case will get me into a scrape yet. Some woman has been using this for a criminal purpose." A *post mortem* examination was held, and it was found that there was some abrasion of the interior walls of the *uterus*, or scratching, apparently caused by some rough instrument, but that the injuries were slight. In the room of the deceased were also found numerous drugs; some bearing marks of "Druggist's Prescriptions of Kansas City, Mo.," others from druggists in Idaho territory; and others prescribed by the appellant,—the latter being only such prescriptions as would be used in ordinary obstetrical cases; that there was no indication of deceased having met her death by abortion produced by the use of drugs.

John Williams (colored) was called and sworn on behalf of the state, and testified as follows: "Was in Huntington, August 31, 1886. Been there ever since. Was first cook in the hotel at Huntington. I knew the deceased while she was at the hotel. She died August 31st of this year. I last saw deceased alive on Monday before her death, about 4:30 o'clock. She was lying upon the floor. Appeared to be very sick. I had brought her some lemonade. Asked her what was the matter with her. I said to her, 'You are a very sick woman.' The boy was coming up with some ice-water. The door was open. She raised her head, and I asked her what was the matter. She said she was sick at her stomach. I says, 'Yes, Lena; you are a very sick woman.' I picked her up, and laid her on the bed. Asked her if I had not better telegraph to Baker for a doctor. She said, 'No; Johnny would be in in the morning, and he could send to Wood River for a physician.'" He was then asked the following question by counsel for the state: "What did she say was the matter with her?" The witness in answer thereto said: "I asked her if the doctor had used instruments on her." The appellant's counsel thereupon duly objected to the witness answering the question. The court ruled that the question might be answered, if the state would connect the statement of the deceased with some act of the appellant with the commission of the crime. Subsequently said witness was recalled by the state, and asked the following question: "State what, if anything, she [referring to the deceased] said about having instruments used upon her, [referring to the time mentioned in his former testimony?]" The appellant's counsel objected to the question as irrelevant, immaterial, and incompetent; that no foundation had been laid for introducing the same, either as a part of the *res gestæ*, or as a dying declaration. The court overruled the objection, to which an exception was allowed, and the witness answered: "I asked her if the doctor had used instruments upon her. She said, 'Yes.'" It appears, also, that appellant, during the time he attended on the deceased, misrepresented the cause of her illness.

This seems to be the substance, so far as I can gather from counsel's briefs, of the proof upon the part of the state.

The appellant was a witness in his own behalf, and testified that the de-

ceased applied to him on the twelfth of August, 1886, to perform an abortion on her; that he refused absolutely to do it, and gave his reasons. He also testified that some 10 or 12 days prior to the death of the deceased she called upon him to treat her professionally, claiming about some derangement of the *uterus*; that he made an examination; found a sponge imbedded in the tissues in the mouth of the womb; that he used a metallic *speculum* and forceps, and removed the sponge; that he found the place occupied by the sponge lacerated, the sponge covered with pus, and very offensive; that he treated her for about six days, and dismissed the case; that he saw nothing more of deceased until the twenty-fifth of August; that he was then called by her; that she complained of nausea of the stomach, and pains in the abdomen, and, upon being questioned, denied having made any attempt of abortion; that symptoms rapidly disclosed themselves indicating labor pains; that he prescribed an anti-abortive treatment; that there were no other physicians in reach with whom to consult, and deceased had no means to employ medical assistance; that he continued such treatment; that deceased also informed him that she had made an attempt to accomplish a miscarriage by inserting a quill into the *uterus*, and told him where the quill could be found, and which was shown to be the same quill before referred to; that thereafter, on the night of the thirtieth of August, deceased gave birth to a dead *fœtus*; that for a considerable time prior to this deceased was in such a condition that to have exposed the cause of her illness would have resulted in a nervous shock extremely dangerous to her life; that appellant removed the *fœtus*, and its appendages, and afterwards surrendered them to the officer, as shown on the part of the state; that he administered opiates to the deceased, placed her in bed for the purpose of her securing repose, gave directions that she should not be disturbed, left the hotel, and went to his breakfast. Upon his return, in about an hour afterwards, found her dying; uterine hemorrhage having set in during his absence, and caused her death.

The appellant assigns a number of grounds of error, which counsel have discussed fully. They relate to the insufficiency of the indictment; the introduction of improper testimony at the trial; misconduct of the judge in making an improper remark during the trial prejudicial to the appellant; in giving improper instructions to the jury; and in refusing instructions asked by the appellant's counsel; in denying the appellant's motion to set aside the verdict; and in refusing testimony offered by appellant's counsel at the trial.

The one relating to the insufficiency of the indictment was passed over at the hearing without argument; and the one denying the motion to set aside the verdict we cannot consider upon this appeal. This court long ago held that a matter of that character is not reviewable. Counsel, however, continue, from time to time, to persist in urging such questions upon the consideration of this court, and seem to think that, unless they are able to raise them, judgments are liable to be given without sufficient evidence in law to sustain them. But such results are not liable to follow if counsel will properly present them. This court will not uphold a judgment where the evidence is not sufficient in law to justify its rendition, if the question is properly made, which can be done by a motion at the trial to discharge the defendant upon that particular ground, and including all the evidence in the bill of exceptions tending to establish his guilt. So, also, a question regarding the sufficiency of the proof of a particular fact in the case may be reviewed here; but it must be raised by an exception at the trial. Should the trial court say to the jury that if they found such and such facts, and there was no sufficient evidence in law to authorize such finding of all or any one of the facts thus submitted, an exception in either case could be saved, and made available. All the evidence, however, would have to be certified to this court, bearing upon the same, in the statement of the exception; and the statement in such case must purport to contain all the evidence upon the

point. This court has nothing to do with the rulings of the lower court upon a motion for a new trial, or to set aside the verdict of the jury. It deals only with questions of law, and they must be squarely presented as such.

In the shape the evidence in this case is in, we cannot determine its sufficiency. I have only attempted to set out the appellant's testimony from what appears in his brief. That is doubtless stated as favorably to him as the facts will permit, and yet I would not undertake to decide therefrom that he was not guilty as charged in the indictment, though he may have been entirely innocent. Very much would depend upon the character and standing, in such a case, of the accused. There appears to have been no improper motive upon the part of the appellant to produce an abortion upon Lena Dakota, unless it were actuated by sympathy for that unfortunate girl. Her anxiety to cover up her shame would be likely to have had an influence upon any one possessed of a sympathetic nature. She had been imprudent, but was not outside of the pale of charity, and yet could not hope for it in the eyes of mankind; especially in those of her own sex. But whether the appellant was guilty or not, no one can determine so well as those acquainted with the surroundings. It would be idle for this court to attempt to speculate upon this question. The verdict of the jury must therefore stand, unless error was committed at the trial.

The remark of the judge at the trial, claimed to have been prejudicial to the appellant, was made in a ruling upon an objection to a question to the witness Williams. Counsel for the state asked the witness, concerning the deceased, whether she was in a family way. The appellant's counsel objected to it upon the grounds that the witness was not competent to give an opinion; that it did not appear that he possessed any scientific knowledge; that he was only a second cook at the Pacific Hotel. The court overruled the objection, and in doing so made use of the following language: "Anybody is competent to tell whether a woman is pregnant or not, at certain stages and times, by her looks,—from common observation. There is a great deal of humbug about medical science, and medical experts and medical testimony, and so-called medical scientific opinion. There is no other profession where there is such a difference, or where such testimony is unsettled and unsatisfactory as medical experts', and there is many a man practicing medicine who ought to be second-class cook in a third-class hotel."

The remark evidently was an honest expression of the judge's opinion upon the question, and, as a general proposition, may have the sanction of many of the legal profession; yet it was unfortunate that the learned judge made it under the circumstances. The last sentence, "There is many a man practicing medicine who ought to be second-class cook in a third-class hotel," was particularly calculated to prejudice the appellant in the minds of the jury. It could hardly have failed to turn their attention directly towards him, and suggest to them the thought, at least, that he belonged to the class the judge alluded to. The latter, I am satisfied, had no intention whatever to convey any such impression. It was a hasty, inconsiderate remark, however, and should not have been made. If there is any one virtue in the judicial mind entitled to superior excellence, it is patience to hear and determine matters involving the rights and liberties of those charged with the commission of a crime. It is the highest aim of the courts to insure parties arraigned at the bar of justice a fair and impartial trial, and to avoid the least semblance indicating that the prosecution is maintained through a spirit of vindictiveness. The supreme court of the United States has ever sedulously guarded against any appearance of passion or impatience in its administration of the law. If such a course is the best and wisest for an appellate court to pursue, how much more important is it that a *nisi prius* court should observe it. The latter is often convened to try cases of highly sensational character, in the vicinity of where they arise, and in which the tone and sentiment of the

community are inflamed by excitement and prejudice. Hence the least encouragement upon the part of the presiding judge would pervert the affair from an investigation to ascertain truth into a scene of persecution. The remark may have had no injurious effect in the case under consideration; but the matter is too serious to be passed over without an expression of disapprobation. I do not think that the question put to the witness was necessarily improper, nor do I find that the witness attempted to answer it; and if the court, after ascertaining that he had sufficient knowledge to answer it, had quietly overruled the objection, there would have been nothing upon that point of which the appellant could have complained; but in the shape it comes here we can do no less than reverse the judgment of conviction.

The other assignments of error might be passed over without further notice, were it not that the case has to be sent back for a new trial.

The counsel for the state contended at the hearing that there was no such bill of exceptions in the transcript as would admit of any examination by this court of many of the questions which the appellant's counsel brought forward, and from what I have seen of the record I am inclined to believe that he is correct. It is very doubtful, to say the least, whether the alleged instructions of the court to the jury, and exceptions thereto, are authenticated in such manner as to entitle them to a consideration in an appellate court. The alleged instructions are on separate sheets from the bill of exceptions. They purport to be the instructions of the court to the jury, and are signed by the judge. But there is nothing to indicate the exceptions thereto, aside from a note upon the margin. The words "excepted to" are there written, and in many instances the name of the judge is appended to it. The practice, in regard to making up a bill of exceptions, ought to be thoroughly understood in this state. There has usually been but one course pursued regarding it ever since there has been an organized judiciary here; and that has been to make one general statement, reciting the general proceedings of the trial, a statement of the exceptions as they occurred, with sufficient of the evidence or other matter to explain them. That course must continue to be observed, unless changed by the legislature. It will not do for counsel to have transmitted here mere *memoranda*, in detached parts, of the proceedings had in a case, and expect that this court will consider the matter. Everything occurring in the trial of a lawsuit, from the time of the calling of the jury till the rendition of their verdict, upon which questions of law arise that are desired to be reviewed, should be embodied in one bill of exceptions. Exhibits have been allowed to be referred to in the bill, and copies thereof attached, but that has led to controversy in consequence of the exhibit having, as alleged, been detached after the bill was signed. It is much the better practice, where it can be done, to set out all such matters in the bill itself, and that prevents any such consequences as are referred to. Counsel, of course, should use judgment in making up a bill of exceptions, so as not to load it down with immaterial matter, or unnecessary portions of the testimony. A little judicious care and discrimination and wholesome industry upon the part of counsel in this matter will save this court from a great deal of annoyance, and avoid a prejudice which an awkward, unwieldy performance is liable to incite.

The instructions given by the court to the jury in this case, as shown by the paper referred to, were very extensive and minute. I think it would be less liable to confuse a jury, in such a case, to submit to them simply the question as to whether the evidence adduced proved, beyond a reasonable doubt, that the accused was guilty of the offense charged in the indictment. He was charged with having done an act forbidden by section 513 of the Criminal Code of the state, which provides that "if any person shall administer, to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve

the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." The *gravamen* of the offense is the employment of means, with intent thereby to destroy the child; that the death of the child or the mother is thereby produced; that the same is not necessary to preserve the life of the mother. The act then is manslaughter. It was necessary, therefore, for the state, in the present case, before it could claim a conviction of the appellant, to prove that said Lena Dakota was pregnant; that the appellant employed means with intent thereby to destroy the child with which she was pregnant; that the death of said Lena was thereby produced; and that the employment of the means to destroy the child was not necessary to preserve her life. The counsel for the state contended at the hearing that the *onus* is upon the accused, in such cases, to prove that it was necessary to employ the means to destroy the child in order to save the life of the mother, after the state has proved the other facts referred to; that it involves a matter peculiarly within the knowledge of the accused; and that the averment of the fact will be taken as true, unless he disprove it. There are a class of cases where a rule of that character has been made applicable. It has been applied in civil and criminal prosecutions, for a penalty for doing an act which the statute only permits to be done by persons duly licensed therefor. Section 79, 1 Greenl. Ev. But I think it doubtful whether any such rule should obtain in such cases. I am unable to discover any principle to found it upon. The relative convenience of the parties to make the proof ought not, it seems to me, to be taken into consideration; but, in any event, no such rule should be applied to a criminal case, where the accused is presumed to be innocent, and the prosecution is required to prove him guilty beyond a reasonable doubt. In fact, I do not see how such a rule could obtain in such a case without overthrowing the two eternal principles of the common law just referred to. Proof that a physician, in his professional treatment of a woman pregnant with a child, had used means, with the intent thereby to destroy the child, and the death of the child was thereby produced, is not evidence that the treatment was not necessary to preserve the life of the mother; nor, if it produced the death of the mother, that it was not an honest effort on the part of the physician to preserve her life. The experience of mankind shows that cases have often arisen in which such treatment has necessarily been resorted to, and, in the absence of other proof, the law, in its benignity, would presume that it was performed in good faith, and for a legitimate purpose. The extent of proof, to establish the negative averment in such a case, would necessarily be limited by the circumstances. It could not, in the nature of things, be made positive, except as aided by the fact that the accused was able to refute it absolutely, if untrue, and had failed to attempt to do so.

In section 78, 1 Greenl. Ev., the author says: "So, in a prosecution for a penalty given by statute, if the statute, in describing the offense, contains negative matter, the count must contain such negative allegation, and it must be supported by *prima facie* proof. Such is the case in prosecutions for penalties given by statute for coursing deer in inclosed grounds, not having the consent of the owner; or for cutting trees on lands not the parties' own; or taking other property, not having the consent of the owner; or for selling, as a peddler, goods not of the produce or manufacture of the country; or for neglecting to prove a will without just excuse made and accepted by the judge of the probate therefor. In these, and the like cases, it is obvious that plenary proof on the part of the affirmant can hardly be expected; and therefore it is considered sufficient if he offer such evidence as, in the absence of counter-testimony, would afford ground for presuming that the allegation is true."

It seems to me that, upon principle and authority, the accused, in such a case, has the right to stand upon his plea of "not guilty;" and that the prosecution is required to prove every charge in the indictment constituting the

offense, including allegations of negative matter, before a conviction can properly be claimed.

The testimony of the witness Williams, as to what the deceased told him about the doctor having used instruments upon her, was mere hearsay, was clearly inadmissible, and the court should have excluded it at once.

The attention of the court was directed at the hearing to the instructions of the circuit court to the jury, regarding the effect to be given to the testimony of the appellant. We should not consider the point if the case were not going back for a new trial, and some question liable to arise thereon. Under the circumstances, we deem it a duty to suggest our view concerning the matter. The act of the legislative assembly of the state, passed in 1880, amending sections 166 and 167 of the Criminal Code, provides that a person charged or accused of a crime shall, at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the court. The point referred to involves the question as to what extent the court is authorized to instruct the jury under that provision of the statute. Section 835 of the Civil Code provides that the jury, subject to the control of the court, in the cases specified in that Code, are judges of the effect or value of evidence addressed to them, except where it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions. There are other provisions of the Civil Code which allow the credibility of a witness, who has an interest in the event of the suit, to be drawn in question. Section 699 of that Code, in connection with section 673 thereof, permits it. Section 165 of the Criminal Code provides that the law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in that Code. Taking these various sections together, the court is of the opinion that the circuit court in such a case is authorized to instruct on the matters, so far as applicable, referred to in section 835 of the Civil Code; also that the witness is presumed to speak the truth, but that such presumption may be overcome by the manner in which he testifies; by the character of his testimony; by evidence affecting his character or motive; by contradictory evidence; or by his having an interest in the event of the prosecution,—the jury to be the exclusive judges of his credibility. The witness, being also the party accused, is not entitled to full credit; but the jury have no right, on that account, to arbitrarily disregard his evidence. The manner in which he testifies may be such as to impress every one with the belief of the truth of what he states. A case came under my own observation once where a party charged with the commission of an offense pleaded guilty to it, and upon being asked the usual preliminary question to his being sentenced, "what he had to say why the sentence of the law should not be pronounced upon him," etc., made such a candid, ingenuous statement in response that the court declined to sentence him, and directed that his plea be withdrawn, and a plea of not guilty be entered, and he was subsequently acquitted upon the latter plea. In that case, however, the judge was a practical man, and would not subordinate his sense of justice and humanity to vain austerity; or believe that courts for the trial of criminal causes were organized only to convict the accused.

The judgment appealed from will be reversed, and the case remanded to the circuit court for a new trial.

ELLIOT v. STEWART and others.

Supreme Court of Oregon. June 13, 1887.

RIPARIAN RIGHTS—FISHERY—"TIDE LANDS."

The legislation providing for the purchase from the state, by littoral owners, of "tide lands," (Laws Or. 1872, p. 129; Laws Or. 1874, p. 76; Laws Or. 1878, p. 42.)

was not intended to authorize the acquirement of a private title to a sand-bar, several miles from the shore, only exposed at low tide, and covered by six feet of water at high tide. Such a bar is not an "island," nor is it a "shore" or "beach," within the legal definitions of those terms, and the purchaser thereof from the state as "tide land," cannot acquire an exclusive right to fish on said bar.

Strong & Strong, for appellants. *Fulton Bros.*, for respondent.

LORD, C. J. This is a suit in equity to enjoin the defendants from fishing on certain premises described in the complaint, and alleged to belong to the plaintiff. The defendants denied the plaintiff's ownership, and alleged that the said premises are a shifting sand-bar in the Columbia river, and only exposed at low tide, being entirely covered with water at high tide, and that said sands or sand-bar have been immemorially resorted to by the public for fishing and drawing seines therein, etc. Issue being joined as to this, a trial was had, and a decree was rendered dismissing the plaintiff's complaint. Substantially, the evidence shows that the alleged land is a shifting sand-bar situated in the Columbia river some six miles from the Oregon shore, and about one mile from the Washington Territory shore, and that fishermen have resorted to these sands for many years to fish for salmon. The plaintiff derived his title by deed from the state, purporting to convey to him the premises as tide land. The inquiry is whether the state has been authorized by any legislation to dispose of lands of the character in question.

The first act providing for the sale of tide lands was passed in 1872. It is entitled "An act to provide for the sale of tide and overflowed lands *on the sea shore and coast*." Among other things, it provides that "the owner or owners of any land abutting or fronting upon or bounded by the shore of any bay, harbor, or inlet on the sea-coast, shall have the right to purchase from the state," etc. Laws 1872, p. 129. This act only authorizes the sale of tide lands on the sea shore and coast, bays, harbors, and inlets. It authorizes the owners abutting upon or bounded by the *shore* of any bay or harbor or inlet to purchase, and indicates quite plainly that the lands referred to as tide lands are what is generally known as the shore or beach. The act of 1874 was amendatory, and extended the right to purchase tide lands on the shores of rivers and ocean's beach, but the distinction here noted is preserved. The act of 1878, which seems to be the final legislation upon the subject, provides only for the sale of that which is on the sea-coast, or in front of lands abutting on the ocean, or any bay, harbor, inlet, lake, or water-course. Laws 1874, p. 76; Laws 1878, p. 42.

In none of these acts is there any provision for the sale of lands coming within the descriptions of the sands or sand-bar in question. Properly speaking, it cannot be said to be an island; nor is there any abutting of land to it, but it is uncovered or exposed to the flux and reflux of the tides, though it does not register the high and low water mark, being submerged six to seven feet at high tide, and laid bare at low tide. In *Andrus v. Knott*, 12 Or. 501, 8 Pac. Rep. 763, it was held that the term "tide lands" applies to lands covered and uncovered by the tides, which the state owns by virtue of its sovereignty, and corresponds with the shore or beach, which at common law is that land lying between ordinary high and low water mark. In *People v. Davidson*, 30 Cal. 386, SHAFTER, J., said: "We find nothing in the act of May 14, 1861, affording the slightest clue to the sense in which the legislature used the words 'tide lands' therein. * * * Under such circumstances that definition must be adopted which on the whole is most reasonable; and that is supplied in our judgment by the words 'strand,' 'beach,' or 'shore,' in the common-law sense of the terms. Shore is defined to be land on the margin of the sea or a lake or river; that space of land which is alternately covered and left dry by the rising and falling of the tide; the space between high and low water mark. It is synonymous with beach, which is the strip of land between high and low water mark. 'By a beach,' said WESTON,

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J., 'is to be understood the shore or strand. * * * The word "beach" must be deemed to be land washed by the sea and its waves, and to be synonymous with shore.' *Cutts v. Hussey*, 15 Me. 241." In *East Haven v. Hemmingway*, 7 Conn. 186, HOSMER, J., said: "The shore is that space of ground which is between ordinary high and low water mark." And BUTLER, J., said that "the legal meaning of the term was indisputable." *Church v. Meeker*, 34 Conn. 424; *Storer v. Freeman*, 6 Mass. 439. "Lands belonging to the state by reason of its sovereignty includes the shores of the sea, and its bays and inlets, in the common law definition of the word 'shore;' that is, the land usually overflowed by neap or ordinary tides." SHAFER, J., in *People v. Morrill*, 26 Cal. 353. See, also, *Doane v. Willcutt*, 5 Gray, 335.

Taken in consideration with the language of the acts, and the common-law definition of the words used, which have been applied to the statutes of similar purport, it must be apparent that those acts of legislation referred to did not contemplate or authorize the sale of lands of the description in question. It follows that there was no error, and that the decree must be affirmed, except as stipulated as to damages; and it is so ordered.

CLARK and others v. PRATT and others.

(Supreme Court of Oregon. June 14, 1887.)

TRUSTS—RESULTING TRUSTS—LACHES.

When suit is brought 13 years after the making of a deed to defendant, and there is no satisfactory explanation of the delay, an action to declare a resulting trust in favor of plaintiff cannot be maintained, especially if plaintiff's evidence is lacking in precision and certainty.

Appeal from circuit court, Wasco county.

J. F. Dufur, for appellants. E. C. Bradshaw, for respondent.

STRAHAN, J. This suit was originally commenced by Henry R. Sampson as plaintiff. Its object was to ascertain and declare a resulting trust in certain real property situate in Wasco county in favor of the plaintiff. The complaint in substance alleges that in 1872 said Sampson bargained with W. D. Gilliam for the real property in controversy for the price and sum of \$1,200; that L. E. Pratt, the ancestor of defendants, wished to have one-half of said land, and it was agreed between said Sampson and Pratt that each should pay one-half the purchase money, and that a deed for said land should be taken in their joint names; that Sampson was obliged to return to Yamhill county, where he now and for 30 years last past has resided, and that Gilliam was obliged to go to Oregon City before said deed could be executed; that said deed was a homestead claim, upon which said Gilliam had not resided for the full period of five years at the date of said contract, and that he thereafter continued his residence on said land with L. E. Pratt until his residence was completed, and then obtained a patent therefor, and that he thereafter executed a deed to said Pratt for said land; that said Sampson left \$600 with said Pratt to pay for one-half of said land, and that Pratt, intending to defraud the plaintiff, contrary to his agreement took the deed to said land in his own name; that, soon after the execution of said deed, Sampson inquired of Pratt about the purchase of said land, and was assured by Pratt that the deed had been taken in their joint names, as had been agreed, and had been recorded; that Sampson relied upon this information, and believed it to be true, and did not know of Pratt's fraud in taking the deed to himself until after Pratt's death, and in 1885; that Sampson paid taxes on said land until 1875, at which time he made a contract with Pratt that he should pay the taxes out of the proceeds of Sampson's property, which Pratt did; that Sampson had known Pratt for many years, and had great confidence in him, and believed him to be honest, and intrusted to him a large number of cattle and

horses; that, before and about the time of the purchase of said land, Sampson intended to and did bring cattle and horses from the Willamette valley, and run them upon the land, and that, when Pratt took an interest in the land, he was to have an interest in the cattle; that Sampson furnished nearly all the cattle,—Pratt but few,—and they were all put in one band, and run as the company cattle of Sampson and Pratt; that in 1874 Sampson had become equal in the cattle, and that Pratt was to occupy all of said land, and for the use of Sampson's interest therein was to care for a few mares and their increase, then on said land, and owned by said Sampson, and that thereafter Pratt occupied said land, and cared for said horses as rental therefor until his death; that until 1874 Sampson visited said land annually, since which time he has been and is now unable to make such visits by reason of sickness; that, after Pratt's death, his widow and heirs continued to reside upon said land, and their administrator delivered to said Sampson said mares, and their increase. The answer puts in issue all of the material allegations of the complaint. The trial in the court below resulted in a decree for the defendants, dismissing the suit, from which decree this appeal is taken. The evidence was reduced to writing upon an order of reference for that purpose, and accompanies the transcript, and the cause has been fully heard here upon the entire record. After the appeal was perfected, Henry B. Sampson died intestate, and on the application of his next of kin and heirs at law the suit has been revived in this court in their names.

The plaintiffs' case rests entirely upon the evidence of Henry B. Sampson. An examination of his testimony leads us to the conclusion that it is too uncertain and unsatisfactory upon which to base a decree, and especially so when the suit was not commenced until after Pratt's death. Sampson's statements are entirely wanting in that precision and certainty which equity will always exact and require before disturbing a legal title. In addition to this, the great lapse of time which has intervened since the making of the deed and the commencement of this suit cannot be overlooked. Of course, this is not decisive against the plaintiffs; but, if unexplained, it is an element which must weigh against them. Sampson evidently realized this, and sought to make such explanations as he might, but they are entirely unsatisfactory. Assuming that he was unable to return to Wasco county after 1874 by reason of sickness, it could hardly be possible, during the 10 years that Pratt lived on the land and managed Sampson's business for him, that he would never have written a single letter to Sampson, or sent him a tax receipt, or any memorandum or statement of their business. And yet, so far as appears, during all of that time these parties never had any communication whatever, by letter or otherwise. The circumstances surrounding the whole transaction are all against the plaintiffs, and we do not think they are accounted for or explained in any satisfactory manner. We do not find it necessary to discuss any of the legal questions presented, but decide the case solely on the insufficiency of the plaintiffs' evidence to make out a case that would entitle them to any relief whatever.

Let the decree of the court below be affirmed.

STATE v. MORAN.

(Supreme Court of Oregon. June 14, 1887.)

1. HOMICIDE—EVIDENCE—PROOF OF DEATH.

In a trial for murder, evidence of a coroner and a doctor that the body of deceased was taken to the morgue, where an inquest was held, and stating his name, is admissible to prove the fact of death.

2. SAME—EVIDENCE.

On a trial for murder, evidence that, two and one-half hours after the deceased had been poisoned, the defendant took two dollars from the pocket of deceased, is competent as showing part of defendant's connection with the occurrence.

3. EVIDENCE—CONFESSIONS.

On trial for murder the confessions of the defendant, made by him, as an admitted accomplice, when another person was on trial for the same crime, are admissible in evidence, when they have been made under an agreement with the district attorney that, if he would testify fully all he knew concerning the murder, he should not be prosecuted for any complicity therein, and subsequently he escaped from custody, and failed to perform his part of said agreement.¹

4. CRIMINAL PRACTICE—EVIDENCE—STATEMENTS TO GRAND JURY.

On a trial for murder, evidence of a grand juror as to statements made by the defendant to the grand jury which indicted another person for the crime of which defendant is charged, is admissible.¹

5. SAME—ACCOMPLICE TESTIMONY.

Under Crim. Code Or. § 748, which provides that "all persons concerned in the commission of a crime, * * * whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals," evidence is admissible, on a trial for murder in the usual form, that poison was administered to the deceased by another person, and that defendant was implicated in the deed.

6. SAME—EVIDENCE—MEMORANDA TO REFRESH MEMORY.

The fact that a witness on a trial for murder, to refresh his memory, read over memoranda taken by another person as to statements made before them both, when he said that he remembered the substance of said statements, does not render the evidence of said witness as to such statements incompetent, but merely affects its credibility.

7. SAME—CONDUCT OF TRIAL—VIEW BY JURY.

Where, on a trial for murder, the court directed a view of the place of the alleged killing, and of the place where the prisoner was confined, upon the application of the district attorney as modified by request of the defendant's counsel, *held*, that the omission by the court to provide for the presence of the defendant at the view, no application therefor having been made by the defendant or his counsel at the time the view was ordered, was not error; following *State v. Ah Lee*, 8 Or. 214.

Appeal from county court, Multnomah county.

Chamberlain & Morrow, for appellant. *Henry E. McGinn*, Dist. Atty., for respondent.

STRAHAN, J. On the eighteenth day of November, 1886, the appellant was indicted for the crime of murder in the first degree by the grand jury of Multnomah county. The charging part of the indictment is as follows: "The said Dan Moran, on the seventh day of July, A. D. 1886, in the county of Multnomah and state of Oregon, purposely and of deliberate and premeditated malice killed Frederick Kaluscha by then and there administering to him, the said Frederick Kaluscha, poison, namely, morphine, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Oregon." Thereafter a trial of said cause was had before a jury, which resulted in a verdict of guilty as charged in the indictment. Afterwards, on motion of the defendant, the court set aside the verdict, and granted him a new trial. On the second trial the jury found the defendant guilty of manslaughter, upon which verdict the court sentenced him to imprisonment in the penitentiary of the state of Oregon for 15 years, from which judgment he has appealed to this court. Upon the trial here, counsel for the appellant, as well as the state, have displayed great research and ability, and the various questions presented were exhaustively argued, and it now only remains for the court to state the conclusions reached, and to indicate the reason therefor.

1. On the trial in the court below, counsel for appellant moved to strike out the evidence of Coroner De Linn and Dr. Bevan. The evidence which was included in this motion was, in substance, this: Coroner De Linn testified that he took the body of deceased to the morgue, where an inquest was held; found his name was Frederick Kaluscha, and that he was a carpenter

¹ See note at end of case.

on the ship Canidate. On his cross-examination he testified that he knew the name of the deceased by hearing witnesses testify to it, and that he had no personal acquaintance with the deceased. Dr. Bevan's evidence was to the same effect. The evidence in neither case was objected to when offered; but, in addition to this, the counsel's position is there was no particular controversy upon the trial as to the identity of the deceased. O'Brien and other witnesses testified to his identity very fully. The object in calling the coroner and Dr. Bevan was to prove the fact of death, and not the identity of the deceased. The court did not err in refusing to strike out this evidence.

2. On the trial in the court below the state introduced the declarations of Moran, given under oath before the magistrate in the case of *State v. James Kelly*, who was charged with the crime of murder in the killing of Kaluscha; also the declarations of Moran given under oath before the grand jury of Multnomah county in the same case. Counsel for the defense claim that the declarations and admissions under oath before the committing magistrate ought not to have been admitted, for the reason they were given and made upon an understanding with the district attorney and the police officers that if he would testify fully as to all he knew in relation to the poisoning of Kaluscha, that he (Moran) should not be prosecuted for any complicity therein. They also object to the statements made by Moran before the grand jury in the same matter for the same reasons, and upon the further ground that it was incompetent for the trial court to allow the proceedings before the grand jury to be made public for this purpose.

3. It must be taken as settled in this state that section 169 of the Criminal Code is only declaratory of the common-law rule in relation to confessions. *State v. Wintzingerode*, 9 Or. 153. Upon the trial of a criminal case, therefore, whenever a confession is offered in evidence against the accused, it becomes necessary for the court to ascertain and determine whether or not the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind. This inquiry is preliminary, and is addressed to the judge who admits the proof—the confession—to the jury, or rejects it, as he may or may not find it to have been drawn from the prisoner by the application of those motives. 1 Greenl. Ev. §§ 219, 220; *People v. Soto*, 49 Cal. 67; *Reed v. Clark*, 47 Cal. 195; *State v. Squires*, 48 N. H. 364; *Redd v. State*, 69 Ala. 255. In *Redd v. State*, *supra*, it is said: "It is a well-established maxim of the law that the *admissibility* of evidence is always a question to be determined by the court, and its *weight* or credibility is for the determination of the jury. It is for the court, therefore, to say whether the confessions of a prisoner are *voluntary* or *involuntary*; and this question, being judicially settled, cannot be reviewed by the jury. Hence a charge is erroneous which submits to them the decision of this legal question, and should, for that reason, be refused." So in *State v. Squires*, *supra*, the same principle is thus stated: "Whether the confession of the prisoner was voluntary or not is purely a question of fact; as much so as the question whether a witness offered to testify was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown so as to allow the introduction of secondary evidence of its contents. In this and like cases the judge who tried the cause must decide, although in some instances he may submit the question of fact to the jury. In either case, whether the decision be by the judge alone, or it be also passed upon by the jury, no exception lies so far as the question is one of fact." When this evidence was offered in the court below, it was objected to by counsel for the appellant because the statements and declarations of the defendant which were offered in evidence, and which he had sworn were true on the previous occasions referred to, had not been freely and voluntarily made so as to entitle them to be admitted. Evidence was heard by the court for and against this objection, and the court then decided to admit the evidence offered. In other

words, the court decided that these sworn statements of the prisoner were freely and voluntarily made within the true meaning of that rule of law, and admitted them. The bill of exceptions does not purport to set out all the evidence submitted to the court on that issue. In such case it is not perceived how this court can review the decision of the trial court on that question. *State v. Tom*, 8 Or. 177. But we are not disposed to rest the decision of this cause on that question alone.

Assuming now that all of the matters objected to are confessions, or in the nature of confessions, it is believed that they fall within what might be regarded as an exception to that rule, or, if not an exception, a modification thereof in its application to the particular facts disclosed by this record. In order that there may be no misunderstanding as to the precise facts in this case so far as they are disclosed by the record, a brief reference to the testimony is proper. Pending the decision of the court below as to the admissibility of the evidence, the district attorney was sworn, and testified in substance: "It is not true, as testified to by the defendant, Moran, that I at any time, either directly or indirectly, agreed to give him anything for testifying in the case against James Kelley. There never was at any time, in my presence, any offer made to the defendant, Dan Moran, but this one: That, if he should become a witness in the case against James Kelley, he should not be prosecuted for any connection he had with that crime. The statement that I said that I would give him a ticket to go east is entirely false. I never made him any offer except that he should not be prosecuted for any connection which he had with the killing of Frederick Kaluscha, and had he kept his word I certainly would not be here prosecuting him." Policeman Berry, who it is claimed held out some inducements to Moran to testify against Kelley and make a full disclosure, testified, on the same occasion, before the court below: "I never promised him [Moran] any money, or made any threats against him to do him bodily harm, or made him any offer except that he should have his liberty if he testified against Kelley. I was present in the chief of police's room when the offer was made to Moran to be a witness for the state, and he accepted that offer. There was no inducement, to my knowledge, held out to Dan Moran at the chief of police's office in this city when he made the statement I stated he made a little while ago on the stand; and I heard every word that was uttered in the room during this interview when the matter was under discussion. No promise of any kind was made except that of his personal liberty; and that was made at his own solicitation and request." R. M. Demant, police judge of the city of Portland, on the same occasion, and to the same point, testified in substance as follows: "I am police judge. I was such in the month of July last. I know Dan Moran. I didn't know James Kelley until the time of his incarceration. I don't know that I know all the circumstances under which Dan Moran became a witness against James Kelley down in the police court. I know a great many circumstances connected with it,—perhaps as many as anybody other than yourself. The time at which he made the agreement to become a witness against James Kelley was in the presence of yourself, [the district attorney;] and, if my recollection serves me right, the chief of police, Mr. Berry, one other gentleman, and myself were in the office of the chief of police in the city jail. This thing had been brewing, if I may so call it, for quite a time,—had been an effort made to secure the statement of Moran or O'Brien, or somebody knowing the facts, with the view of securing the conviction of some one connected with this crime. It was to that end that the district attorney, the chief of police, and this other gentleman, including myself, had been working. At the time I refer to, Moran had been talking for some time with various persons, myself among others, and he was leading us to believe that he would tell the truth; but there seemed to be one point that he raised. * * * He wanted the assurance of some person upon whom he could rely that he

would be held harmless in the matter. That assurance was given to him in my presence by the chief of police, and I remember that I joined in with him in the statement that for the ends of justice the district attorney would probably agree to it. And I think it was at his request that Mr. McGinn was present at the time I refer to,—at Moran's request. There was a positive agreement made at that time,—as positive as an agreement could be made,—* * * he [Moran] wouldn't be prosecuted provided he would tell the whole truth in the matter." And, as to what transpired before the grand jury on the same subject, Mr. Severson testified substantially as follows: "Well, he demanded of the grand jury that they give him their word of honor that they wouldn't prosecute him in case he turned state's evidence; that they would stand by him, and not prosecute him. Mr. Ladd assured him that we would do it, that we would see that he wasn't prosecuted in that case if he would turn state's evidence, and tell the whole truth, and nothing but the truth. He still hesitated, and didn't seem satisfied; and we finally all of us individually consented and assured him that we wouldn't prefer any charges against him if he would tell the whole truth, and nothing but the truth, before us, and before the trial jury, when the trial came off, and he finally consented to that, and took the oath. He accepted the proposition that was made to him, and was willing to stand by it apparently. And, after he took his oath, one of the grand jurors said to him: 'Now, Dan, you know what you are doing; you understand this,'—wanted to call it up to him again, —and then he went on with his story." The sequel to all this is found in the testimony of Jailer Doherty as follows: "My name is E. J. Doherty. In the month of November, 1886, I was employed by Thomas A. Jordan as jailer of the county jail. Dan Moran was in custody as a witness against James Kelley before the grand jury had acted on the case of Kelley. He was kept in close confinement, and was allowed no liberties whatever; but, after he had agreed to become state's evidence, he was allowed more liberty. On the morning of Saturday, November 6, 1886, knowing that he was to be called to court to testify as a witness, he asked for permission to blacken his boots. He was taken into the witness room, the door being unlocked. The sheriff then sent me in search of one Casey, another witness; and, when I returned, he had *left and gone*. He ran away, and I knew he could not be found, although every effort was made to find him." It elsewhere appears in the record that Kelley was then on trial, and that Moran did not appear to testify against him, and that he was acquitted.

In *Com. v. Knapp*, 10 Pick. 477, the attorney general wrote the prisoner a letter promising the protection of the government on condition of his making a full disclosure, and testifying in the case fully and truly. "The benefit was offered upon the sole condition that he should make an explicit, exact, and full disclosure of every circumstance connected with the event referred to; and he was informed that in case of refusal to answer touching any topic known to him, or of any evasion, equivocation, or designed contradiction or withholding of testimony, he was not to receive the benefit. To that he assented." A full confession was made by the prisoner under this arrangement with the attorney general; but, upon being called to testify against his accomplices, he refused to do so. The prisoner was then placed on trial charged with the same crime, and his confessions previously made under the agreement with the attorney general were offered in evidence against him. In disposing of his objection made to the admission of this evidence, the court said: "The confessions which are now offered in evidence were made deliberately, in part execution of the prisoner's agreement; but, upon being called to testify upon the trial of John Francis Knapp, he refused to do so. By his refusal to testify it is admitted that he has forfeited all claim to the extraordinary favor of the government. But in what did that favor consist? It was in not using that confession against himself if he would conduct himself faithfully as a state's

witness. By his refusal the government is absolved, and it is now contended that the prisoner is absolved also, and that his confession cannot be used against him notwithstanding his refusal. Persons who are properly admitted here as state's witnesses are substantially in the same situation as persons in England who are properly admitted to become witnesses for the crown against their accomplices. The protection of the government is extended on the same terms, although the forms of proceeding are somewhat different. There, if the witness for the crown conducts himself fairly, and makes and testifies to a full disclosure, he is recommended to mercy, and a full pardon is always granted. Here the attorney general, of his own authority, and upon his official responsibility, gives the pledge of the government that the state's witness shall not be prosecuted if he makes and testifies to a full disclosure of all matters in his knowledge against his accomplices. In England, as well as in Massachusetts, those who are admitted as witnesses for the government may rest assured of their lives if they perform their engagements, so that it becomes a material inquiry how those persons in England who have been admitted as witnesses for the crown are dealt with if they fail to redeem the pledge which they made to the government upon receiving the benefit of becoming king's witnesses. And we believe the law to be clearly settled there that if they refuse to testify, or testify falsely, they are to be tried themselves, and may be convicted on their own confession which was made after they were permitted to become witnesses for the crown." This case was decided in 1830, and so far as our research extends, has never been overruled or questioned.

The rule of the common law is thus stated in Roscoe's Criminal Evidence, (pages 125, 126:) "So where, in a case of burglary, an accomplice who had been allowed to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts upon which he had before given evidence, COLERIDGE, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. *Rex v. Moore*, 2 Lewin, Cr. Cas. 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused before the grand jury to give any evidence at all, WIGHTMAN, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. *Rex v. Holtham*, (Staff. Sp. Ass. 1843,) 2 Russ. by Greav. 958. So where an accomplice who was called as a witness against several prisoners gave evidence which showed that all except one, who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one being present, and the jury found all the prisoners guilty, PARKE, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. *Rex v. Hokes*, (Staff. Sp. Ass. 1837,) 2 Russ. by Greav. 958*f*." To the same effect are the standard authorities in this country on this subject. 1 Greenl. Ev. § 379; *Whiskey Cases*, 99 U. S. 594; Whart. Crim. Ev. § 656; *State v. Lyon*, 81 N. C. 600.

Counsel for appellant seem to overlook the fact that this party is an admitted accomplice in the administering of the drug which caused the death of Frederick Kaluscha, and that he was promised immunity upon the sole condition of his testifying fully as to his knowledge of the crime in the case against Kelley. At the very last moment, when the jury in *Kelley's Case* were in the box, and when he must have known that his refusal to testify would result in the acquittal of Kelley, he fled. By his own act and bad faith he voluntarily laid aside and deprived himself of the protection which had been accorded him. In such case it is difficult to see on what ground he can complain. The authorities cited clearly declare the rule of law applicable to such case, but we think they are supported by the better reason as well. It is the policy of the law that for every violation of its mandates proper pun-

ishment shall be inflicted. But this is not always practicable. Many crimes are committed in secrecy; and those concerned in their commission find their best security in silence; but even this is not always safe, because circumstances frequently point out the guilty, and the means used in the perpetration of the crime, with unerring certainty. In other cases some one of the parties concerned in the commission of the crime, prompted, it may be, by a sense of guilt, or the fear of discovery and punishment, makes known to the officers of the law his willingness to make a full and complete disclosure of all he knows on the subject, and to testify to the same upon the trial of his accomplices, upon the sole condition that he shall not be prosecuted. This is called a *confession*. It is an admission of guilt, and the argument that would exclude this species of evidence because it may be false would exclude all evidence. Its falsity is possible, and so may be any evidence offered in a court of justice; but it is not rejected for that reason. It is received, and tested and weighed by the rules of law, and then the case is determined according to the effect it has produced on the minds of the jury. It must therefore be assumed that, when a party makes a *confession*, it is an acknowledgment of some degree of guilt on his part in connection with the particular crime. If such confession is made under the sanction of the court or the district attorney, and with the understanding that the party shall make a full and complete disclosure, and testify to the same upon the trial of his accomplices, is the state not equitably bound by the terms of such an agreement? And the public faith being thus plighted, could its violation be tolerated for an instant? *People v. Whipple*, 9 Cow. 707. And is it not equally true that, if the state is bound, the party making the confession is also bound by the like good faith on his part? He cannot be permitted to refuse to testify against his accomplice, and then claim the full benefit of his agreement with the state when his confessions are offered in evidence against him. Having willfully refused to testify against his accomplice, has he not forfeited the immunity which the state offered him upon that sole condition? His only complaint is that the state used his confession against him upon the trial; but this he could have avoided by going on the witness stand, and narrating what he knew of the commission of the crime. Having failed to do this, he has no cause of complaint, and especially so where the truth of his confession was not denied by him, but, on the contrary, was corroborated by all the attendant circumstances.

In opposition to the numerous authorities cited by respondent, counsel for appellant have referred to *Womack v. State*, 16 Tex. App. 178. It must be conceded that this case tends to support the appellant's contention; but this case rests on the authority of that court alone. No decision of any court is cited to sustain it; nor is *Com. v. Knapp*, *supra*, nor any of the numerous common-law authorities, referred to; but the court apparently based its decision on the general proposition that, to render a confession admissible, it must have been voluntarily made, without the appliances of hope or fear by any other person.

In the examination of this question, we have not been unmindful of the great care and caution courts must always exercise in the admission of confessions of persons accused of crime, nor of the fact that they must have been freely and voluntarily made; but these considerations do not appear to be sufficient to exclude accusatory facts freely and voluntarily disclosed by an accomplice under an agreement made by the state, represented by its district attorney, that he will testify fully and truly against his associate in the crime, and who thereafter repudiates his agreement, and refuses to testify. In such case the common-law rule undoubtedly is that such admissions and confessions may be given in evidence against him; and that rule having never been changed or abrogated by any statute, and not being inconsistent with our constitution or laws, nor inapplicable to our circumstances and condition, must

be regarded as in force in this state. The evidence offered and received upon the trial was not, therefore, incompetent on any of the grounds thus far considered. But counsel further insist that Severson's evidence was improperly admitted for the reason he was a grand juror when the disclosures testified to by him were made by the appellant, and that such statements were made before the grand jury. It therefore becomes necessary to determine whether or not it is competent for the trial court, in the exercise of a sound judicial discretion, to allow a grand juror to testify as to matters which transpired before that body when, in the opinion of the court, the ends of justice require it.

5. The policy of the law generally is that the proceedings before the grand jury are secret. The reasons for this secrecy are many and obvious. It assists them in discharging their important duties; they are not troubled with any questions by the interested or curious; the means and sources of their information are not made public until the trial of the accused; and in many cases the guilty may not know that he is even suspected of crime until he is in custody. But there are cases in which the court is authorized to remove this secrecy, and to require the proceedings before the grand jury to be disclosed. It is provided by section 58 of the Code of Criminal Procedure that a member of a grand jury may be required by any court to disclose the testimony of a witness examined before such grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before such grand jury by any person upon a charge against such person for perjury, or upon his trial therefor. And Mr. Bishop, in his work on Criminal Procedure, (volume 1, § 859,) states the rule thus: "But, when the reasons for keeping the testimony private have passed away, the obligation of secrecy would seem to have ended also. Yet when, in addition to this, the claims of public justice must go unsatisfied unless the disclosure is made, the same reasons which originally required secrecy, require that the secret be no longer kept." So, in *Burnham v. Hatfield*, 5 Blackf. 21, it is said: "Upon the trial, the defendant offered to prove by a member of a previous grand jury some admissions respecting the cause of action made by the plaintiff on his examination before the grand jury. This evidence was objected to, and the objection sustained. We think the witness ought to have been examined. The oath of grand jurors to keep their proceedings secret does not prevent the public or an individual from proving by one of the grand jurors in a court of justice what passed before the grand jury." To the same effect is *Sands v. Robison*, 12 Smedes & M. 704. It is there said: "It seems not to be contrary to the policy of the law to allow disclosures by the grand jury of what has been testified before them when they are called upon as witnesses in court to speak in relation thereto; but to permit it or not is in the discretion of the court, according to the time or circumstances of each case." And to the like effect is *State v. Broughton*, 7 Ired. 96, 45 Amer. Dec. 570; *State v. Wood*, 53 N. H. 484; *People v. Young*, 31 Cal. 563; *Burdick v. Hunt*, 43 Ind. 381; and Whart. Crim. Ev. § 510, and note 5, where the authorities are very fully collated. It may be conceded that the authorities cited from Missouri and Minnesota are opposed to this view; but it seems clear to us that they are at great variance with the great weight of authority on this subject; and, in addition to that, they rest upon a narrow and technical construction of the statutes of those states. The court, therefore, did not err in allowing the grand juror, Severson, to disclose Moran's testimony before that body.

6. Counsel for the appellant insist, also, that the court erred in allowing evidence on the part of the state tending to prove the administering the poison to the deceased by Kelley, and the defendant's complicity therein, for the reason that the necessary facts are not stated in the indictment. The indictment against the appellant is in the usual form in use in this state, and charges him

with the crime of murder in the first degree. The Criminal Code, § 748, provides: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the crime, or aid and abet in its commission, though not present, are principals and to be tried and punished as such." Under this section, any person concerned in the commission of a crime is a principal, and is to be charged as such, whether he directly committed the act or not, and all evidence tending to prove his complicity in the crime is admissible under that form of indictment.

7. It appears from the testimony of Severson that, before going on the stand as a witness, he had read over some *memoranda* taken before the grand jury, by some person other than himself, of the statements of the prisoner before that body, and in that manner refreshed his memory; but he did not refer to or use the same while he was on the witness stand. This witness, before testifying, said he remembered the substance of Moran's statements; and it was that which he repeated to the jury. Appellant's counsel objected to Severson's evidence because he had referred to the *memoranda* before coming on the stand as a witness. This objection does not go to the competency of the evidence offered, but to its credibility,—a matter which was exclusively for the jury. On his cross-examination the appellant had the right to test the strength and accuracy of the witness' memory, and of course, if the only knowledge he then had of the facts was what he derived from the *memoranda*, then his testimony would have been weakened to that extent,—in fact, would have been shown to be of but little value. On the contrary, if his memory was accurate and retentive, and the facts were present in the mind of the witness independently of the *memoranda*, a cross-examination would have rather tended to strengthen than weaken his evidence, and the fact that the witness had looked at this paper, when it appeared that he did not write it himself, or that it was not written under his direction, when he knew the facts recited in it went also to the credibility of the testimony. It tended to weaken his evidence in some degree, and the jury must have considered this matter in passing on the guilt or innocence of the accused.

8. It appeared in evidence that about two hours and a half after the deceased had been poisoned in Kelley's saloon, and while he was lying on a lounge asleep in Turk's boarding-house, the appellant took two dollars from the pocket of the deceased, for the purpose of keeping the same safely for him until he should awake. Exception was taken to this evidence, but it was clearly competent. In the first place, it was part of the appellant's statement as to his connection with the transaction. The state also had the right, and it was bound to submit to the jury, not a partial, but the substance of his entire statement. It is not perceived that any error was committed in admitting this evidence.

9. It appears from the record that, during the examination of the case, the district attorney asked the court that the jury be allowed to view the premises. The defendant's counsel said he would like to have the court make an order that, in addition to viewing the premises, the jury may also view the dark cell and sweat-box at the city jail. The district attorney said he was satisfied this should be done. The court stated that, the parties having consented, such will be the order; that the jury view the *locus in quo*, and the dark cell and room in the third story of the city jail. When the prisoner was called for sentence, he objected, for the reason that the jury had been allowed to view the premises where the crime was alleged to have been committed without his presence; but the court overruled his objection, and sentenced him, which action of the court is now assigned as error. This objection was presented to this court, and decided adversely to the appellant, in *State v. A. A. Lee*, 8 Or. 214, and we see no sufficient reason to reconsider or review what was then decided.

There were some other questions presented on the argument in behalf of the appellant, and which we have examined, and deem them not of sufficient importance to require separate notice.

NOTE.

CONFESSIONS. In *Utah* the confession of a party who voluntarily appears, and testifies before the grand jury, is admissible in evidence, *U. S. v. Kirkwood*, 13 Pac. Rep. 235 in *Wisconsin*, his voluntary testimony on his preliminary examination, *State v. Glass* 6 N. W. Rep. 500; or upon the preliminary examination of another person accused of the same crime, *Dickerson v. State*, 4 N. W. Rep. 321; and see *Mack v. State*, Id. 449 So, also, in *Indiana*. *Eppe v. State*, 1 N. E. Rep. 491. In *New York*, on a trial for murder, the statements of the accused, made before a coroner's inquest, are not admissible in evidence when it does not appear that, before making such statements, he was informed of his right to refuse to answer questions tending to criminate him, and was unattended by counsel. *People v. Mondon*, 8 N. E. Rep. 490.

Respecting the admissibility of confessions generally, see *Biscoe v. State*, (Md.) 8 Atl. Rep. 571; *Hoover v. State*, (Ala.) 1 South. Rep. 574, and note; *State v. Moorinan*, (S. C.) 2 S. E. Rep. 621; *Rice v. State*, (Tex.) 3 S. W. Rep. 791.

FIRST NAT. BANK OF PUEBLO v. NEWTON, impleaded, etc.

(*Supreme Court of Colorado*. 1887.)

PARTNERSHIP—CHANGE OF FIRM—LIABILITIES.

Defendant Newton was a silent partner of the other two defendants, who were ostensible partners. September 15, 1882, a 90-days note, bearing the firm name, was given to the plaintiff for \$1,500. The firm name was composed of the names of the two ostensible partners. October 2, 1882, defendant Newton retired from the firm, and another silent partner took his place, but no notice of the change was given and the firm name remained the same. December 16th the note was taken up, marked "Paid" by plaintiff's cashier, and a new note given therefor, bearing the firm name. The cashier testified that the new note was received in payment of the old one. *Held*, in the absence of evidence of an agreement that the new note should be accepted in payment of the old one, the members of the original firm were liable for the debt.

Error to district court, Pueblo county.

MACON, C. In the summer and fall of 1882 the defendants in error were partners, doing business in the city of Pueblo, under the firm name of Todd & Fairchild; defendant Newton being a silent part-member, and Todd & Fairchild the ostensible members. During the months of August and September of that year the firm had overdrawn its account with plaintiff in error to the extent of \$952, and on the fifteenth day of September of the same year executed a note to the plaintiff, signed by P. B. Fairchild and S. E. Todd, and with the firm name of Todd & Fairchild, for \$1,500, due at 90 days, bearing interest at the rate of 1½ per cent. per month, to secure the overdraft, as well as an additional credit then and there extended the firm by the bank, of \$542. On October 2, 1882, Newton withdrew from the firm, and one G. J. Piper took his place therein; but no change was made in the firm name. Newton gave no notice of his withdrawal, nor did the firm give any notice of the association of Piper in the partnership; at least none was given to the plaintiff in error. This note of September 15th was not paid at maturity in money, but Todd & Fairchild executed another note to the bank for the same sum, signing it with the firm name, and with the individual name of P. B. Fairchild, which note was due in 90 days, bore interest at the same rate as the first, which the bank accepted in lieu of the first, surrendering the latter to Todd & Fairchild, and stamping it "Paid." Plaintiff in error was ignorant at this time of the fact that Newton had retired from the firm, or that Piper was a member thereof, and would have refused to accept the new note and surrender the old had it (plaintiff) been advised of these facts. The last note has never been paid.

In September, 1883, the plaintiff in error brought suit in the district court of Pueblo county against defendants in error upon the original indebtedness, averring that on the fifteenth day of September, 1882, it loaned to said defendants the sum of \$1,500, and that defendants promised to repay the said sum within 90 days, with interest at $1\frac{1}{4}$ per cent. per month; and that said defendants had not paid that sum, nor any part thereof, except the interest up to the sixteenth day of December, 1882.

Defendant Newton answered, (the other defendants not being served with summons,) and denied that he was indebted to the plaintiff in any sum for any money loaned to the defendants, or either of them; admitted that he was a member of the firm of Todd & Fairchild on the fifteenth day of September, 1882, but that he was solely a silent partner in the firm; that his connection therewith was unknown to all persons dealing with the firm; and that when said loan was made, on the fifteenth day of September, 1882, the plaintiff had no notice or knowledge whatever of his connection with said firm, and that the loan was made without any knowledge or notice on the part of plaintiff that he (Newton) was or would be personally liable for the repayment of the whole or any part of the said loan, as a member of the firm or otherwise; that the loan was made by plaintiff upon the sole credit and responsibility of S. E. Todd, Jr., and P. B. Fairchild; further avers that prior to and on the fifteenth day of September, 1882, and when said loan was made, an agreement existed between the defendant and the other members of the copartnership that no promissory notes should be made, or any firm indebtedness contracted, by any member of the said firm, which would in law bind the said firm, without first obtaining the consent thereto of each and every member thereof; that such agreement was in full force and effect at the time of said loan; that said loan was effected in violation of said agreement, and the same was done without the knowledge or consent of defendant Newton, and against his will. Defendant further alleges in his defense that the said loan was obtained by the firm of Todd & Fairchild, and in its name, for the sole and individual use and benefit of said Fairchild, and that defendant had no notice that said loan had been effected until long after the firm had been dissolved by his withdrawal therefrom, and after the affairs thereof were fully wound up, completed, and adjusted between him and the other members of the firm; further avers that on the fifteenth day of September, 1882, said Fairchild negotiated said loan, and procured the \$1,500 from plaintiff in the name of, and professedly on behalf of, said firm, but in fact for the sole use and benefit of said Fairchild; "that, as the consideration for such loan upon the part of plaintiff, it (the plaintiff) then and there demanded from and required of said P. B. Fairchild the execution and delivery of a promissory note, to be then and there made by said P. B. Fairchild in the name of said firm, and as a member of the said firm of Todd & Fairchild; that the said note was then and there executed by the said Fairchild to the plaintiff, before the payment of any part of the said sum of \$1,500; that, in pursuance of said requirement on the part of the plaintiff, the said Fairchild then and there made, executed, and delivered to the plaintiff a promissory note, and the said Fairchild and S. E. Todd then and there signed, as joint makers, the said firm name of Todd & Fairchild, and the individual names of P. B. Fairchild and S. E. Todd, Jr., by the terms of which note the said makers thereof thereby promise to pay to the order of the plaintiff the said sum of \$1,500, in 90 days from date thereof, with interest thereon at the rate of $1\frac{1}{4}$ per cent. per month from date until paid; that thereupon, on the delivery of said note to the plaintiff, it (the plaintiff) then and there paid the said P. B. Fairchild, or his representative, the said sum of \$1,500, the same being then and there the identical indebtedness and loan referred to in plaintiff's said complaint, and the said note was then and there accepted by the plaintiff in discharge of said indebtedness mentioned in said complaint." It further avers that on the second day of October, 1882, the

said firm, composed of S. E. Todd, Jr., P. B. Fairchild, and George A. Newton, (as silent partner,) was dissolved by mutual consent, the said defendant Newton retiring therefrom, and said copartnership was reconstituted by the association of G. J. Piper in the firm, which new firm became the successor of the old, with the same firm name of Todd & Fairchild; that at the maturity of said note the new firm, on the sixteenth day of December, 1882, at the request of the plaintiff, executed another promissory note for the sum of \$1,500, payable 90 days after date, to the order of the plaintiff, with interest at 1½ per cent. per month after date until paid; that said promissory note, last and aforesaid, was signed by the firm of Todd & Fairchild, and by P. B. Fairchild in his individual capacity, and as joint maker; that said note was then and there accepted by the plaintiff in full payment and discharge of the first said note, the said firm paying at that time the interest accrued on said first note, and at the same time plaintiff marked upon the note of September 15, 1882, the word "Paid," and delivered the same to the makers thereof; and the last-mentioned note is still outstanding, and in full force and effect, and held and owned by the plaintiff.

To this answer plaintiff filed its replication; averring that at the time of said loan it was informed and believed that the defendant Newton was a partner in said firm; professes ignorance of any agreement between the members of the firm as to giving of promissory notes, or of contracting the firm's indebtedness, so as to bind the firm; denies that said loan of \$1,500 was obtained for the sole individual use and benefit of said Fairchild, but that the same was made for and on behalf and for the use and benefit of said firm; denies that the last note was given and accepted by the plaintiff in full payment and discharge of the note of September 15, 1882; and avers that the said last note was executed merely in renewal of the previous note, and was not intended to be nor was it accepted in payment or discharge thereof.

In September, 1883, the cause was tried to the court without a jury, and the testimony taken in the case shows these facts: That defendant Newton was a silent partner in the firm of Todd & Fairchild; that he retired from the copartnership on the second of October, 1882; that the plaintiff in error was not informed by either Newton, Todd, or Fairchild of Newton's withdrawal; that no notice of the dissolution of the firm, or of the association of Piper with the firm, was given; that the note of September 15, 1882, was not paid at maturity in money; that a new note, executed on December 16, 1882, was taken by plaintiff in error in ignorance of the fact that Newton was not still a member of the firm, and that Piper was a member; that the note of September 15, 1882, was exchanged for that of September 16th, stamped "Paid," and surrendered to the makers by plaintiff in error, in the belief that no change had occurred in the firm; that the indebtedness of \$1,500, for which the first note was given, was in part, to-wit, to the extent of \$952, an overdraft by the firm, occurring some time before the fifteenth of September; the balance of the \$1,500, to-wit, \$548, was a credit extended to the firm by the plaintiff; that Fairchild did not negotiate the loan, nor did he receive individually any part of it; that the plaintiff in error, at the time of the overdraft, and at the time of the execution of the two notes spoken of, was ignorant of any agreement or arrangement between the members of the firm to the effect that no firm notes or firm indebtedness should be contracted by any member thereof, without the consent of each member. Nothing appeared in the evidence to show that, since the last note was executed, any settlement had been made between defendant in error and his copartners. Plaintiff in error, at the trial, produced and offered to surrender the note of December 16, 1882.

Whether the last note was taken in payment and discharge of the indebtedness there is nothing to show further than the testimony of one Robert Lytle, cashier of plaintiff in error, who was called and examined at the trial, (and who was the only witness examined,) and testified, in answer to cross-

examination, as follows: "*Question.* Is this the note that was taken in satisfaction of the old one? *Answer.* Yes, sir. *Q.* When you surrendered this note of September 15th, and stamped it 'Paid,' you surrendered that, and took a new note in satisfaction of the existing indebtedness, did you not? *A.* Yes, sir. *Q.* So at the time you gave up this note of September 15th, and marked it 'Paid,' you received the interest on it, which is \$57.50, and received the new note in payment of the note of September 15th? *A.* Yes, sir; they gave us a check for \$57.50 on the Stock-Growers' National Bank, and the new note."

Upon these facts the court gave this opinion: "And the court being of the opinion that the surrender of the note of September 15, 1882, and marking it 'Paid,' and receiving the new note of December 16, 1882, constituted a payment in law of the original indebtedness;" and found the issues for the defendant, and entered judgment accordingly,—to which the plaintiff excepted, and comes to this court by writ of error, assigning two errors, both of which are resolvable into one, and they go directly to the opinion of the court as to the legal effect of the surrender of the old note, marking it 'Paid,' and receiving the new one.

It is insisted by plaintiff in error, and contested by defendant, that a silent partner, when discovered, may be held liable to the debts of his firm contracted while he was such member; and that whether plaintiff in error knew or suspected that defendant Newton was a copartner in the firm of Todd & Fairchild is immaterial,—he can be held for the debts of his firm; that whether the credit was given to him or not is immaterial, if the fact is afterwards discovered that he was at the date of the loan in this case one of said firm.

As a general proposition, there can be no doubt of its soundness. Persons dealing with a copartnership, trust it as a whole, as well as each member thereof. They are under no obligations to inquire who constitute the firm, and it is common that the firm itself sees fit to conceal the names of some of its members. If one deal with a copartnership, under the impression or belief that certain parties compose it, and afterwards discover his error, he may lose by the mistake, but cannot be heard to complain. On the other hand, if persons in dealing with a copartnership are mistaken in supposing that certain persons are not members thereof, and afterwards discover their mistake, they may have the benefit of the mistake in their increased security.

In *Winship v. Bank of the U. S.*, 9 Curt. Dec. 466, MARSHALL, C. J., says: "The counsel for the plaintiff in error supposes that, though these principles may be applicable to an open and avowed partnership, they are inapplicable to one that is secret. Can this distinction be maintained? If it could, there would be a difference between the responsibility of a dormant partner and one whose name was to the articles. But their responsibility in all partnership transactions is admitted to be the same. * * * The responsibility of unavowed partners depends on the general principles of commercial law, and not on the stipulations of the articles."

In *Bigelow v. Elliot*, 1 Cliff. 38, it is said that "persons who jointly participate in profits of trade, or business ostensibly carried on by another for his sole use and benefit, within the principles already explained, are equally liable, when discovered, with the ostensible and active owner, to all creditors of the concern whose debts were contracted during the time of such participation, without the knowledge of the same, or of the actual relations between the parties at the time the credit was given; and that liability exists notwithstanding the parties may have privately stipulated that they shall not be partners, and in contemplation of law really are not such as between themselves. * * * Dormant or secret partners are held liable, under such circumstances, partly on the ground that every man who has a share in the profits of a trade or business ought also to bear his share of the loss, and partly on

the ground of policy and necessity to prevent bad faith in secret arrangements; as all experience has shown that if the rule were otherwise third persons might be exposed to numberless frauds."

In *Bourdeaux v. Martinez*, 25 La. Ann. 169, the doctrine was laid down in this language: "The liability of secret or dormant partners in commercial partnerships, in all cases like the present, is so well established, and so universally recognized, that authorities need scarcely be referred to. *McDonald v. Clough*, 9 Colo. —, 14 Pac. Rep. 121.

In the case of a dormant or secret partner, the credit is manifestly given only to the ostensible partner, for no other partner is known. Still, however, it is not treated as an exclusive credit; for the law in all cases of this sort founds its decision upon the ground that the creditor has had a choice or election of his debtor, which cannot be where the partner is dormant or unknown. The credit, therefore, is not deemed exclusive, but binding upon all for whom the partner acts, if done in their business, and for their benefit, as in cases of agencies for an unknown principal.

In the case of *Searwell v. Payne*, 5 La. Ann. 255, this court said, in relation to deceit practiced by one partner upon another: "The validity of the transactions between the bank and the parties who affected the loan, and consented to its application, is not effected by the state of affairs between the partners *inter se*. A deceit between partners has nothing to do with their obligations towards third persons, who are not privy to it, and is no evidence of any connivance on the part of the bank."

These decisions—and many more to the same effect might be cited—cover both the ground of the liability of a silent partner, and the inefficacy of secret arrangements between partners to affect their customers dealing with them in ignorance of such secret arrangement; and as nothing appeared in evidence to show any secret arrangements between the parties in this case, as is alleged in the answer, or that plaintiff in error had knowledge of any such, if they existed, we must look to other rules of law upon which to sustain the judgment in this case, if it is to be sustained.

The only point upon which defendant in error relies, in support of the judgment of the court below, which the evidence in the case authorized him to urge, is that the note of December 16, 1882, was an extinguishment of the note of September 15, 1882, and of the original indebtedness. In order to understand the effect of this transaction, it is necessary to ascertain what the cases have held to be the legal effect of the giving of a promissory note for a precedent debt. In this case the last note was given as a renewal of the first, by which act the first note was extinguished, and all right of action upon the same was extinguished with the note. The note was but evidence of the indebtedness, not the indebtedness itself. While the note was current, the right of action upon the original indebtedness was suspended, and no suit could have been maintained upon such original debt. *Byles*, Bills, 304; *Okie v. Spencer*, 2 Amer. Lead. Cas. 275; *Stedman v. Gooch*, 1 Esp. 4; *Price v. Price*, 16 Mees. & W. 231, 239.

The giving of the debtor's own note, bill, or check, or the note, bill, or check of a third person, to meet an antecedent indebtedness, is *prima facie* not a payment or discharge of such indebtedness. *Collins v. Dawley*, 4 Colo. 141; *Hart v. Boller*, 15 Serg. & R. 162; *Sutton v. The Albatross*, 2 Wall, Jr. 327; *Woodward v. Miles*, 4 Fost. 289; *Fickling v. Brewer*, 38 Ala. 685; *White v. Jones*, 38 Ill. 159; *Matthews v. Dare*, 20 Md. 248; *Schilling v. Durst*, 42 Pa. St. 126; *Smith v. Smith*, 7 Fost. 244; *McMurray v. Taylor*, 30 Mo. 263; *Hayes v. Pollock*, 1 Pa. St. 376; *Kephart v. Buttcher*, 17 Iowa, 240; *Welch v. Allington*, 23 Cal. 322; *Peter v. Beverly*, 10 Pet. 562, 568; *Sheehy v. Mandeville*, 6 Cranch, 253; *The Kimball*, 3 Wall. 45.

In the last case, FIELD, J., speaking for the court, holds the following language: "By the general law, as well of England as of the United States, a

promissory note does not discharge the debt for which it is given, unless such be the express agreement of the parties. It only operates to extend until its maturity the period of the payment of the debt. The creditor may return the note when dishonored, and proceed upon the original debt. The acceptance of the note is considered as accompanied with the condition of its payment. Thus it was said as long ago as the time of Lord Holt that "a bill shall never go in discharge of a precedent debt, except it be a part of the contract that it should be so." Such has been the rule in England ever since; and the same rule prevails, with few exceptions, in the United States. The doctrine proceeds upon the obvious ground that nothing can justly be considered as payment in fact except that which is in truth such, unless something else is expressly agreed to be received in its place. That a mere promise to pay cannot of itself be regarded as an effective payment is manifest.

The presumption that the note of the debtor, or of a third person, given for an antecedent debt, is not payment of the same, is so strong that it is held that though a receipt in full be given at the same time that such note is accepted by a creditor, the same is construed to be upon the condition that the note shall be paid at maturity. *McIntyre v. Kennedy*, 29 Pa. St. 448; *Perit v. Pittsfield*, 5 Rawle, 166; *McGinn v. Holmes*, 2 Watts, 121; *Tobey v. Barber*, 5 Johns. 68; *Johnson v. Weed*, 9 Johns. 310; *Roget v. Merrit*, 2 Caines, 117; *Maze v. Miller*, 1 Wash. C. C. 328; *Harris v. Lindsay*, 4 Wash. C. C. 271; *Peter v. Beverly*, *supra*; *Glenn v. Smith*, 2 Gill & J. 494; *Berry v. Griffin*, 10 Md. 27; *Wheeler v. Schroeder*, 4 R. I. 383, 389; *Street v. Hall*, 29 Vt. 165; *Johnson v. Cleaves*, 15 N. H. 332; *Sutton v. The Albatross*, *supra*; *Sheehy v. Mandeville*, *supra*.

The burden of proof is upon the debtor to show that such note was taken as payment of the original indebtedness. *Noel v. Murray*, 13 N. Y. 168; *Leas v. James*, 10 Serg. & R. 307, 315; *White v. Jones*, 38 Ill. 159; *Woodward v. Miles*, 4 Fost. 289.

If, then, as the authorities clearly hold, a note is not to be taken as payment of a debt it evidences, without further proof that it was so intended, does the evidence in this case make out that fact for defendant in error? At the outset of this inquiry it may be said that this court will not disturb the verdict of the jury, nor the finding of the court, on the evidence, except in extreme cases. This rule we have no disposition to set aside or evade; but the court below did not find that the evidence showed an *agreement* to accept the new note in payment of the debt of which the old note was evidence, but that, in the absence of any agreement to that effect, as matter of law, the transaction amounted to a payment of the debt. Hence there is no necessity for a review of the finding of the facts upon the evidence by the district court. The only question is, did that court err in holding that the transaction by which the new note was substituted for the old, amounted in law, independently of agreement and intention, to a payment of the debt due plaintiff in error from the firm of Todd & Fairchild, on or before the fifteenth day of September, 1882. In the light of the decided cases upon this question, the district court unquestionably erred in its ruling upon this point.

But it is insisted by defendant in error that the evidence of the witness Lytle clearly establishes that the second note was received by the creditor in full payment, satisfaction, and discharge of the first. We do not think the testimony of Lytle warrants such a conclusion. This testimony shows the usual bank transaction, where a party, unable to pay his note at maturity, takes it up, and gives a new one. While the second note was received in lieu of the first, it does not appear that it was distinctly understood and agreed that it was in satisfaction of the original indebtedness in any such sense as destroyed its existence, or precluded an action upon it.

The only other contention of defendant is that, by reason of the surrender of the note of September 15th, and stamping it "Paid," plaintiff in error is v.14p.no.7—28

estopped to proceed against Newton upon the original indebtedness; because Newton, having settled with his copartners upon the basis of their having paid this note, which he found in their possession, cannot now be called upon to pay it to the plaintiff in error. It is unnecessary to enter into a discussion of this proposition, because there is no evidence in the record that any settlement has ever been had between Newton and his copartners upon any such basis, and, in the absence of such evidence, a discussion of the rules of law which might govern the case, if such settlement had been made, would be outside of the issue, and would have no binding force in any subsequent case.

The district court erred in rendering judgment for the defendants, and the judgment should be reversed.

RISING and STALLCUP, CC., concur.

PER CURIAM. For the reasons assigned in the foregoing opinion the judgment is reversed, and the cause remanded.

BENTLEY and others v. BROWN.

(*Supreme Court of Kansas. July 9, 1887.*)

1. EVIDENCE—OPINION—VALUE OF SERVICES.

A court or jury trying the question of the value of legal services is not bound to accept as conclusive the opinions given by attorneys respecting such value. While the opinions of professional witnesses who are familiar with the character and compensation usually paid for legal services are entitled to great weight, such opinions are only to be considered in connection with the other testimony in the case, in the light of which, and of its own general knowledge, the court or jury should for itself determine the value.

2. APPEAL—REVIEW OF EVIDENCE.

The finding of the trial court, being based on conflicting testimony, is as conclusive as the verdict of a jury, and therefore cannot be successfully assailed in this court.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county.

Bentley, Hatfield & Bentley, for plaintiffs in error. *Adams & Adams*, for defendant in error.

JOHNSTON, J. Mary F. Brown brought this action against Bentley, Hatfield & Bentley to recover the sum of \$1,071.60. They are lawyers who had been employed by her to attend to several matters and proceedings in which she was interested. While serving in that capacity, they received from several sources moneys belonging to her, and for which this action was brought. They admitted the receipt of the money, and that they were accountable for the amounts charged against them; but they set up a claim that she was indebted to them in a much larger sum for the legal services which they had performed for her, and they prayed judgment against her for a balance of \$580. She replied that a final settlement had been made, and that she had made payment in full for the legal services charged against her. The cause was tried without a jury, and the court found and stated the facts, and reached the conclusion that the plaintiff below was entitled to recover on her demand the sum of \$972.45, for which amount judgment was given. The complaint of the plaintiffs in error is that the court disregarded the testimony in the findings which it made. There was a long list of charges for legal services, which run through a period of about two years, upon each of which the court found specially as to the nature and extent of the services rendered, and the value of the same.

Several attorneys were called who testified as experts in regard to the value of the services rendered; and it is now contended that the court erred in plac-

ing a lower estimate upon the value of the services than was done by the professional witnesses produced by the plaintiffs in error. The judge or jury trying the question of the value of professional services is not bound to accept as conclusive the opinions of the professional witnesses. In this case there was considerable testimony produced besides the opinions of the experts; and their opinions respecting the value of the services were not at all harmonious. There were before the court the terms of employment, the character of the litigation in which the services were rendered, the manner in which the services were performed, the time occupied, and the benefits resulting to the defendant in error from the services. It was the duty of the court to consider all these matters in determining the value of the services. The court could not abdicate the duty of exercising its own judgment, and blindly accept the judgment of the experts. The opinions of professional men who are conversant with the nature and value of legal services are entitled to great weight; but such opinions are not binding or conclusive. They should be considered in connection with all the other testimony and circumstances of the case; and the court or jury trying the fact must not only weigh the conflicting opinions of the witnesses, but must use and apply its own general knowledge and judgment, in the light of the testimony, to determine the value of the services. *Anthony v. Stinson*, 4 Kan. 211; *Head v. Hargrave*, 105 U. S. 45; *Rose v. Spies*, 44 Mo. 20. Although the plaintiffs in error were very successful in the litigation and business which they carried on and performed for the defendant in error, we cannot say that the court was unjust in the allowance of compensation, nor that the findings were without support.

But, apart from the foregoing consideration, the findings of the court will compel an affirmance of the judgment. In the twenty-eighth finding it is stated "that on the fifteenth day of August, 1884, the plaintiff paid to the defendant O. H. Bentley the sum of \$250 on account of his services; that the said payment was understood by both parties at the time to be in full of all services rendered by the defendants, or either of them, to the plaintiff up to that time." There is a further finding that, after this payment and settlement, the only service rendered by the defendants, or either of them, was in the trial of a certain case for which the compensation was fixed by agreement between the parties, together with some work which was done towards the making of a case for the supreme court, and an allowance was made for both of these items by the trial court. The testimony concerning the settlement is conflicting, but it is sufficient to sustain the finding when it is assailed here. A finding made by the trial court upon conflicting testimony is as conclusive, when attacked in this court, as is the verdict of a jury; and the findings alluded to practically dispose of all the objections which have been urged by the plaintiffs in error.

The judgment of the district court must be affirmed.
(All the justices concurring.)

BENTLEY and others v. BROWN.
(*Supreme Court of Kansas. July 9, 1887.*)

CONTRACT—ACTION ON—RECOVERY.

An action was brought by B. to recover from her attorneys moneys which had been paid to them for her. It was admitted that they were in the receipt and custody of the moneys, but they set up claims for legal services rendered in behalf of B., alleged to be unpaid. B. recovered in the action, although the amount of her recovery was somewhat reduced by an allowance upon the unpaid claims of her attorneys. *Held*, that B.'s cause of action was one for the payment of money only, within the meaning of section 556 of the Civil Code; and the fact that the amount of the recovery was somewhat reduced by an allowance upon a counter-claim, which involved more than a contract for money only, will not debar B. from the privilege afforded by the section referred to.

(*Syllabus by the Court.*)

Error from district court, Sedgwick county.

Bentley, Hatfield & Bentley, for plaintiffs in error. *Adams & Adams*, for defendant in error.

JOHNSTON, J. This proceeding has been brought to reverse an order made to enforce the judgment rendered in the action between the parties hereto, and which judgment we have just affirmed. *Bentley v. Brown*, ante, 434. The only question presented is whether the action of Mary F. Brown, upon which the judgment was rendered, is one "arising on contract for the payment of money only," within the meaning of section 555 of the Civil Code. That section reads: "In an action arising on contract for the payment of money only, notwithstanding the execution of the undertaking in the last section mentioned to stay proceedings, if the defendant in error give adequate security to make restitution in case the judgment is reversed or modified, he may, upon leave obtained from the court below, or a judge thereof in vacation, proceed to enforce the judgment. Such security must be an undertaking executed to the plaintiff in error by at least two sufficient sureties, to the effect that, if the judgment be reversed or modified, he will make full restitution to the plaintiff in error of the money by him received under the judgment."

We think the action in question belongs to the class mentioned in the foregoing section. It was brought by the plaintiff therein to recover money that had been paid to the defendants for her, and which it was admitted by all belonged to her. The fact that the money came rightly into their hands as her attorneys does not affect the determination of this action, as there was an implied obligation or contract that they would pay the moneys to her upon demand. No distinction is made in this statute between express and implied contracts, and the terms employed are such as to fairly include implied contracts, providing they are for the payment of money only. *Water-Power Co. v. Brown*, 23 Kan. 695. It is true that their counter-claim involved more than the contract for the recovery of money, but the action of Mary F. Brown rested wholly on a contract for money only, and upon that contract she recovered. The judgment sought to be reversed was a recovery upon her cause of action, and not upon their counter-claim. The mere fact that the amount of her recovery was somewhat reduced by an allowance upon their claims for legal services does not change the nature of the cause of action upon which the judgment was rendered, nor does it debar her from the privilege afforded by the section quoted. We cannot say that there was any abuse of discretion in granting the order, and therefore it must be affirmed.

(All the justices concurring.)

SWEARINGEN v. HOWSER and another.

(Supreme Court of Kansas. July 9, 1887.)

1. ATTACHMENT—DISSOLUTION.

The district judge has the power to hear and determine a motion to dissolve an order of attachment at chambers, where both parties appear, and no objection is made, although, at the time, the regular session of the district court is being held in the same county, with a judge *pro tem*. presiding.

2. SAME—AFFIDAVIT.

The affidavit for an attachment, sworn to by the plaintiff before a notary public, who is the attorney of record of the plaintiff in the action, is at most only voidable, and may be amended.

(Syllabus by the Court.)

Error from district court, Harper county.

Campbell & Glenn, for plaintiff in error. *Finch & Finch* and *S. S. Sisson*, for defendants in error.

HORTON, C. J. This was an action brought by the plaintiff against the defendants to recover the sum of \$150. Plaintiff also filed his affidavit for an attachment with a sufficient undertaking, and thereupon the clerk of the district court issued an order of attachment, and the sheriff of Harper county attached a portion of a stock of groceries belonging to the defendants. Afterwards the attorneys for the defendants made a motion before the district judge at chambers, in the city of Wellington, Sumner county, to dissolve the attachment on the ground that the affidavit therefor had been sworn to before William M. Glenn, notary public, but one of the attorneys of record for the plaintiff. On the hearing of the motion, plaintiff asked leave of the court to amend the attachment affidavit by swearing to it before some officer duly authorized to administer oaths other than his attorney in the case. The district judge refused to permit the affidavit to be amended, and ordered the attachment to be dissolved. At the time of hearing this motion the district court was in session in Sumner county, with a judge *pro tem.* on the bench. The plaintiff brings the case here. He complains that the district judge at chambers was acting without jurisdiction of the case, as a judge *pro tem.* was holding court at that time in the same county. There is no showing that the judge *pro tem.* was not properly selected and sitting in the case in which the judge of the district court was disqualified. In the absence of any proof to the contrary, we must assume that the judge *pro tem.* was properly holding court at the time. *Garvin v. Jennerson*, 20 Kan. 371. The parties have no cause to complain because the judge *pro tem.* was trying a case in which they had no interest, so long as the legally elected judge of the district court heard and determined the motion in dispute at chambers. This action was brought in Harper county, one of the counties in the Nineteenth judicial district. This motion could not have been heard before any other person than the judge of the district. Comp. Laws 1879, c. 28, § 2. The plaintiff did not question the power of the judge at chambers until the decision was rendered against him. He makes that objection for the first time in this court.

Plaintiff makes the further objection that the district judge refused to permit him to file an amended affidavit. The decision of this question compels us to determine whether the affidavit upon which the order of attachment issued was voidable only or wholly void. By section 1 of the act relating to oaths, the general power, without any exception or limitation, is given to notaries public "to administer oaths pertaining to all matters wherein an oath is required." By section 348 of the Civil Code, the general power, without any exception or limitation, is given to notaries public to take depositions. By section 345 of the Civil Code, the general power, without any exception or limitation, is given to any person authorized to take depositions to act as the officer before whom affidavits may be taken and authenticated. Under section 350 of the Civil Code, however, "the officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding;" and therefore, inferentially, "the officer before whom affidavits are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." Hence it will be seen that notaries public have the general power to take depositions or affidavits in all cases, and without any exception or limitation. There are cases, however, where it would be improper or irregular for a notary public to exercise such power, as where the deposition or affidavit is to be used in some suit or proceeding where the notary public is a relative or an attorney of either party to such suit or proceeding, or in some manner interested in the event of the suit or proceeding, and in such cases he should not exercise the power to take the deposition or the affidavit. If he should do so, however, it would not be acting without power, but would be an irregular and wrongful exercise of power. Where any officer or agent acts with power, but only irregularly and wrongfully, his acts are not void,

but at most only voidable. Parties to a suit cannot confer power upon an unauthorized person to administer oaths, or to take depositions or affidavits. The power or authority must come from the law, or it cannot exist. The parties themselves cannot, even by consent or agreement, create it. Hence, supposing a notary public to be powerless to act in the particular case under the law, then the parties could not by consent or agreement confer power upon him to administer oaths, or to take depositions or affidavits, where he might be a relative of either party in the slightest degree, or an attorney of either party in any manner or degree, or interested in the event of the suit in the slightest or most remote degree.

In a case like the present, where the affidavit was originally sworn to before an attorney of one of the parties, no harm can be done by giving leave to amend the affidavit by having it sworn to before some other person,—certainly not if the facts stated in the affidavit are such that no person will again swear to them. If some person will again swear to them, the opposing party may show, if he can, that the alleged facts are not true.

In *Wade on Attachment*, two cases are cited in support of the claim that the officer before whom an affidavit is made must have authority to administer the oath in that particular case, otherwise the affidavit is void. Section 60. *Owens v. Johns*, 59 Mo. 89; *Greenvault v. Bank*, 2 Doug. (Mich.) 498. In the Missouri case the action was instituted by the clerk of the circuit court, and he swore to the attachment affidavit before his own deputy. Of course, in such a case, the whole proceeding was a nullity. The writ was issued without authority of law, as the deputy had no more power to administer the oath to the clerk than the clerk would have had to have sworn himself. In the Michigan case the attachment affidavit was sworn to before the clerk of the circuit court in vacation. The clerk of the court had no authority to administer oaths or take affidavits in vacation, and hence the affidavit was void, as the officer was not authorized to administer any oath at the time. Those cases are not exactly like the one at bar, and do not fully support the text cited.

As the attachment affidavit in this case was not wholly void, in the furtherance of justice the plaintiff should have been permitted to have filed an amended affidavit, as he requested.

The order of the district judge will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

YOAKAM v. HOWSER and another.
(*Supreme Court of Kansas. July 9, 1887.*)

Error from district court, Harper county.

PER CURIAM. The questions in this are similar to those in the foregoing case, and under that authority the order of the district court will be reversed.

ISRAEL v. NICHOLS and others.
(*Supreme Court of Kansas. July 9, 1887.*)

JUDGMENT—REVIVAL.

The provisions of the Civil Code for the revival of judgments apply to a judgment rendered before a justice of the peace, where such judgment has not been transferred to the district court by appeal or otherwise.

(*Syllabus by the Court.*)

Error from McPherson county.

On June 13, 1879, Nichols, Shepard & Company recovered a judgment against D. J. Israel before a justice of the peace of McPherson county for the sum of \$103.75, together with costs, taxed at \$4.65. No execution or other

proceeding was had in the action until March 23, 1885, when Nichols, Shepard & Co. filed a motion before the justice of the peace to revive the judgment, and caused a notice thereof to be served upon D. J. Israel. On April 1, 1885, the motion was heard and overruled. Nichols, Shepard & Co. prosecuted their petition in error to the district court, and on April 30, 1885, that court reversed the ruling of the justice of the peace, and subsequently revived the judgment of June 13, 1879. Exception was taken to this ruling by Israel, who now complains thereof.

J. L. Pancoast, for plaintiff in error. *Milliken & Hulse*, for defendants in error.

HORTON, C. J. The sole question presented in this case is whether a justice of the peace can revive a judgment rendered before him that has become dormant. The district court held that a justice possessed the power. In this view we concur. There is no express provision in the Justice's Code for the revivor of dormant judgments; but, under section 185 of this Code, the provisions of the Civil Code for the revival of judgments are applicable to judgments rendered before justices of the peace, where the judgment has not been transferred to the district court by appeal or otherwise. Section 440, Civil Code; *Angell v. Martin*, 24 Kan. 334; *Miller v. Curry*, 17 Neb. 321, 22 N. W. Rep. 559. Section 522 of the Civil Code prescribes the mode of reviving judgments of justices of the peace after they have been docketed or transferred to the district court. Hence that section does not conflict with the conclusion reached. *Rahm v. Soper*, 28 Kan. 529.

The order and judgment of the district court will be affirmed.
(All the justices concurring.)

ISRAEL v. NICHOLS and others.

(Supreme Court of Kansas. July 9, 1887.)

PER CURIAM. The same question decided in the foregoing case is also presented in this one. Upon the above authority, the judgment of the district court will be affirmed.

KOENIG v. ADAMS.

(Supreme Court of Kansas. July 9, 1887.)

PARTNERSHIP—ARTICLES—DISSOLUTION.

Where a partnership is formed, and the articles of partnership expressly state that the partnership is to continue until dissolved as the law provides, *had*, to be a partnership at will, and may be dissolved at the pleasure of either party, without the consent of the other.

(Syllabus by Clogston, C.)

Error from district court, Sedgwick county.

Plaintiff commenced this action in the district court of Sedgwick county to recover damages upon a contract of partnership between him and defendant. Issue joined, and at the trial the defendant objected to the introduction of any testimony by plaintiff under his petition, for the reason that it did not state a cause of action. Motion sustained, and the cause dismissed. The plaintiff brings the case here on error.

W. T. Buckner, for plaintiff in error. *Bentley, Hatfield & Bentley*, for defendant in error.

CLOGSTON, C. The article of partnership under which plaintiff claims damages is as follows:

"This indenture, entered into between C. L. Adams, of the first part, and Joseph Koenig, of Louisville, Kentucky, of the second part, this eighteenth day of August, 1884, at Wichita, Kansas, (1) witnesseth that the party of the

first part and second part herein named do hereby mutually agree, promise, and bind themselves to form a copartnership under the name of Adams & Koenig, for the purpose of carrying on the business of cutting, sawing, and dressing stone, marble, and granite for all purposes; also of trading, buying, and selling lime, cement, bricks, plaster, hair, etc. (2) Each copartner shall have an equal undivided one-half interest in all stock, fixtures, materials, tools, teams, papers, etc., owned by such firm. The profits shall be equally divided at the end of every year, and each partner bears an equal share of all losses. (3) Each of the above partners agrees and promises to devote his whole time and attention to said business. (4) Each of said parties agrees and promises not to sell or convey his interest in said firm, unless the other partner consents. (5) Each party agrees and promises not to draw from said business more than one thousand dollars per year, if so much profit be made that his share would amount to that sum, unless the other partner of said firm consents. (6) Joseph Koenig, the party of the second part, agrees and promises that two dollars per day be allowed to C. L. Adams, the party of the first part, for six months following the first six months of the existence of the said partnership, over and above his share of the profits. (7) It is further agreed between the said parties that neither partner shall have the right nor power to bind the other partner for any greater sum than \$300, without the consent of his copartner. (8) This partnership is to take effect on and including the sixteenth day of September, 1884, and shall continue until dissolved as the law provides. (9) It is further agreed between the above parties that C. L. Adams will supervise the shop, and work connected with it, and that Joseph Koenig will generally see to the work connected with the business outside of the work-shop, or outside of the city.

"Signed the nineteenth of August, 1884.

C. L. ADAMS.

"JOSEPH KOENIG.

"Witness: CHRIS. KIMMERLE."

Plaintiff also alleges in his petition that, by virtue of said agreement, the partnership was formed, and continued from the nineteenth day of September until the thirtieth day of September, 1884, when the defendant notified plaintiff that he would no longer do business with him, and no longer continue the partnership; and that by reason thereof the partnership was dissolved, and plaintiff sold his interest therein, and sustained damages in the sum of \$1,600; that by the terms of said article it was understood that the partnership was to continue a year. Plaintiff objected to the introduction of testimony under this petition, and the court sustained the motion, and dismissed the case. Plaintiff complains, and insists because the contract provides for a division of profits for the first year, that thereby it becomes a contract of partnership for one year. Defendant claimed, on the other hand, that the contract created a partnership at will, and could be dissolved at the pleasure of either party without the consent of the other. We think the defendant is right. The eighth provision of the article under which the partnership was formed, provides that the partnership shall continue until dissolved as the law provides.

Mr. Parsons, in his work on Partnership, says: "Dissolution of Partnership takes place in seven different ways: *First*, by provision of the articles; *second*, by will of all the partners; *third*, by act of one or more of the partners alone; *fourth*, by a change of the partnership; *fifth*, by death of one of the partners; *sixth*, by decree of a court of equity; and, *seventh*, by bankruptcy." See, also, *Blaker v. Sands*, 29 Kan. 551.

But plaintiff insists because provision is made for the division of the profits for one year, that it must be deemed a partnership for that length of time at least. In this the plaintiff is mistaken. The contract provides for a division for the first year only on condition that it is not dissolved, as the law

provides, sooner. No presumption will operate in favor of a party to continue a partnership when, by the terms of the article forming said partnership, it expressly states how or when it may be dissolved. We are therefore of the opinion that this contract established a partnership at will only, and, being a partnership at will, might, at the will of the defendant, fairly expressed, be dissolved at any time, and the plaintiff cannot complain.

It is recommended that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

TEFFT v. KNOX and others.

(*Supreme Court of Kansas. July 9, 1887.*)

BANKRUPTCY—DISCHARGE.

March 1, 1877, plaintiff filed his voluntary petition in the United States circuit court, asking to be adjudged a bankrupt. At that time there was pending in the Shawnee county district court an action against him as an accommodation indorser on a promissory note, and he had been duly served with summons, but failed to answer, and made no appearance. In September, 1877, judgment was duly rendered against him, and in October following he received his final discharge in bankruptcy. In November, 1884, he filed his motion in the district court, as provided by section 3, c. 12, Comp. Laws 1885, to have indorsed on the judgment record, "Discharged by virtue of the bankrupt law." *Held*, that the plaintiff, by waiving his right to have said case continued in the state courts, as provided by section 5106 of the Revised Statutes of the United States, until he received his final discharge in bankruptcy, did not forfeit his right to have said judgment discharged under the provisions of section 3, c. 12, Comp. Laws 1885.

(*Syllabus by Clogston, C.*)

Error from district court, Shawnee county.

The plaintiff in error, by motion, applied to the Shawnee county district court to have the words, "Discharged by virtue of the bankrupt law," indorsed upon the record of the judgment of the court against him, and in favor of the plaintiff in error; the plaintiff having obtained his discharge from bankruptcy after the rendition of the judgment. The motion was heard upon an agreed statement of facts, which are substantially as follows: In December, 1876, the defendants in error sued the plaintiff in error upon his liability as a commercial indorser of a promissory note, being duly served with summons, and made default. In March, 1877, he filed his voluntary petition in bankruptcy, in which this debt was scheduled. In September, 1877, the defendants in error obtained a judgment in this action by default, and October 31, 1877, the plaintiff in error obtained his discharge in bankruptcy. Defendants in error did not prove their debt in bankruptcy, nor make any appearance in the bankruptcy court. There were no assets and no dividends. This motion was made and overruled in November, 1884.

G. C. Clemens and H. C. Root, for plaintiff in error. *J. G. Slonecker*, for defendants in error.

CLOGSTON, C. The only question for consideration is, was the judgment in question discharged by reason of the defendant being discharged as a bankrupt? To determine this question the provisions of the bankrupt law must be examined. Section 5106 of the act of 1867 provides: "No creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall be, upon the application of the bankrupt, stayed to await the determination of the court in bankruptcy on the question of said discharge." There is an exception to this provision that provides that the creditor may proceed to judgment by special leave of a bankruptcy court, for

the sole purpose of ascertaining the amount due; which, when determined, may be proved in bankruptcy as an adjudicated claim.

Under this section there were two ways in which the judgment might have been affected: *First*, by the appearance of the defendant with his showing that he had been declared a bankrupt, and by moving that the cause be continued until his discharge could be procured from the bankruptcy proceedings; *second*, the plaintiff might procure leave of the court in which the bankruptcy proceedings were pending to proceed to final judgment, and, after such judgment, have proved the same as a claim against the bankrupt. But both might waive such right. The plaintiff, by so doing, would not abandon his right to prove his judgment, and would have the right to file his judgment as a claim against the bankrupt estate, and share with the other creditors. The defendant might abandon his right to have the proceedings stayed to await his final discharge, but in so doing he would not forfeit his right to plead his final discharge in bankruptcy when procured; and, if he did not receive his discharge until after judgment had been rendered against him in the state courts, then he might proceed, as in this case, to have the judgment discharged.

Since the case was submitted to this court, the supreme court of the United States has passed upon the same question involved in this case, in which Justice MILLER says: "These provisions exclude altogether the idea that the state court has lost jurisdiction of the case, even when the bankrupt shall have made application showing the proceedings against him. The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time in regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons—*First*, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the *second* place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried; in the *third* place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid, *pro rata* with his other debts, by the assignee in bankruptcy. If for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene, as he may do, he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court, and obtain the stay of execution which he asks for now." *Boydton v. Ball*, 7 Sup. Ct. Rep. 984. See, also, 24 Cent. Law J. 587.

In view of this opinion, we recommend that the case be reversed and remanded for further proceedings, in accordance with the views herein expressed.

BY THE COURT. It is so ordered; all the justices concurring.

HATES v. WIGGIN and another.

(Supreme Court of Kansas. July 9, 1887.)

1. PRINCIPAL AND SURETY—REMEDIES OF SURETY.

B. signs C.'s notes as surety, and, in consideration of such signing, C. agrees to convey personal property to him. Afterwards W., as receiver of C., in another

action, takes possession of such personal property, C. being insolvent. *Held*, that B., after the maturity of the notes, was entitled to the possession of said property, and could bring an action in replevin at once to obtain possession of the same, and is not compelled to wait till he has actually paid such notes as surety.

2. CHATTEL MORTGAGES—ORAL MORTGAGE.

An agreement not in writing, to convey personal property as security, may be regarded as an oral mortgage; and when inquired into between the parties thereto, or between parties having no greater or different rights, will be held to be valid without the actual delivery of the personal property so conveyed.

(*Syllabus by Holt, C.*)

Error from district court, Ellsworth county.

Action in replevin. H. B. Clark, one of the defendants in an action by Oscar A. Burton against H. B. Clark *et al.*, pending in the United States circuit court, had charge of a ranch in Ellsworth county, Kansas, in the year 1884, whereon he had 6,700 head of sheep, and a large number of cattle, horses, and hogs. In the fall of that year he was short of funds, and made arrangements with the First National Bank of Ellsworth to raise money to buy grain and feed to keep his stock through the winter. He made arrangements with Frank A. Bates, the plaintiff herein, to become surety on notes to be given by him at the bank. The money thus obtained was to be used by Clark for the purpose of buying feed, which was to be used on the ranch. He commenced to buy said feed in November, 1884, and continued until he bought about \$2,500 worth. Clark gave two notes at the bank, with Bates as surety, amounting to \$2,500, which were both overdue when this action was commenced. The agreement between Clark and Bates was not in writing. It was made for the purpose of securing Bates for signing as surety for Clark. At the time Bates signed the notes as surety, he was insolvent, although the bank believed that he was perfectly solvent. Clark was also insolvent. Clark fed out the millet, hay, and grain purchased, as it was necessary, and on the fifth of January, 1885, J. A. Wiggin, as receiver in said case in the United States district court, took possession, not only of the feed, but of the stock, and has kept them ever since. Testimony was introduced in the trial of this action, tending to establish the truth of all the statements above detailed. At the close of the testimony the defendant interposed a demurrer, which was sustained by the court.

Lloyd & Evans, for plaintiff in error. *J. B. Johnson* and *J. D. McFarland*, for defendants in error.

HOLT, C. The first question that presents itself is, was the contract between Bates and Clark a conditional sale, or was it a mortgage on the property in controversy? The testimony is not uniform concerning the agreement. Some of the witnesses testify that the title should pass, and the property become absolutely the property of Bates at once. They all agree that the title to the property should be in Bates until the notes were paid to the bank, but there is some testimony showing that the title to the property remaining should revert to Clark upon the payment of the notes, at once and without any formal transfer. The testimony shows that Clark fed his stock out of a part of the property purchased. The writer of this opinion is inclined to believe that the agreement constituted a mortgage, yet there was testimony enough introduced tending to show that it was a conditional sale, so that it might have been a proper question for the jury to determine whether the transaction was a mortgage or a sale. *Goodwin v. Kelly*, 42 Barb. 194. If it had been a sale of the property, then certainly Bates, the owner of the same, could maintain his action for the possession of it.

The defendants contend that, if it was an oral mortgage, it would be void without an actual delivery of the property to Bates. We do not believe that claim is tenable. There is a distinction between mortgages and pledges, but there is no distinction, nor reason for a distinction, between oral and written

mortgages in this respect. There is no provision in our statutes, as there is in some states, that the sale of personal property of a certain value, unaccompanied by delivery, shall be void unless a memorandum of the sale, in writing, is made and signed by one of the parties thereto. There is no question of purchaser or creditor arising in this action, under the evidence brought here. It is simply a controversy between Bates and the receiver of H. B. Clark. Such receiver takes the property of Clark subject to all existing equities and liens, and has no greater rights than Clark himself would have against Bates, and can interpose no defense that Clark could not. *In re North American Gutta-Percha Co.*, 17 How. Pr. 549; *Lorch v. Aultman*, 75 Ind. 162; High, Rec. § 138.

The testimony in this action tends to show that this transaction was entered into in good faith, and the conditional sale or mortgage, whichever it may be, was given upon a sufficient consideration; and when inquired into between the parties themselves, or between parties having no greater or different rights, we know of no rule, or reason for a rule, that would make delivery indispensable as between them, any more than under a written mortgage. *Jones, Chat. Mortg. § 2; Morrow v. Turney*, 35 Ala. 131. If a sale of chattels, not in writing, is valid without delivery, we know of no reason why an oral mortgage should be void between the parties thereto without delivery.

In the view we take of this case, it is of very little importance whether the transaction was a conditional sale or a mortgage. If it was a mortgage, it was a transaction to secure \$2,500, and the statement of the values in the affidavit of plaintiff shows the total value of the property claimed to be only \$1,439.75, much less than the amount sought to be secured.

It is contended, if this transaction is a mortgage, that the plaintiff could not maintain an action of replevin for this property until he had paid the notes, or some part thereof, upon which he was surety. Whatever the general rule may be, we believe, where the surety has a mortgage on the property of his principal to secure him for signing his principal's notes after the maturity of the debt, he is not bound to wait until he has actually paid as surety, but may have the mortgage foreclosed at once, and, where the principal is insolvent, may retain any funds in his hands to apply to the discharge of his liability. The purpose of this contract between Bates and Clark was to hold Bates harmless against loss or damage by reason of his signing Clark's notes at the bank as surety. He was, at the commencement of this action, legally liable on the notes, and he was entitled to obtain possession of the property given him to save him harmless because he signed the same. *Brandt, Sur. § 193; Baylies, Sur. 352; Decottes v. Jeffers*, 7 Fla. 284; *Succession of Montgomery*, 2 La. Ann. 469; *Daniel v. Joyner*, 3 Ired. Eq. 513.

It is recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

SMYTHE, Sr., and others, v. PARSONS and another.

(Supreme Court of Kansas. July 9, 1887.)

1. PLEADING—REDUNDANCY.

Where certain words in a petition are immaterial and redundant, the court has a discretion to permit them to remain in the petition, or to order them to be stricken out; and where the court permits them to remain in the petition it does not commit material error.

2. SAME—SUFFICIENCY.

The petition in this case states a cause of action.

3. CUSTOM AND USAGE—EVIDENCE.

Parties to a contract are presumed to contract with reference to a uniform and well-settled custom or usage pertaining to the matters concerning which they make

the contract, where such custom or usage is not in opposition to well-settled principles of law, nor unreasonable; and therefore *held*, that the trial court did not err in permitting testimony to be introduced tending to prove a general custom at Wichita, Kansas, with reference to the method of ascertaining the number of brick in a wall, the contract having been made at Wichita, and not prescribing how the number of the brick in the wall should be ascertained.

4. EVIDENCE—COMPETENCY.

Where testimony, a portion of which is competent and a portion incompetent, is introduced without objection, and afterwards the adverse party moves to strike out *the whole* of it, *held*, that the court may overrule the motion without committing error.

5. TRIAL—BY COURT—FINDINGS.

Where the trial of a case is submitted to the court without a jury, the court may find generally, and without stating its conclusions of fact found separately from its conclusions of law, unless requested to find specially before the general finding is made, and the judgment rendered thereon.

(*Syllabus by the Court.*)

Error from district court, Greenwood county.

W. P. Campbell, for plaintiffs in error. *John R. Parsons*, for defendants in error.

VALENTINE, J. This action is founded upon a written contract, set forth as an exhibit to the plaintiffs' petition, and is for a balance due for labor and materials furnished in 1882, in the construction of a large brick building in the city of Wichita, Kansas. The action was commenced in the district court of Sedgwick county by Charles A. Parsons and James Longmire, partners, against F. G. Smythe, Sr., F. G. Smythe, Jr., and Charles H. Smythe, and was afterwards removed by change of venue to the district court of Greenwood county, where it was tried in 1885 before the court without a jury, and the court found generally in favor of the plaintiffs, and against the defendants; finding a balance due at the time of the trial of \$487.60, for which amount, with costs, the court rendered judgment in favor of the plaintiffs, and against the defendants.

The defendants, as plaintiffs in error, bring the case to this court, and ask for a reversal of the aforesaid judgment. They claim that the court below committed error as follows: (1) They claim that prior to the trial, and prior to their filing any answer in the case, the court below erred in overruling their motion to strike out of the plaintiffs' petition the words "kiln count," and "actual kiln count," claiming that said words are "redundant, immaterial, and repugnant" to the contract sued on. (2) They further claim that the court below erred in overruling the defendants' objection to the introduction of any testimony on the ground that the plaintiffs' petition did not state facts sufficient to constitute a cause of action. (3) They further claim that the court below erred in admitting testimony tending to prove a general custom at Wichita with reference to the method of ascertaining the number of brick in a wall. (4) They further claim that the court below erred in permitting one of the plaintiffs to testify as to the number of brick used by actual count, when it is claimed that such plaintiff did not count the brick himself, but obtained his information only from others. (5) They further claim that the court below erred in refusing to make special findings of fact and conclusions of law.

We shall consider these claims of error in their order.

1. The original contract between the plaintiffs and the defendants, and the one sued on in this action, is in writing, and under it the defendants were to furnish the plaintiffs with all the brick necessary for the construction of said building. As to how the number of the brick should be ascertained, or how they were to be counted, the contract is possibly ambiguous; and if it is, then the words "kiln count" and "actual kiln count" have some office to perform in the plaintiffs' petition; for by them it is shown how the brick should be

counted. These words merely show how the plaintiffs construe the contract. If, however, the contract is not ambiguous, then these words could certainly do no harm, for the parties must be governed by the contract, and the words must be treated as surplusage. The contract itself is set out as an exhibit to the plaintiffs' petition, and must govern whatever may have been alleged concerning it. It may be that the aforesaid words are immaterial and redundant, and probably they are; and, if so, then the court might, in its discretion, have stricken them out; but, as the court has a discretion in such cases, we do not think it erred in refusing to strike them out. *Drake v. National Bank*, 33 Kan. 639, 7 Pac. Rep. 219. They could not do any harm by being permitted to remain in the petition.

2. There is nothing at all in the second alleged error.

3. We think the testimony tending to prove a general custom at Wichita, with reference to the method of ascertaining the number of brick in a wall, was properly admitted. The plaintiffs were brick-layers and contractors, and the defendants were the owners of the building, and the defendants were to pay the plaintiffs, for laying the brick in the wall, a certain amount or rate per thousand; and the question arose, how shall the brick be estimated or counted in the wall? The foregoing testimony was admitted upon the theory that the contract itself was ambiguous, or, at least, did not definitely or specifically prescribe how the number of the brick in the wall should be ascertained, and that the parties contracted with reference to this custom, which was well known at Wichita. Parties are always presumed to contract with reference to a uniform and well-settled custom or usage pertaining to the matters concerning which they make the contract, where such custom or usage is not in opposition to well-settled principles of law, nor unreasonable, (*Walls v. Bailey*, 49 N. Y. 464 *et seq.*, and cases there cited; *Graham v. Trimmer*, 6 Kan. 231; and by the introduction of the aforesaid testimony it was attempted on the part of the plaintiffs to prove such a custom or usage. Besides, there does not seem to have been any objection made or exception taken to the introduction of this testimony. Hence, for this reason also, and it might be for this reason alone, if the other did not exist, the court below did not err in admitting the testimony.

4. The other testimony complained of is the testimony of Charles A. Parsons, one of the plaintiffs in the case. This testimony was introduced by the plaintiffs without any objection being interposed thereto on the part of the defendants. Some of it was competent, and some of it was incompetent. Afterwards, as the record shows, "the defendants moved to strike out all of Parsons' testimony as hearsay and incompetent and irrelevant, which motion the court overruled; to which the defendants excepted." We think the motion was rightfully overruled. In the case of *Smith v. Brown*, 8 Kan. 609, it was held as follows: "If any portion of the evidence objected to is competent, the court may, on a motion to exclude the whole, exclude the part that is incompetent, but is not obliged to do so. It may only respond to the motion as made, and overrule. The motion must fit the case, or the court may overrule it." See, also, *Gano v. Wells*, *ante*, 251, (decided by this court on June 11, 1887.) We might further say that the incompetent portion of Parsons' testimony could not have prejudiced any of the rights of the defendants. It tended to show that the number of brick delivered by the plaintiffs to the defendants did not exceed 181,402; while the competent evidence clearly showed the same thing, and there was no evidence tending to show that any larger number of brick was delivered.

5. The court below did not err in refusing to make special findings of fact and conclusions of law. No request was made that the court should do so until after the general finding was made, and after the judgment was rendered. After the judgment was rendered the defendants filed a motion "requesting the court to find and file conclusions of law and fact separately."

Whether this motion was called to the attention of the court at any time prior to the time when the case for the supreme court was settled and signed is not shown. At the time of settling the case, the matter was called to the attention of the court, and the court then offered to find and file such conclusions, if desired; but the defendants objected, and the court did not do so. No error was committed by the trial court in this respect.

The judgment of the court below will be affirmed.

(All the justices concurring.)

LINDER v. MURDY.

(Supreme Court of Kansas. July 9, 1887.)

GARNISHMENT—ANSWER—ESTOPPEL.

In an action by A. against B., C. is garnished, and C. answers said garnishment that he is indebted to B. on certain conditions to be performed by B.; that upon said answer C. was ordered to pay into court the amount found due from B. to A. C. refused to comply with the order, and paid no part of the said sum so ordered. Held that, in an action by A. against C. on said answer and order in garnishment, C. is not estopped by said proceedings from showing that the conditions under which the conditional indebtedness arose had not been complied with, and that he is by reason thereof not indebted to B.

(Syllabus by Clogston, C.)

Error from district court, Barton county.

John Murdy brought this action on an answer of the defendants in a garnishment proceeding had in an action brought by Murdy against James A. and S. S. Shields, in justice's court of Barton county. Judgment for the defendant in error on the said answer, and the defendant appealed to the district court. Trial by jury. Verdict and judgment for plaintiff (defendant in error) for the sum of \$187.77; and the defendant (plaintiff in error) brings the case here for review.

Diffenbacher & Banta, for plaintiff in error. *Clayton & Clayton* and *L. R. Nimocks*, for defendant in error.

CLOGSTON, C. Defendant in error brought an action in justice's court, in Barton county, against Shields and Shields, and caused the plaintiff in error to be garnished, and in response to such proceedings the plaintiff in error made his answer as follows, to-wit:

"Examination of D. W. Linder, garnishee in the above-entitled action, made this third day of January, 1888: *Question*. At the time you was served with the notice of garnishment in the above-entitled action, had you then, or had you since that time, or have you now, in your possession or under your control any property, moneys, or credits of the above-named defendant? *Answer*. I am indebted to James A. Shields in about the sum of two hundred dollars, on conditions attached hereto. The conditions upon which I owe James A. Shields two hundred dollars are as follows: About the twenty-third day of December, 1882, I bought of James A. Shields the N. W. $\frac{1}{4}$ of sec. 34, Tp. 17, range 14 west, for \$1,000. There is a mortgage of \$700 and other claims against it. I was to assume the mortgage of \$700, and was to advance to him the money to pay the taxes and other claims against the farm, and was to pay him \$50 in money, besides clearing place up. James A. Shields and wife have made a deed to me for the land, and I have accepted the deed as all right. Then the deed was left in hands of S. S. Shields till I should give him my note for balance found due and \$50 in cash. I was to pay James A. Shields. The \$50 in cash was to be part of \$300, and I was to give my note for balance of the \$300, after paying the place clear and paying \$50 in cash. I am now, and have been, ready to perform my contract fully, and would have done so before garnishment in these cases, and but for small-pox. S. S. Shields and I agreed to wait a few days. This is my answer in case of *John*

Murdy v. James A. Shields, and the case of *John Murdy v. James A. Shields and S. S. Shields*. D. W. LINDER."

That afterwards, and upon said answer, the justice of the peace made the following order:

"D. W. Linder, Garnishee: You are ordered forthwith to pay the undersigned, A. J. BUCKLAND, justice of the peace of said township, in said county, the sum of fifty dollars and — cents, being the amount due by you to said defendant James A. Shields, as disclosed by your answer in garnishment filed in the above-entitled action; and hereof fail not at your peril.

"Given under my hand this ninth day of January, A. D. 1883.

"A. J. BUCKLAND, Justice of the Peace."

And afterwards defendant in error duly obtained a judgment against said Shields and Shields for the sum of \$——. The plaintiff in error refused to comply with the order of the justice, and paid no part of the said sum of \$50 so ordered to be paid; and this action was brought by the defendant in error to recover from the plaintiff in error the amount of said judgment so recovered by him against said Shields and Shields.

At the trial in the district court the plaintiff in error insisted that the conditions under which he became indebted, as he alleged in his answer, had not been completed or complied with between himself and Shields, and that he was not liable on his answer. The defendant was called as a witness on his own behalf, and the following questions were asked him, to all of which questions the plaintiff objected, and said objection was sustained by the court; which ruling the plaintiff in error did at the time duly except to, and now insists that in said ruling the court erred: "You may state whether or not on the twenty-seventh day of December, 1882, Mr. James A. Shields, by himself or his agent, executed or tendered a deed for the north-east quarter of 34, 14, 7. If you were indebted to James A. Shields, or either of them, at the time you were served or answered in garnishment, in any manner whatsoever, you may state what that was. You may tell the jury when you say in your answer that you are indebted to James A. Shields in the sum of \$200, in the conditions of some deed, what deed you have reference to. I will ask you, Mr. Linder, to tell the jury whether or not the indebtedness, if any existed, or did exist from you to James A. Shields prior to the service of this garnishment on you. You may tell the jury whether or not at the time you were served with this process of garnishment you had examined the records of the land between you, and whether you had completed the contract at that time. You may tell the jury whether or not this contract between you and Mr. Shields was a written or oral contract. At the time you were served with notice of garnishment in the above-entitled action, had you then, or had you since that time, or have you now in your control or in your possession, any money or credits of the above-named defendants?"

The plaintiff's bill of particulars in this action shows substantially the following: *First*. The action between plaintiff and Shields; the affidavit and summons in garnishment; the answer of said garnishee, and, upon said answer, the order of the justice, directing him to pay the amount the justice found due into court. *Second*. The refusal of the defendant to comply with the order; the nature and character of the indebtedness between the defendant and Shields and Shields; and prayer for judgment.

This made an issue upon the entire garnishment proceedings, and to maintain the issues on the part of the plaintiff it would only be necessary for him to show such answer and order; but the defendant would not be concluded from showing that the answer was made under a misapprehension of the facts, or that the answer had not been correctly made; but might show in addition thereto whether he was indebted to Shields, and, if so, when that indebtedness was due, or whether conditional or absolute; and the entire transaction between himself and Shields. In fact, it might be as full in this in-

quiry as it might have been in his former answer. The plaintiff, by his proceedings in garnishment, could obtain no greater rights to compel payment by defendant than Shields had. It was simply an assignment of whatever was due by the defendant to Shields. The plaintiff stood in the place of Shields, and could enforce payment only as Shields might do. *Phelps v. Atchison, T. & S. F. R. Co.*, 28 Kan. 165; *Board of Education v. Seoville*, 13 Kan. 32.

The evidence excluded by the court on the part of the defendant was competent, and its exclusion was error. The defendant was attempting to show the transaction between himself and Shields, and it seems that whatever indebtedness there was grew out of a purchase by the defendant of the tract of land from Shields, and upon the completion of that transaction he would be indebted to Shields at least in the sum of \$50; and the defendant's evidence excluded tended to show that this transaction had never been completed. The deed to the premises had never been tendered or received by the defendant. Now, before Shields could have maintained an action on his supposed indebtedness, he would have had to show a completed transaction, and that the deed had been delivered, and a perfect title conveyed, subject to whatever liens there were, and showing the balance due, or the tender of a deed showing title. If this right was transferred to the plaintiff, then, before he could recover, he would have to show the same facts.

Plaintiff's theory, and which seems to have been adopted by the court, was that the answer of the defendant in garnishment was conclusive, and that he was estopped from denying or contesting it. Even viewed from this standpoint, we think the court was in error; for the answer made by the defendant shows on its face an uncompleted or conditional indebtedness, depending upon the delivery to him of a deed, the cancellation of certain indebtedness, the payment of certain taxes, and the amount of indebtedness to be ascertained from these payments. And, before the plaintiff could recover upon that answer alone, plaintiff would have to show that these conditions had been performed; for, as long as there was anything more for Shields to do before this payment, that performance would have to be done or shown, or a tender proffered, before payment could be demanded. Defendant was entitled to receive a title to the land; and, before he could be compelled to pay Shields or the plaintiff, the conveyance of the land must be completed.

It is therefore recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

OLMSTEAD and others v. MASONIC MUT. BEN. SOC. OF KANSAS and another.

(Supreme Court of Kansas. July 9, 1887.)

INSURANCE—BENEFICIARY—WILL.

O. became a member of a co-operative life insurance company organized under the laws of Kansas for the purpose of giving aid to the widows, orphans, and dependents of deceased members. By the terms of his contract with the company the benefit was payable to his wife, or her legal representatives. His wife died during his life-time, but no affidavit was made as prescribed in section 78, c. 93, Laws 1871, nor did he take any steps to appoint any person as beneficiary in place of his deceased wife, except that he undertook to dispose of the benefit arising from his membership by a will. *Held*, that the will was ineffectual to dispose of the money payable on account of his death, or to divert the same from the heirs of his deceased wife.

(Syllabus by the Court.)

Error from district court, Reno county.

Vandever & Martin, for plaintiffs in error. *Zimmerman & Taylor* and *Whiteside & Hutchinson*, for defendants in error.

v.14p.no.7—29

JOHNSTON, J. This is a controversy among several claimants to money due upon a certificate of membership issued by the Masonic Mutual Benefit Society of Kansas, a co-operative insurance company organized for charitable and benevolent purposes. It was organized under the laws of Kansas, and its declared purpose is "to give financial aid and benefit to the widows, orphans, and dependents of deceased members thereof." David D. Olmstead became a member of the society, and as such there was issued to him, on February 4, 1874, a certificate of membership, by which it was agreed that his beneficiary or beneficiaries would be entitled to a sum not exceeding \$2,000 upon his death, if certain rules and requirements were complied with. It was expressly agreed and stated in the certificate that the benefit should be paid to Jennett Olmstead, his wife, or the legal representatives of the said Jennett Olmstead. On the fifth day of August, 1878, Jennett Olmstead died, and left surviving her the husband, D. D. Olmstead, and several children, the fruits of the marriage relation with D. D. Olmstead. On the twenty-fifth day of August, 1884, D. D. Olmstead died, leaving no other heirs than those heretofore named as the heirs of Jennett Olmstead. Shortly before his death he executed a will in which he named his son Oscar W. Olmstead as executor, and by which he undertook to bequeath the benefit to be derived from his membership in the insurance company. He gave, in equal amounts, about one-half of the benefit to seven of his children, and to the one appointed executor he gave the balance, and directed him to pay out of the balance certain doctor bills, his funeral expenses, and also for his tombstone. The certificate of membership remained in the possession of D. D. Olmstead during his lifetime, and all fees charged and assessments made thereon were paid. No change was made in the beneficiary, either before or since the death of Jennett Olmstead, and the Masonic Mutual Benefit Society never received from the assured, nor from any one else, an affidavit setting forth the facts with reference to the decease of Jennett Olmstead, and there was never issued any other certificate or policy in lieu of the one originally issued. The Masonic Mutual Benefit Society admits its liability upon the certificate, and is willing to pay the same to whomsoever is entitled to receive it. Oscar W. Olmstead claims the money as executor of the last will and testament of D. D. Olmstead, and has brought the present action against the society to recover the same. The society brought the money into court, and asked that the legal representatives and heirs of Jennett Olmstead be made parties defendant, and a determination made as to whom the money belonged. At the trial it was determined that D. D. Olmstead could dispose of the benefit by his will, and the claim of the executor was sustained. The plaintiffs in error complain of this judgment.

We are to decide whether the beneficiary named in the certificate could be changed, and the fund disposed of by the will, as was attempted to be done. The general rule applicable to policies of ordinary life insurance companies is that the rights of the beneficiary are vested when the policy is taken out, and the assured cannot, by will, deed, or otherwise, change the beneficiary, or transfer the interest vested, without the consent of the beneficiary named in the contract. *Bliss, Life Ins. § 318*. It is insisted that the certificates issued by co-operative insurance companies, like the Masonic Mutual Benefit Society of Kansas, are not governed by the rule mentioned, and that in such cases the rights of the beneficiary are not fixed upon the issuance or by the terms of the certificate, but do depend upon the standing of the assured in the society, and his rights under the constitution and by-laws of the society; and therefore the member may exercise the power of changing the beneficiary. Among the authorities cited which appear to support this proposition are the following: *Presbyterian Fund v. Allen*, 106 Ind. 593, 7 N. E. Rep. 317; *Legion of Honor v. Perry*, 140 Mass. 580, 5 N. E. Rep. 634; *Hellenberg v. I.*

O. B. B., etc., 94 N. Y. 580; *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561; *Gentry v. Supreme Lodge*, 20 Cent. Law J. 393; *Masonic Mut. Ben. Soc. v. Burkhart*, 10 N. E. Rep. 79; *Swift v. Railway Passenger & P. C. Ben. Ass'n*, 96 Ill. 309.

However well founded this distinction may be, it is clear that the beneficiary can only be changed, and the benefit transferred to another, in the manner prescribed by the rules and regulations of the society, and in accordance with the terms of the contract. The contract in this case specifically provided that the benefit should be paid to the wife of the member, or to her legal representatives. The addition of the words "legal representatives" clearly imports that, in case of her death, the benefit should be paid to her heirs or next of kin who fall within the classes mentioned in the charter to whom aid may be given. Thus the contract fixed and limited the persons who might receive the benefit. If we assume, as the authorities appear to hold, that a member of a co-operative society retains the power to change the beneficiary, still he cannot exercise his power except with the consent of the society, and in conformity with the rules and regulations of the society. *Aid Soc. v. Lupold*, 101 Pa. St. 111; *Vollman's Appeal*, 92 Pa. St. 50; *Eastman v. Relief Ass'n*, 20 Cent. Law J. 266; *Hellenberg v. I. O. B. B., etc.*, 94 N. Y. 530; *Presbyterian Fund v. Allen*, 106 Ind. 593, 7 N. E. Rep. 317; *Insurance Co. v. Miller*, 13 Bush, 489; *Gentry v. Supreme Lodge*, 20 Cent. Law J. 393. No provision was made in the certificate of membership for a change in the beneficiary, and the record does not show what rules, if any, the society had made respecting such change. It is admitted that no new designation was made by the assured prior to the death of his wife, nor was any change afterwards made except as attempted by the will. Section 76, c. 93, Laws 1871, provides that "in case any life insurance company organized under the laws of this state shall have issued, or may hereafter issue, any policy of insurance upon the life of any person or persons for another's benefit, and such beneficiary dies during the life-time of the person or persons whose life or lives are assured by said insurance policy or policies, then it shall be lawful for such company to receive from the person or persons whose lives are assured an affidavit setting forth the facts in the case; and, if it shall appear from such affidavit that the affiants have theretofore paid the annual premium on such policy or policies, and intended thereby to insure for the benefit of the person or persons named in such policy or policies as beneficiary, that such person or persons are dead, and that said policy or policies have not been assigned or transferred to any person or persons, and nominating or appointing some other person or persons as beneficiary in place of the said deceased in said policy or policies named, it shall then be the duty of said insurance company to take up and cancel said policies, at the request of said assured, and issue in like terms another policy or policies upon the life or lives of said insured for the benefit of the beneficiary in said affidavit nominated."

This statute applies to the defendant society. It was enacted prior to the making of the contract in question, and the parties must be held to have contracted with reference to it. It prescribes the manner by which the member may designate a beneficiary where the one first appointed has deceased; and it appears to be the only mode prescribed. We think the maxim, *expressio unius est exclusio alterius*, applies; and, as the prescribed mode has not been followed, no change was actually made, and therefore the benefit must be paid according to the terms of the contract. The assured has no interest in the benefit resulting from his membership. In no event was it payable to him, nor could it become a part of his estate; and having no interest in the fund, what was there for him to bequeath?

We think the will was ineffectual to change the beneficiary, or divert the fund from the persons named in the certificate, to-wit, the representatives of Jennett Olmstead. It follows that the judgment of the district court must

be reversed, and the cause remanded, with instruction to enter judgment in favor of the plaintiffs in error.

(All the justices concurring.)

FOSTER v. MARKLAND and others.

(*Supreme Court of Kansas. July 9, 1887.*)

1. WRIT—SERVICE.

A summons in an action before a justice of the peace, issued and served on the thirty-first day of October, to appear at 2:30 P. M. of the third day of November, is served three days before the time of appearance.

2. SAME.

To contest such a service, the proper motion is to set aside the service, not to dismiss the action.

(*Syllabus by Simpson, C.*)

Error from district court, Saline county.

John Foster, for plaintiff in error. *J. G. Mohler*, for defendants in error.

SIMPSON, C. This action was commenced before a justice of the peace in the city of Salina, Saline county. Bill of particulars filed, and summons issued on the thirty-first day of October, 1884, returnable on the third day of November, at 2 o'clock P. M. The summons was served on the thirty-first day of October, the day it was issued. The defendant below, plaintiff in error here, made a special appearance on that day before the justice, and filed a motion to dismiss the action, for the reason that the court had no jurisdiction of the person or the subject-matter, and for the additional reason "that the summons issued in this case was not served on the defendant three days before the time of his appearance, as named in the summons in this case." This motion was overruled and excepted to, the evidence heard, and a judgment rendered for the plaintiff for \$113.50 and costs. A bill of exceptions was presented and signed, and the case taken to the district court on error, and affirmed.

The case is here on petition in error from the district court; the plaintiff in error claiming that it ought to be reversed for error apparent on the face of the record. The question discussed in the briefs of counsel on both sides is as to whether there was sufficient time given by the summons. The plaintiff in error is bound by the terms of his motion, and that was to dismiss the case; and, even if there was not sufficient time given by the summons for the appearance and answer, it would not be a cause for dismissal of the action. In such a case the summons ought to be set aside, and a new one issued, giving the defendant the benefit of the statutory requirement in this respect; but it constitutes no reason for the dismissal of the action. We think the service was good, and that sufficient time was given for the appearance of the defendant. Excluding the day of service, there were three days before the time of appearance.

We see no error, and therefore recommend that the ruling of the district court of Saline county be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

McGANNEN v. STRAIGHTLEDGE.

(*Supreme Court of Kansas. July 9, 1887.*)

PUBLIC LANDS—INDIAN TITLE.

So much of section 2, c. 79, Laws 1874, of the "Act to protect *bona fide* purchasers of Indian lands," which provides that a person purchasing land from an Indian, allotted under a treaty, cannot be evicted by any other person who has obtained

the legal title to the same, until such subsequent purchaser has repaid the prior purchase money, with interest, is inoperative until the Indian title is extinguished, as violative of a paramount federal law.

(Syllabus by the Court.)

Error from district court, Miami county.

Baryman & Sheldon, for plaintiff in error. *Thomas M. Carroll*, for defendant in error.

HORTON, C. J. This action was before this court at its July session, in 1884, upon the question whether the plaintiff's title was barred by any statute of limitations. 32 Kan. 524, 4 Pac. Rep. 1042. It was then held that as the land continued to be Indian land, and the title an Indian title, up to the time it was conveyed by Harriett Sky, or No-me-co-se-quah, sole heir of Pakan-giah, and her husband, to the plaintiff, no statute of limitation could operate. Upon the new trial, judgment was rendered for the plaintiff. The defendant then made application to the court for the payment of his purchase money, and the value of his improvements upon the land, before the plaintiff should be let into possession of the same, under the provisions of section 2, c. 79, Laws 1874, and section 601, Civil Code. The plaintiff admitted that the defendant was entitled to the value of his lasting and valuable improvements, less rents and profits, but denied that he was entitled to reimbursement for his purchase money under "the act to protect *bona fide* purchasers of Indian lands," upon the ground that so much of said act as provides that a person purchasing land from an Indian, allotted under a treaty, cannot be evicted by any other person who has subsequently acquired title to the same, until such subsequent purchaser has repaid the purchase money, is inoperative and void, as in violation of the act admitting the state into the Union, and also of the treaty with the Kaskaskia, Peoria, Piankeshaw, and Wea tribes of Indians, of May 30, 1854.

The district court decided that the plaintiff should pay to the defendant his purchase money, with interest, in addition to the value of his lasting and valuable improvements, less rents and profits, before the defendant should be required to deliver up the possession of the premises. To this ruling the plaintiff excepted.

The question for our determination is whether the defendant can recover his purchase money, with interest, as provided in section 2, c. 79, Laws 1874, before he can be required to surrender possession of the premises owned by the plaintiff. The act of admission of January 29, 1861, among other things, provides "that nothing contained in the said constitution, [of Kansas,] respecting the boundary of said state, shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed." Article 3 of said treaty reads: "* * * All selections in this article provided for shall be made in conformity with the legal subdivisions of the United States lands, and shall be reported immediately in writing, with apt descriptions of the same to the agent for the tribe. Patents for the lands selected by or for individuals or families may be issued, subject to such restrictions re-

specting leases and alienations as the president or congress of the United States may prescribe." 10 St. U. S. 1082, 1083.

The land being Indian, and the title thereto being Indian title up to the date of the conveyance to the plaintiff, in our opinion, under the foregoing provisions, the legislature has no right to impose the lien, charge, or incumbrance upon the land now asserted, and therefore the act cannot have the effect to require the plaintiff to pay to the defendant any purchase money. To compel the plaintiff to pay such purchase money would violate a paramount federal law. So much of said chapter 79, Laws 1874, as requires the second purchaser, under such circumstances as appear in this case, to pay any purchase money to the first purchaser, is wholly void. *Vickroy v. Pratt*, 7 Kan. 238; *Lemert v. Barnes*, 18 Kan. 9; *Maynes v. Veale*, 20 Kan. 374; *Brown v. Steele*, 28 Kan. 672; *Wilcox v. Jackson*, 13 Pet. 517.

If the legislature has the power to impose a lien for two or three hundred dollars upon this land, without benefiting in any manner the purchaser, and without the consent of the United States, or of the Indian to whom it was allotted, as the district court seems to have decided, then the legislature would have the power to prescribe under what rules and regulations Indian lands might be sold or conveyed, and would also have the absolute power to deprive the United States and the Indian to whom the land was allotted of all power of alienation. This, of course, the legislature could not do.

Counsel for the defendant refers to *Krause v. Means*, 12 Kan. 335, as decisive that the successful litigant must pay the defeated claimant his purchase money. That decision, which was only concurred in by two members of this court, gave the defeated party the benefit of the occupying claimant's act. It was said: "He is within the spirit of the law which aims to secure compensation to him who, in a mistaken conviction of ownership, meliorates the land he occupies with lasting and valuable improvements." We have no inclination to criticise or question that decision, so far as it is based upon the equitable doctrine that a person receiving the benefits of improvements shall make compensation therefor. Further than that we are unwilling to go.

The order of the district court granting the application of the defendant for his purchase money will be reversed. The cause will be remanded for further proceedings in accordance with views herein expressed.

(All the justices concurring.)

KANSAS FARMERS' MUT. FIRE INS. CO. v. AMICK.

(Supreme Court of Kansas. July 9, 1887.)

PLEADING—AMENDMENT—DELAY.

Where an action is brought against a fire insurance company to recover damages alleged to have been sustained by fire, and the defendant is in default for want of an answer for several months, and afterwards, on leave of the court, files an answer, and afterwards the trial of the case is had, and had nearly two years after the fire occurred, and after the plaintiff has introduced the principal portion of her testimony, but before she has rested, the defendant asks leave of the court to amend its answer by setting up new matter, and what it claims to be a new, independent, and complete defense to the plaintiff's action, but makes no showing with reference to the delay, or as to whether the defense is true, and the court refuses to permit the amendment to be made, *held* not error.

(Syllabus by the Court.)

Error from district court, Franklin county.

Stambaugh, Hurd & Dewey and J. R. Burton, for plaintiff in error. *Alonzo Dishman*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Franklin county by Lydia A. Amick against the Kansas Farmers' Mutual Fire Insurance Company, on a fire insurance policy, to recover damages alleged to

have been sustained by fire. The case was tried before the court and a jury, and judgment was rendered in favor of the plaintiff and against the defendant for \$1,326 and costs; and the defendant, as plaintiff in error, brings the case to this court for review. The fire occurred on December 27, 1883. The action was commenced on December 23, 1884. The defendant demurred to the plaintiff's petition on January 31, 1885. The demurrer was overruled on June 6, 1885, and 20 days were given the defendant within which to file an answer. The defendant did not file any answer within that time, but on September 14, 1885, without leave of the court, and for the first time, filed an answer. This answer was stricken from the files on September 28, 1885, and on the same day the defendant, with leave of the court, filed another answer, setting forth substantially all that was set forth in the first answer, and more too. On October 6, 1885, the trial was commenced. On October 7, 1885, after the plaintiff had introduced the principal portion of her testimony, but before she had rested, the defendant asked leave of the court to amend its answer by setting up new matter, and what it claimed to be a new, independent, and complete defense to the plaintiff's action, but the court refused; and this refusal is the first ruling of the court below of which the defendant (plaintiff in error) now complains.

We do not think that the court below committed any error in making this ruling. Why the defendant did not set up this defense sooner is not shown; nor is it shown whether the defendant had any reasonable grounds to believe that the defense was true. No affidavit concerning the matter was filed, nor was any other evidence in support of the defendant's application submitted to the court. Of course, under section 139 of the Civil Code, the court may in any case, *in furtherance of justice*, and on such terms as may be proper, permit a party to amend his pleadings by inserting other allegations material to the case, when such amendment does not change substantially the claim or defense; but the amendment, in any case and at any time, can be made *only "in furtherance of justice,"* and it must be *affirmatively shown* that the amendment is *in furtherance of justice*. No such showing was made in the present case. The proposed amendment was that a city ordinance prohibited all persons from putting a stove-pipe through the roof of a building, and that the plaintiff in this case violated such ordinance, and that the fire was caused by reason of such violation. Now, if this were true, the defendant could have known it long before this action was commenced, and could have set it up in an answer as soon as the action was commenced. It is probable that the defendant knew, when the insurance policy was issued, just how the stove-pipe was arranged in this building; for the stove-pipe and the building were in the same condition before the insurance was effected as they were at the time when the fire occurred. And the defendant did unquestionably know, more than two weeks before the trial, just how the stove-pipe was arranged in the building. In all probability the defendant could not have proved that the fire originated by reason of the stove-pipe's running through the roof. But, whatever it might have proved, still it is clear that the defendant might have known, by the exercise of reasonable diligence, at least 20 months before the trial, just what it knew with regard to this subject on the day of the trial. The trial court, in the exercise of its discretion, might, perhaps, upon proper terms, have permitted the amendment to be made; but still, under the circumstances of the case, we do not think that it committed any error in refusing the same.

The defendant (plaintiff in error) also claims that the judgment is excessive. It is useless to discuss this question. There was sufficient evidence to warrant the verdict of the jury; and their verdict, as now presented to us, must be held to be conclusive.

The judgment of the court below will be affirmed
(All the justices concurring.)

TAYS v. CARR.

(Supreme Court of Kansas. July 9, 1887.)

1. DEPOSITIONS—EXCEPTIONS.

Exceptions to depositions for incompetency and irrelevancy should be heard and decided usually during the progress of the trial. The court can properly refuse to hear them before the trial commences.

2. WITNESS—PRIVILEGED COMMUNICATION.

A communication from a client to his attorney may be admitted in evidence, but the attorney, without his client's consent, is prevented from testifying concerning such communication.¹

3. TRIAL—INSTRUCTIONS—ORAL REQUEST.

When a party to an action desires special instructions to be given to the jury, such instructions shall be reduced to writing, and delivered to the court. It is no error to refuse to give an instruction orally requested of the court.

(Syllabus by Holt, C.)

Error from district court, Marshall county.

Glass & Polack, for plaintiff in error. *A. E. Park* and *McClure Preston*, for defendant in error.

HOLT, C. This action was tried in the Marshall county district court at the August term, 1885, by a jury. Plaintiff in error was defendant below, and defendant in error was plaintiff below. The action was brought upon a note signed by defendant, and two others, for \$300, given in Missouri in 1881, and due in one year after date. There is a conflict of testimony as to whether Tays, the defendant, was one of the principals or surety on the note.

The defendant, before the cause was called for trial, made a motion in writing to strike out certain parts of the depositions of sundry witnesses because such parts were incompetent and irrelevant. The motion did not contain the testimony claimed to be incompetent and irrelevant, but designated it by stating in each instance at what line and page of the depositions such testimony began, and what line and page it ended. Of the depositions complained of the record shows that the plaintiff read from them. How much or how little, or what part, we are left to conjecture. It does not state that all or any of them were introduced in evidence except the deposition of Homer W. Carr, which was all read to the jury. The depositions are not preserved in the record, and there is no proof that the parts of the depositions complained of were, as a matter of fact, admitted in evidence, Carr's only excepted. In his deposition was a letter of defendant to J. R. Good, Esq., who, the defendant claims, was his attorney at the time the letter was written. Objection was made to its introduction, and an offer to prove that the relation of attorney and client existed as claimed. The court declined to hear evidence on that point, and allowed the letter to be read. This was no error. An attorney is incompetent to testify concerning any communication made to him by his client, without the client's consent. It is not the communication itself from attorney to client that is incompetent, but the attorney is prevented from testifying concerning it. *State v. Buffington*, 20 Kan. 599. See, also, *State v. White*, 19 Kan. 445; *Wilkins v. Moore*, 20 Kan. 538.

Plaintiff in error complains because the district court refused to hear the said motion at that time, *i. e.*, before the beginning of the trial, and says that such refusal of itself is error. This objection might be answered by simply stating that no material error has been preserved in the record in this case.

¹ Respecting privileged communications between a party and his attorney, see *French v. Hall*, 7 Sup. Ct. Rep. 170; *Benedict v. State*, (Ohio,) 11 N. E. Rep. 125, and note; *Plano Manufg Co. v. Frawley*, (Wis.) 32 N. W. Rep. 768; *Brigham v. McDowell*, (Neb.) 27 N. W. Rep. 384, and note; *Romberg v. Hughes*, (Neb.) 26 N. W. Rep. 351; *Grant v. Hughes*, (N. C.) 2 S. E. Rep. 339; *Brazel v. Fair*, (S. C.) 2 S. E. Rep. 293; *Morris v. Cain*, (La.) 1 South. Rep. 797.

Further, we are inclined to believe that the time of deciding whether certain testimony is competent or relevant in a deposition may be either before the trial of the case, very properly after the trial has commenced, and during its progress. The defendant, however, cites us to section 365 of the Civil Code, viz.: "The court shall, on motion of either party, hear and decide the questions arising on exceptions to depositions, before the commencement of the trial." He claims that section is mandatory, and leaves no discretion in the court, but it must hear and decide all such exceptions before the commencement of the trial. If that section stood alone, his claim might be correct, but section 364 reads as follows: "No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial." If we give section 365 the force defendant claims for it, section 364 would be left without any meaning, or by a strained construction it might be held to mean that any exception to incompetency and irrelevancy, if filed before the commencement of the trial, must be heard and decided only at that time; but any exceptions upon those two grounds, made after the trial began, could be heard during its progress. Such a construction would be a forced one, and without any sound reason for the distinction sought to be made, and would not be a liberal construction of the two sections referred to. By a natural rendering we can give both sections a reasonable and definite meaning, each in harmony with the other. When that can be done, it is the duty of the court to so construe them. Section 365 would then be held to mean that all exceptions, save those for incompetency and irrelevancy, must be heard and decided before the commencement of the trial; and it might fairly be inferred by section 364 that the proper time to take exceptions to the incompetency and irrelevancy of evidence in depositions would be during the progress of the trial. *Johnson v. Mathews*, 5 Kan. 118. It would follow, of course, that at that time they must be heard and determined. If such is the proper construction,—and it seems a natural one,—it would be unreasonable to say, because such exceptions happened to be made before the trial began, they must be decided then, and not at the time when the law contemplates they should be. But section 364 is not in this matter mandatory. We believe that the time when the question of competency and relevancy is to be settled rests usually in the discretion of the trial court. It is a practice prevailing in some of the district courts of the state, and one to be commended, to decide the competency and relevancy of the testimony offered in depositions during the progress of the trial; but, when a deposition is claimed to be incompetent and irrelevant in its general scope and effect, then the objections raised might perhaps be settled before the beginning of the trial. When only a portion is objected to, the question can ordinarily be best determined during the progress of the trial, and after a part of the other evidence in the case has been introduced.

Another objection urged by the plaintiff in error is to the general instructions of the court. The only exception thereto is as follows: "To the giving of the general instructions as shown above by the court to the jury, the defendant, Tays, objected, and duly excepted." By such an objection the attention of the court was not directed to any particular portion of the charge of the court as objectionable; and in this case, where it is of considerable length, the objection is insufficient, and too indefinite to be considered, unless in its general scope the charge is erroneous. *Wheeler v. Joy*, 15 Kan. 389; *Hentig v. Kansas L. & T. Co.*, 28 Kan. 617. We have examined the instructions given by the court, and believe they state fairly the law applicable to the case, and we have been unable to detect that any portion of the same is erroneous.

After the general instructions had been given, the defendant orally requested the court to instruct the jury as follows: "If you find from the evidence that defendant, R. L. Tays, was surety on the note sued upon in this ac-

tion, and that the time of payment was extended for a definite period of time, for a valuable consideration, without the consent of said R. L. Tays, then you must find for the defendant." The instruction asked is correct as an abstract principle of law; but our statute provides (section 275, Civil Code) that, if either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party asking them, and delivered to the court. This is the plain provision of the statute, and must govern in this case. In this instance the instruction was not applicable to the evidence introduced in this action. There was some testimony showing that Tays was surety on the note; also that the time of the payment of the note had been extended, but there was not a *scintilla* of evidence showing that there was any valuable consideration given for such extension. On the other hand, it does appear that not all of the interest then due on the note was paid; and, so far as the consent of Tays was concerned, the talk of extension was made at the store where he was at work, and discussed before him; and, although he did not formally agree to its extension, he made no objection to it.

The plaintiff in error complains of other alleged errors. We think it is unnecessary to specially mention them. We find no material error in the record.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

WEAVER v. YOUNG.

(*Supreme Court of Kansas. July 9, 1887.*)

PLEADING—AMENDMENT—MISNOMER.

The district court has power, in the furtherance of justice, to permit an amendment of a petition by striking out the name of Joseph M. Young as plaintiff, and substituting that of E. J. Young, when it is shown that the first name was used by mistake.

(*Syllabus by Simpson, C.*)

Error from district court, Marion county.

This action was commenced in the district court of Marion county on the fifteenth day of December, 1884. Trial by court at March term, 1885. A finding and judgment for Weaver, the defendant below. The action being ejectment, a second trial was demanded and granted. Motion at the next June term to substitute E. J. Young as plaintiff in place of Joseph M. Young. This motion was supported by the following affidavit:

"Frank Doster, on oath, says he is an attorney at law of the district court of Marion county, Kansas; that he is the attorney of the above-named Joseph M. Young and also of E. J. Young, and has been such attorney generally and exclusively, so far as he knows, for many years past of both said persons; that Jos. M. and E. J. Young are husband and wife, and that said Joseph M. Young is the agent of said E. J. Young; that a few months prior to the purchase of the land in the above-entitled cause, described by the said E. J. Young, he was consulted professionally about the title of the same by said Jos. M. Young, and about the advisability of purchasing the same. Affiant gave to Jos. M. Young as his opinion that the tax title held and owned on said land by said defendant was invalid, and that said Jos. M. Young could safely buy the original or patent title of the same. Affiant does not remember whether the said Jos. M. Young consulted him in his own interest, or in that of said E. J. Young. Subsequent to said consultation said Joseph M. Young informed affiant that the said original or patent title had been purchased by him, but affiant does not remember whether he stated that he had purchased it himself, or as the agent of said E. J. Young, but he assumed that the pur-

chase had been made by said Jos. M. Young for himself and in his own name; and, on being instructed to commence suit against the defendant, commenced it in the name of said Jos. M. Young, under the supposition that the land belonged to him, and did not discover that the title to said land was in said E. J. Young, and that the suit should have been brought in her name, until after the commencement of the present term of this court, when his attention was called to it by said Jos. M. Young. While affiant had no remembrance as to the fact, yet he believes that the said Jos. M. Young never instructed him to bring said suit in his name, or informed him that he owned the land, but believes, from his knowledge of the business habits of Jos. M. Young, that he informed the affiant of the real facts as to the ownership of said land, and that the bringing of said suit in the name of said Jos. M. Young, instead of the said E. J. Young, was the mistake of the affiant solely. At the February term of this court for 1885 there was only a formal trial of said cause, and the evidence therein was not fully presented so as to discover the mistake in the name of said plaintiff.

FRANK DOSTER.

"Subscribed and sworn before me this twenty-fifth day of June, 1885.

[Seal.] "C. F. BROOKER, Clerk."

The motion was sustained, and it was ordered that the title of the cause be amended by entitling the same "*E. J. Young, plaintiff vs. Daniel Weaver, defendant*," so as to correct the mistake in the name of the said plaintiff. Exceptions were duly saved by Weaver. There was a trial by the court, and a finding and judgment for Young. Weaver brings the case here, and the only question discussed or error complained of is that the court below permitted the amendment to be made.

L. F. Keller, for plaintiff in error. *Doster & Bogle*, for defendant in error.

SIMPSON, C. The only question discussed by counsel on both sides in their briefs is the power of the court to make the amendment. This consisted in substituting the name of E. J. Young as plaintiff in the place of Joseph M. Young, who, by mistake of the attorney for defendant in error, was originally made the plaintiff in the action. E. J. Young is the wife of Joseph M. Young, and is the person to whom the deed was made that is now claimed to have conveyed to her the title to the land involved in this controversy. We must confess that, if this question was now presented to the court for the first time, we would have great difficulty in controlling the argument and resisting the authorities cited by the counsel for the plaintiff in error. The line of decision heretofore made by the court on this question is broad enough to embrace the amendment made in this case, and there is no error in the district court permitting it. In *City of Atchison v. Twine*, 9 Kan. 350, the action was brought by the widow, and the court permitted the administrator to be substituted as plaintiff; and this court, by Chief Justice KINGMAN, says "that the power of the court to make the amendment is undoubted; nor should we hesitate if it were the mere substitution of one name for another." In *National Bank v. Tappan*, 6 Kan. 456, the action was brought in the name of Tappan. It turned out on the trial that the claim was in favor of the firm of Tappan & Weichselbaum, and the amendment was made, and affirmed here. In *Hanlin v. Baxter*, 20 Kan. 134, the action was entitled in the name of John B. Baxter, and William O. Baxter was substituted as plaintiff in the suit.

These cases seem conclusive against the claim of the plaintiff in error, and we recommend the affirmance of the judgment of the district court of Marion county.

By THE COURT. It is so ordered; all the justices concurring.

DAVIS v. FINNEY.

(Supreme Court of Kansas. July 9, 1887.)

1. REFERENCE—REPORT—STIPULATION.

Where a stipulation is filed by the parties that the referee shall submit his report to the district court for confirmation before the close of the November term of the court for 1884, and the said term of court is adjourned from a day in November to January 5, 1885, and continues in session until January 30, 1885, and the report of the referee is filed December 20, 1884, such report is filed before the close of the November term for 1884, in accordance with the terms of the stipulation.

2. SAME.

Where a stipulation is filed by the parties that the report of the referee shall be heard and judgment rendered in vacation, and objection is subsequently made to the stipulation being carried out for want of power to render a judgment at such time, the district court has authority to hear and dispose of the report of the referee at the first term after the report is filed.

3. SAME.

Where it appears that the party moving to set aside the report of the referee has been notified what the decision of the referee will be, and has ample opportunity thereafter to prepare and present a bill of exceptions to the referee, the report will not be set aside because such party did not have actual notice of the particular day the referee would file his report.

(Syllabus by the Court.)

Error from district court, Woodson county.

On August 26, 1884, D. W. Finney commenced his action against James J. Davis to recover \$625.62, with interest from August 1, 1884, as a balance claimed to be due on a written contract dated February 9, 1884. James J. Davis answered, admitting the execution of the contract, but alleged as a defense that the execution thereof had been procured through false and fraudulent representations on the part of Finney, and set up the facts and circumstances constituting the alleged fraud. Finney replied, denying all the allegations of fraud. In October, 1884, the case being at issue and for trial, the parties executed and filed the following written stipulation:

"It is hereby stipulated that said cause shall be referred to A. C. Bogle, Esq., for trial of the issues joined, and that the same shall be tried at Iola, Kansas, some time during the November term, 1884, of the district court of Allen county, and that the report of said referee shall be made prior to the expiration of said term, and that the same shall be submitted to the court for confirmation, and judgment rendered thereon, in accordance with the decision of the court, by the close of said term of the Allen county court. Said judgment shall be entered as of the present term. The hearing of the application for confirmation may be before the judge at Iola. The plaintiff may amend the reply at any time within a week, and the defendant may amend within one week thereafter, if desired.

"SLAVENS & DICKSON, for Plaintiff.

"PICKETT & KEPLINGER, for Defendant."

Thereupon the court appointed A. C. Bogle, Esq., as referee, and ordered that he make and submit his report for confirmation and judgment, in accordance with the terms of the stipulation. Subsequently the referee made the following report:

"To the Honorable, the District Court of Woodson County, Kansas:

"This cause came on to be heard before me at my office in the city of Iola, Allen county, Kansas, on the eleventh day of November, 1884, the plaintiff being present in person and by his attorneys, L. W. Keplinger and J. E. Pickett, and defendant being present in person and by his attorneys, H. D. Dickson and W. M. Slavens. Your referee was duly sworn by and before A. H. Campbell, a notary public in and for the county of Allen, state of Kansas, well and faithfully to hear and examine the cause of *D. W. Finney v. James*

J. Davis; and a just and true report make therein according to the best of his understanding. Having heard all the evidence, and the arguments of counsel on the part of both plaintiff and defendant, and having duly examined and considered the same, together with the pleadings in the case, I find as follows:

"FINDINGS OF FACT.

"(1) That on the ninth day of February, 1884, plaintiff and defendant were both residents of the county of Woodson, state of Kansas.

"(2) That plaintiff at said time was the owner of certain real estate situated in said county of Woodson, consisting of certain lots in the city of Neosha Falls, in said county; also a certain stock of hardware in the said buildings in the said city of Neosha Falls.

"(3) That at said time plaintiff and defendant entered into a contract and agreement in writing, a true copy of which contract is attached to defendant's answer filed in this cause as Exhibit A, whereby plaintiff sold to defendant his said property in the said city of Neosha Falls, consisting of said lots, buildings, and stock of hardware.

"(4) That defendant turned over to plaintiff a certain farm in Everett township, Woodson county, Kansas, and of which defendant was at that time the owner, as part payment for said property of plaintiff, and agreed and contracted to pay plaintiff the further sum of \$3,760 at the time specified in the said contract referred to in finding 3 above.

"(5) That said contract was entered into after mature deliberation, and with a full knowledge of all the facts in regard thereto, and without any willful misrepresentations, or attempts to deceive, cheat, or defraud on the part of either of the parties hereto.

"(6) That at the time of the commencement of this suit the defendant was indebted to the plaintiff on said contract the sum of \$625.

"CONCLUSION OF LAW.

"That plaintiff is entitled to judgment against defendant in the sum of \$625, with interest from the twenty-sixth day of August, 1884, and costs of suit.

"All of which is respectfully submitted.

A. C. BOGLE, Referee."

On December 19, 1884, the district judge, while holding court in Neosha county, heard the motion filed by Finney to approve the report of the referee. Finney appeared by H. D. Dickson, his attorney; Davis not appearing. Thereupon the court confirmed the findings of fact and conclusion of law of the referee, and rendered judgment, in accordance therewith, in favor of Finney and against Davis. This judgment was entered on the journal of the district court of Woodson county as of October 21, 1884, according to the stipulation of the parties filed in the case. On December 16, 1884, being prior to the hearing of the motion to confirm the report of the referee, Messrs. Pickett & Smith, attorneys for Davis, acknowledged receipt of notice that on December 19, 1884, the attorneys of Finney would make a motion before the district judge to confirm the referee's report.

In the month of January, 1885, Davis filed his motion to vacate the judgment, and set aside the report of the referee, for various grounds therein alleged. This motion was heard by the district court on March 11, 1885. Finney appeared by Slavens & Dickson, his attorneys, and the defendant then appeared by Messrs. Knight & Faust, his attorneys. After consideration of the testimony and arguments of counsel, it was found by the court that the judgment rendered in the action was, by virtue of the stipulation filed in the cause, entered during the vacation of the court, and therefore the court ordered such judgment to be vacated and set aside. The court, however, found that the trial before the referee was had in pursuance of the stipulation be-

tween the parties, with all parties present and assenting thereto, during the November term of the district court of Allen county for 1884; the trial before the referee commencing November 11, 1884. The court further found that the November term of the district court of Allen county, 1884, was adjourned to January, 5, 1885, at which time it again convened, and did not finally adjourn until January 30, 1885; that the report of the referee was duly made before the expiration of said term of court, according to the stipulation of the parties in the case, and filed in the office of the clerk of the district court of Woodson county on December 20, 1884. Thereupon the motion to set aside the report and findings of the referee was overruled, and the report of the referee was confirmed, and judgment was rendered in favor of the plaintiff and against the defendant for the sum of \$625, together with costs taxed at \$66.80, and also the sum of \$100 allowed as compensation to the referee. The defendant excepted to the ruling, orders, and judgment of the court, and brings the case here.

Knight & Faust, for plaintiff in error. *W. H. Slavens* and *H. D. Dickson*, for defendant in error.

HORTON, C. J. It is claimed that the district court erred in overruling the motion to set aside the report of the referee and grant a new trial, for the following reasons: (1) That if the Allen county district court for the November term, 1884, expired November 18th,—and that, it is urged, was the plain intent and purpose of the stipulation,—then the filing of the report by the referee subsequently was a mere nullity, being unauthorized, and therefore void; (2) that if the Allen county district court extended to and included January 30, 1885, any attempt on the part of the court to confirm the report or render judgment after that date was unauthorized by the stipulation, which required not only that the report be submitted for confirmation, but also that judgment be rendered thereon before the close of the Allen county district court; (3) that the referee, by failing to give notice to the plaintiff in error of the time when he would file his report, prevented him from having any opportunity to prepare and present a bill of exceptions.

The written stipulation of the parties provided that the report of the referee should be made prior to the expiration of the November term of the district court of Allen county for 1884. The court continued to January 30, 1885. The report was made prior to that day. The judgment was entered in the journal of the district court of Woodson county as of October 21, 1884. The stipulation, therefore, in this respect, was fully complied with. The adjournment of the November term of the court for 1884 to January 5, 1885, was a continuation of the November term to that time, and such term did not expire until January 30, 1885. We can find no statement in the record that all of the evidence presented upon the hearing is embraced therein, and therefore we must presume that the findings of the trial court were made upon sufficient testimony.

Under the stipulation of the parties, the application for confirmation was heard in vacation, before the judge at Iola. It was supposed that, by having the judgment entered as if rendered at the October term of the district court for Woodson county for 1884, no objection would be made on account of its rendition in vacation. Plaintiff below complied with his part of the stipulation, and the judgment rendered in vacation was set aside upon the application of the defendant below. He is now complaining, and alleges that, because the judgment was not rendered before the expiration of the Allen county court, the court had no power to render the judgment at any subsequent time. Even if the part of the stipulation providing for the rendering of the judgment in vacation is invalid, still the district court had the power to hear and dispose of the report of the referee in term-time. The report of the referee was confirmed at the March term, 1885, of the court for Woodson county, and

judgment rendered at that term. This was the first term of the district court for Woodson county after the filing of the stipulation for the reference of the case. The terms of the district court for Woodson county commence as follows: The first Monday in March, the first Monday in June, and the second Monday in October, in each year. We cannot perceive that the failure of the referee to give notice to the parties of the time he would file his report was, in this case, in any way prejudicial. On December 16, 1884, Messrs. Pickett & Smith, then attorneys for the plaintiff in error, accepted notice of the hearing of the motion to confirm the report of the referee before the district judge on December 19, 1884, but the report of the referee was not filed with the clerk of the district court of Woodson county until December 20, 1884. Undoubtedly, Messrs. Pickett & Smith could have examined the report before December 19th, and prepared a bill of exceptions therefrom. Messrs. Knight & Faust were notified by the referee about December 10, 1884, of the purport of his report, and that the same, with the evidence, exhibits, etc., had been forwarded to the district judge. This was 10 days before the report of the referee was filed, and several days before the hearing of the report. The district judge informed these attorneys that he had the report, papers, etc., at Erie, where they could see them. Therefore Messrs. Knight & Faust had several days in which to go to Erie, and prepare a bill of exceptions. There is no showing in the record that Messrs. Knight & Faust appeared before the district judge on December 19, 1884, at the hour named in the notice for the hearing of the motion to confirm the report. The record recites that the plaintiff below "appeared by H. D. Dickson, his attorney, the defendant below not appearing." The record further recites that the defendant below "had been duly notified of the time and place of the hearing of the motion." It would seem that Messrs. Knight & Faust did not reach Erie, on December 19th, until the hearing upon the report of the referee had been acted upon.

Again, when the motion to set aside the report of the referee was overruled, on March 11, 1885, the attorneys for plaintiff in error might have made their motion for a new reference of the case. This was not done.

There are other matters presented in the briefs, but upon the record before us we think comment not necessary.

The judgment of the district court will be affirmed.

(All the justices concurring.)

GEISS v. WYETH HARDWARE & MANUF'G CO.

(*Supreme Court of Kansas. July 9, 1887.*)

DAMAGES—BREACH OF CONTRACT.

Where goods are sold by the manufacturer of such goods, and the purchaser refused to receive and pay for the same, and suit is brought by the manufacturer to recover damages sustained by the breach of said contract of sale of such goods, the measure of the plaintiff's damages is the difference between the market value of the goods and the price at which they were sold to the purchaser; and the cost value, or what it would cost to manufacture the goods, is presumably the market value of the same.

(*Syllabus by Clogston, C.*)

Error from district court, Leavenworth county.

Stillings & Stillings, for plaintiff in error. *Lucien Baker*, for defendant in error.

CLOGSTON, C. This was an action brought by the Wyeth Hardware & Manufacturing Company against Henry Geiss, to recover for an alleged breach of contract for the purchase of certain manufactured goods sold by the plaintiff to defendant, which defendant refused to accept. Plaintiff claimed

damages—*First*, for the cost of packing the goods; *second*, the difference between the cost or manufactured value of the goods and the price for which they were sold at to the defendant. Trial by jury, and judgment for plaintiff below (defendant in error) for the sum of \$87.50 and costs; and of this judgment the defendant (plaintiff in error) complains.

But one question is presented for consideration; that is, what is the rule or measures of damages in case of sale of manufactured articles where the purchaser refuses to accept the goods? There is no substantial difference or dispute between the counsel for the parties as to the true rule or measure of damages, and both concede the rule to be the difference between the actual market value and the price sold at; or, in other words, the profit sold at over and above the actual market value of the goods. But counsel for plaintiff in error insists that the evidence given did not establish damages under this admitted rule; and the court did not properly instruct the jury under said evidence and rule of damages.

The plaintiff, to establish his damages, called one J. E. Edmunds, who testified as follows: That he had been in the employ of the plaintiff for several years as a traveling salesman, and that he knew the cost price of the goods in controversy. Plaintiff asked the witness the following question: "I will get you to state, if you know, at about what profit, if any, you sold this bill of goods to the defendant over and above the cost price for which they could have been manufactured? [To which question defendant objected; and the objection was overruled by the court.] *Answer*. The bill of goods was sold at a profit of from 5 to 8 per cent. over the cost of the same, by said plaintiff to said defendant. *Question*. What profit was the plaintiff getting by said sale made by the plaintiff to the defendant over the cost price of the goods? [Question objected to and overruled.] *A*. The profit of the plaintiff on the sale made of the goods set out in the petition would have been from 5 to 8 per cent. on the amount of the sale." And the court, on said evidence, gave the jury the following instructions on the question of the measure of damages: "The rule of damages would be, or the amount these people would be entitled to receive would be, the reasonable cost they had incurred in putting up the goods, together with what profit would have been made by them in case he had received the goods and paid for them."

This was all the testimony and instructions on the question of damages, or measure of damages, except evidence showing the cost of packing the goods. It must be remembered that the goods were purchased from the manufacturer of such goods, and the witness Edmunds testified to the cost price, or what they could be manufactured for, and then the price per cent. above this value at which plaintiff sold the goods. We think this was equivalent to proving their market value, and the measure of plaintiff's damages. The cost value, or the cost of manufacture when manufactured for a purchaser, would be presumably the market value of the manufactured articles. The court instructed the jury on the measure of damages, and confined the rule to the profit the plaintiff would have made had the goods been received. This, we think, was the proper measure. True, the instructions were very meager in stating the rule, but the record does not show that any additional or further instructions were asked and refused by the court. If the defendant was not satisfied with this instruction, he ought to have asked to have additional instructions given. It was the duty of the court to instruct on the law, giving the jury such instructions, under the evidence, as to the measure of damages that he deemed proper; and the instructions given being proper, this court will not grant a new trial for the sole reason that the trial court meagerly stated the rule or measure of damages in his instructions to the jury, unless it is shown that the jury was misled. We think that the evidence was properly admitted, and competent to establish the measure of damages, and the instructions of the court proper thereunder.

It is therefore recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

KILMER, Adm'r, etc., v. ST. LOUIS, FT. S. & W. R. Co.

(*Supreme Court of Kansas. July 9, 1887.*)

CONTINUANCE—WHEN GRANTED.

A party asking for a continuance on account of absent evidence must show that he has been sufficiently diligent in his efforts to obtain it. What his efforts were must be set forth in his affidavit; and from the facts thus detailed the court must decide whether he has used due diligence. It is not enough that the party sets forth that he made diligent inquiry, without either stating how, where, or of whom he inquired.

(*Syllabus by Holt, C.*)

Error from district court, Greenwood county.

T. L. Davis, for plaintiff in error. *Clogston & Fuller*, for defendant in error.

HOLT, C. There is but a single question for consideration in this case,—whether the district court erred in overruling the motion for continuance made by plaintiff in error. The facts in the case are briefly these: On the tenth day of September, 1884, Minerva Wilkinson saved the life of a child two years of age, snatching it from the track of defendant's railroad in front of one of their locomotives. As she caught the child, she was struck by the engine in the left temple and instantly killed. She left her husband and five children. An administrator of her estate was appointed, not her husband. Action was brought, and the case was at issue for the first time at the December term, 1884, of the district court of Greenwood county. It met in that county on the seventh day of December. This cause was tried on the seventeenth of the same month. The affidavit states facts that would have been material and relevant on the trial of the cause. The only question is whether the plaintiff used sufficient diligence in attempting to procure the testimony of the absent witness, William Wilkinson, the husband of Minerva Wilkinson.

Ordinarily, the question of sustaining or overruling a motion for continuance lies largely in the discretion of the trial court; and, when the trial court sustains the motion for a continuance, its decision, unless it is manifest that there is an abuse of discretion, will be upheld. This rule does not have the same force when the motion is overruled, and the parties are compelled to go to trial at once. Yet it is a fact, then, that the trial judge, knowing all the circumstances surrounding a case, can properly exercise a wide discretion, and is often justified in compelling the parties to immediately proceed to trial.

In his affidavit, plaintiff states that the absent witness is the husband of the woman killed; that for three years he had been living four miles west of Eureka, the county-seat, and continued to reside at said place, after the death of his wife, up to about the last of November, 1884, and up to within nine days of the beginning of the then present term of court; that said witness had frequently promised the plaintiff that he would certainly be present at the trial to testify as witness for the plaintiff, and that nothing but sickness or death would prevent him from doing so; that he knew nothing of said witness Wilkinson's intention to leave, did not know that he had gone until the fifth day of December, and did not know where he was; that he made diligent inquiry and every effort to find out the whereabouts of the witness since he left, but he was unable to ascertain anything about it. There is no statement as to where or how he inquired, or what efforts he made. The fact that Wilkinson,

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with five children, lived only four miles from Eureka, would indicate that every effort and diligent inquiry would have led plaintiff to have gone to his usual place of residence and to his neighbors. He could ordinarily have ascertained from some one of the five children of witness the whereabouts of their father; or, if they had left home with him, he could have ascertained from some of the neighbors in what manner they left, the place of their destination, and what was the probable length of their absence. None of these facts are set forth. It is simply stated that his efforts to procure the witness by diligent inquiry, and by every means in his power, were useless, without attempting to detail what he actually did, but simply stated the conclusion that he drew himself. If he had set forth the details of his inquiry, the court may not have considered it diligence, and his efforts entirely misdirected and inadequate. It is to be remembered that this witness was the husband of the woman who was killed; that his interest in the action must have been as great as that of any person,—certainly as that of the plaintiff, who was appointed administrator of the estate of the deceased woman. Having that interest, and leaving the short time that he did before the action, has much to do with our sustaining the ruling of the court below.

There is no showing that the whereabouts of the witness could have been ascertained, or that he could be procured as a witness at the next term of court, or that his deposition could be taken, except the bare assertion in the affidavit of plaintiff that he had every reason to believe that he could procure his evidence at the next term of court. He failed to set forth a single fact upon which he could have rested his belief. It seems strange that a party interested in the result of an action, as this witness must have been, left just before the commencement of the term of court at which it would probably be tried. The fact that a subpoena was issued on the tenth day of December for the witness, if the plaintiff knew that he was out of the county, was made as a mere matter of form, that it might be stated in an affidavit for continuance as proof of diligence. It is not very strong evidence of diligence to issue a subpoena for a witness if he is known to be out of the county at that time, and no probability of his being in the county before or at the trial of the cause. Proper diligence would have been to have made inquiries where such inquiries would probably have been answered, and where some clue to the whereabouts of the absent witness could have been found, or some reason ascertained for his strange departure.

Although it appears from the record here that it would have been no error to have granted a continuance, yet we cannot say that the court below abused its discretion in compelling the plaintiff to go to trial. It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

PARKINSON and another, Copartners, etc., v. ALEXANDER and others.

(*Supreme Court of Kansas.* July 9, 1887.)

1. **MECHANIC'S LIEN—ACTION ON CONTRACTOR'S BOND.**

Under section 1, c. 136, Laws 1872, laborers, mechanics, and material-men furnishing work or materials in the construction of a railroad are so protected that they may recover against the obligors on the bond where a bond is given by the contractor in pursuance of the statutes, or against the railroad company where no bond is given, for everything furnished by them which goes into the construction of the railroad, whether such laborers, mechanics, or material-men are employed by the contractor or by a subcontractor, or by a sub-subcontractor; but persons furnishing only provisions, or goods which do not go into the construction of the railroad, are not so protected unless such provisions or goods are furnished to the contractor himself.

2. SAME.

And therefore held, where a bond is given by the contractor, and goods are furnished by a merchant in payment *pro tanto* of the wages of the laborers constructing the railroad, under an agreement with the sub-subcontractor and upon his orders, and such goods are not intended to be and are not used in the construction of the railroad, the sureties on the bond of the contractor are not liable to the merchant for the purchase price of such goods.

(Syllabus by the Court.)

Error from district court, Franklin county.

John W. Deford, for plaintiffs in error. *C. B. Mason* and *C. N. Sterry*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Franklin county by John Parkinson and Jonathan Parkinson, partners doing business under the firm name of J. Parkinson & Co., against H. B. Alexander, as principal, and H. C. Cross, C. Hood, and William Martindale, as sureties, on a certain bond given by them to the Kansas City & Emporia Railroad Company, under section 1 of chapter 136 of the Laws of 1872, (Comp. Laws 1879 and 1885, c. 84, § 35.) No proper service of summons was ever obtained upon H. B. Alexander, and hence no proceedings were had in the court below as against him. As between the plaintiffs and the other defendants, Cross, Hood, and Martindale, the case was submitted to the court below upon an agreed statement of facts, and the court rendered judgment in favor of the defendants and against the plaintiffs for costs; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

The material facts of the case, briefly stated, are as follows: The Kansas City & Emporia Railroad Company let a contract to H. B. Alexander to grade its road-bed from Emporia to Ottawa, and took from him, as principal obligor, and the said Cross, Hood, and Martindale, as sureties, the bond sued on in this action. Afterwards the contractor, H. B. Alexander, sublet 11 miles of the work to D. P. Alexander. Afterwards the subcontractor, D. P. Alexander, sublet separate portions of his work to R. T. Pepper, Lucky & Cook, and White & Douglas, respectively. It was the agreement among all the parties that the payments should be made monthly as the work progressed; that all payments for work done should be made upon estimates made by the railroad company's civil engineer; and that the contractor, H. B. Alexander, should have the right, as it was his duty under the law and under his bond, to pay or to see paid, out of the funds due for the work done, the wages of all laborers on the work, whether employed by the subcontractor or by any of the sub-subcontractors. The plaintiffs were merchants, selling goods, wares, and merchandise at Pomona, Kansas, near where the grading was to be done, and where it was done; and they, by agreement with the laborers and the sub-subcontractors, Pepper and the others, and upon the orders of the said sub-subcontractors, supplied goods, wares, and merchandise to the laborers, and charged the amounts of the purchase price therefor to the sub-subcontractors, Pepper and the others, and these amounts were then charged by the sub-subcontractors, Pepper and the others, against the laborers, respectively, on the monthly pay-rolls made out by the subcontractor, D. P. Alexander, and the sub-subcontractors, Pepper and the others, under the head of "Merchandise Account;" and these amounts, as so charged, were considered by all the parties as payments to the laborers of their wages to the extent of such amounts, and the pay-rolls were then placed in the hands of the contractor, H. B. Alexander, showing these payments. The railroad company's civil engineer made monthly estimates of the work done on each of the several sections of the work, and the amount due thereon, and H. B. Alexander then paid to each laborer the amount due him, as shown by the pay-rolls, which was the amount of his entire wages for the month, less the amount which the pay-rolls showed that he had already been paid in "merchandise,"

in the manner aforesaid; and then H. B. Alexander paid to the subcontractor, D. P. Alexander, the remainder as shown to be due him under his contract by the estimates of the railroad company's civil engineer. This was in accordance with the understanding and agreement of all the parties. It was the agreement between the plaintiffs and the sub-subcontractors, Pepper and the others, that either the sub-subcontractors, Pepper and the others, or the subcontractor, D. P. Alexander, should pay the plaintiffs for their goods; and there was no contract on the part of the contractor, H. B. Alexander, to pay to the plaintiffs anything, or to pay to the sub-subcontractors anything. H. B. Alexander has been paid in full by the railroad company for all the work done, and he has paid to all the parties, respectively, everything that he ever agreed to pay to any person. The laborers have also been paid their entire wages, and all that is due them. The subcontractor, D. P. Alexander, and the sub-subcontractors, Pepper and the others, have also been paid in full, and all that is due them; and it was and is their duty to pay the plaintiffs for the goods, wares, and merchandise furnished by the plaintiffs to the laborers upon the aforesaid agreement, but they have not done so, and the plaintiffs have not been paid; and this failure of payment on the part of somebody is the only breach of the condition of the defendants' bond alleged in this action.

The statute under which the bond was given reads as follows: "Section 1. That whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, and material-men, and persons who supply such contractor with provisions or goods of any kind, all just debts due to such persons, or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the register of deeds in each county where the work of such contractor shall be; and, if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor." Comp. Laws 1879 and 1885, c. 84, § 35.

No copy of the bond sued on in this action has been brought to this court, but it is admitted that the bond was executed under and in pursuance of the foregoing statute, and that it is a good bond. Under this statute, laborers, mechanics, and material-men furnishing work or materials in the construction of a railroad are so protected that they may recover against the obligors on the bond, where a bond is given by the contractor in pursuance of the statute, or against the railroad company where no bond is given, for everything furnished by them which goes into the construction of the railroad, whether such laborers, mechanics, or material-men are employed by the contractor, or by a subcontractor, or by a sub-subcontractor. *Mann v. Corrigan*, 28 Kan. 194; *Missouri, K. & T. Ry. Co. v. Brown*, 14 Kan. 557. But persons furnishing only provisions or goods which do not go into the construction of the railroad are not so protected unless such provisions or goods are furnished to the contractor himself. *Wells v. Mehl*, 25 Kan. 205; *St. Louis, W. & W. Ry. Co. v. Ritz*, 30 Kan. 30, 1 Pac. Rep. 27. The statute does not protect any person who furnishes any kind of goods when he furnishes them only to a subcontractor, or to a sub-subcontractor, when it is not the intention of the parties at the time that the goods shall go into the construction of the railroad itself, and when they do not go into such construction.

Under the contract between H. B. Alexander and D. P. Alexander, H. B. Alexander was bound to pay to D. P. Alexander the full contract price for all work done by or under him, except that H. B. Alexander reserved to himself the right to pay or to see paid out of the funds going to D. P. Alexander the amount of the laborers' wages. Also, under the bond sued on in this case,

H. B. Alexander and his sureties, the defendants, were bound to pay or to see paid the wages of the laborers for all work done by them in grading the railroad. But neither was H. B. Alexander, nor were the defendants, his sureties, bound to pay or to see paid the laborers in any particular manner. All that they were required to do was to see that the laborers were paid or satisfied in some lawful manner; and, when this was done, then all the remainder of the money due to D. P. Alexander after paying or satisfying the laborers should be paid to him, and he could recover it from H. B. Alexander. But H. B. Alexander never was under any obligation to the sub-subcontractors, Pepper and the others, or to the plaintiffs. H. B. Alexander never agreed to pay the plaintiffs anything; never gave any orders upon them; never agreed to satisfy any orders received by them; and was never under any obligation to them, or to see that they were paid. He was never a debtor to them, nor even a debtor to their debtors. Their debtors were the sub-subcontractors, Pepper and the others, and H. B. Alexander never owed the sub-subcontractors anything, nor was he under any obligation to them. They were to look for their pay to the subcontractor, D. P. Alexander, and not to the contractor, H. B. Alexander. Of course, where subcontractors or sub-subcontractors are also laborers, mechanics, or material-men, a different rule would apply.

A great deal has been said about contracts, agreements, and other transactions taking place after the execution of the bond sued on. Now, it is scarcely necessary for us to say that the obligation of the defendants, who are only the sureties on the bond, could not be enlarged by anything transpiring subsequent to its execution. Their obligation was and is fixed by the bond itself, and not by any subsequent contracts, agreements, arrangements, or transactions brought into existence by any person or persons except themselves. We are simply to look to the bond to see what their obligation is, and then look to the facts transpiring subsequently to see whether there has been any breach of that obligation or not. We think there has been no breach.

It has been suggested that when the laborers received their goods, wares, and merchandise from the plaintiffs, they transferred their claims to the plaintiffs. This is not so, however, and it was never the understanding of the parties. It was the understanding of the parties that when the laborers received their goods, wares, and merchandise from the plaintiffs, that the amount of the purchase price thereof was a payment *pro tanto* of their claims against the sub-subcontractors, Pepper and the others, and in lieu thereof new debts or claims were created in favor of the plaintiffs and against the sub-subcontractors, Pepper and the others. By this arrangement the debts due to the laborers from the sub-subcontractors, Pepper and the others, for work done on the railroad, to the extent of the purchase price of the goods, wares, and merchandise received by them, were extinguished; and in lieu thereof the sub-subcontractors, Pepper and the others, became debtors to the plaintiffs; and these debts, due from these parties to the plaintiffs, were not for laborers' wages, or for anything that went into the construction of the railroad, but were simply for goods, wares, and merchandise sold by the plaintiffs as merchants.

We think no material error was committed in this case, and therefore the judgment of the court below will be affirmed.

(All the justices concurring.)

WALKER v. FLEMING.

(Supreme Court of Kansas. July 9, 1887.)

1. LIMITATION OF ACTIONS—BAR UPON PLEADINGS.

Before a demurrer can be sustained to a petition upon the ground that the plaintiff's action is barred by the statute of limitations, the court must be able to find by an examination of the petition that the cause of action was so barred; and, if said petition does not so show upon its face, the demurrer must be overruled.

2. SAME.

Where a petition states facts which, if true, constitute a good cause of action in favor of the plaintiff and against the defendant, but in the prayer of the petition judgment is asked upon a wrong theory of the case, *held*, that the plaintiff is entitled to whatever relief the facts stated in his petition entitle him to, and a misstatement in the prayer for relief is no ground for a demurrer.

COVENANT—WARRANTY—TAX TITLES.

Where an action is brought to recover damages for a breach of covenant of warranty in a deed, and the petition sets out that, at date of the deed of purchase, there were outstanding regular and valid tax certificates constituting a valid lien against the premises described in the deed, the assignment of the certificates in due form, and the regular indorsement thereon of the taxes paid by the holder of the tax certificates in due form, and the taking out of tax deeds thereon in due form of law, and the purchase and conveyance of said tax title to the plaintiff by a deed of conveyance in due form; and the only answer to this petition is a general denial, not verified by the defendant: *held*, that the answer does not put in issue the tax proceedings and title, but the regularity and legal effect of said tax proceedings are admitted thereby.

(Syllabus by Clogston, C.)

Error from district court, Jackson county.

Augustus A. Fleming brought this action against A. D. Walker and James H. Lowell to recover damages for the breach of covenants in a deed executed by Walker and Lowell to him, March 5, 1879. Plaintiff's petition was as follows:

"The plaintiff complains of the defendant in the above-entitled action, and shows to this court: (1) And for a first cause of action plaintiff avers that on the fifth day of March, 1879, the defendants, together with Annie E. Walker, wife of said A. D. Walker, and Kate M. Lowell, wife of said James H. Lowell, by deed in writing of that date duly executed, acknowledged, and delivered, (a copy of which is hereto attached marked 'Exhibit A,' and made a part hereof,) in consideration of \$600 by the said plaintiff then in hand paid to the defendants, granted, bargained, sold, and conveyed to the said plaintiff, and to his heirs and assigns, forever, all of the following described tract and parcel of land, lying, being, and situate in the county of Jackson and state of Kansas, to-wit: the north-west quarter of section twenty-one, (21,) in township five, (5,) of range fifteen, (15,) together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, to have and to hold the said premises, with the appurtenances, unto the said Augustus A. Fleming, his heirs and assigns, forever; and the said defendant by said deed covenanted to and with the said plaintiff, his heirs and assigns, forever, that they, the said defendants, were lawfully seized of the premises aforesaid; that said premises were free, clear from all liens, incumbrances, whatsoever; and that they would forever warrant and defend the same, with the appurtenances, unto the said plaintiff, his heirs and assigns, against the lawful claim or claims of all persons whatsoever. And plaintiff avers that, at the time of making and delivering said deed, said premises were not free and clear of liens and incumbrances, but, on the contrary, said premises were then subject to valid liens for unpaid taxes lawfully assessed and levied against said premises for each of the following years, to-wit: 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878. Said premises had been lawfully sold at tax sale on the eighth day of

May, 1862, and the first day of May, 1866, respectively, by the county treasurer of Brown county, Kansas, in which county said land was situated, at each of said dates respectively. And at the date of the execution and delivery of said deed by defendants to the plaintiff, as aforesaid, valid tax-sale certificates, based upon said tax sales, were outstanding, in full force and virtue, and each of said tax-sale certificates were then held by one Medad Harvey, and the taxes, penalties, and charges for all of said years from 1861 to 1878, both inclusive, had been paid by the said Medad Harvey, and his grantors and assignors, claiming under said tax-sale certificates, and by reason of the premises aforesaid the said Medad Harvey, at the date of the execution and delivery of said deed by the defendants to the plaintiff as aforesaid, then had and held a valid lien against said premises for the taxes, penalties, costs, charges, and interest for all of the years aforesaid, to-wit, the years 1861 to 1878, both inclusive, and for an amount equal to the cost of redemption at that time, to-wit, the sum of one thousand dollars. And thereafter, to-wit, on or about the sixth day of July, 1881, said Medad Harvey, for value received, sold, assigned, and delivered said tax-sale certificates to one F. D. Mills, and on the third day of February, 1882, the county clerk of Brown county, state of Kansas, duly made, executed, acknowledged, and delivered to said F. D. Mills a tax deed in writing of that date, in due form, based upon said tax sale of May 8, 1862, and conveying said premises to said F. D. Mills. And on the fourth day of May, 1882, the county clerk of Brown county, state of Kansas, made, executed, acknowledged, and delivered to said F. D. Mills two other certain tax deeds in writing of that date, based, respectively, upon said tax sales of May 8, 1862, and May 1, 1866, and the subsequent taxes and charges paid by the tax purchaser and his assigns as aforesaid, each of said tax deeds being in due form of law, and each conveying to said F. D. Mills the said tract of land sold and conveyed by the defendants to this plaintiff as aforesaid, and which said two tax deeds last mentioned were on the sixth day of May, 1882, filed for record in the office of the register of deeds of Jackson county, Kansas, and duly recorded therein, in Book 26 of Deeds, at pages 610, 611, and 612, respectively.

"Plaintiff further avers that he, the said plaintiff, was compelled to remove said incumbrance, and was compelled to and did pay the full sum of \$1,000 to discharge the same, of all of which the defendants were duly notified. Yet the said defendants, though often requested, have not paid to this plaintiff the said sum of money so paid by him for the removal of said incumbrances upon the title to said premises as aforesaid, or any part thereof, but, on the contrary, have refused and still refuse to pay the same. And plaintiff avers that, by reason of the premises so as aforesaid averred, he has sustained damage in the sum of one thousand dollars. Plaintiff further avers that the said defendants, A. D. Walker and James H. Lowell, have each been absent from the state of Kansas more than one year since the fifth day of March, 1879. Wherefore, for the causes aforesaid, plaintiff prays judgment against the said defendant for said sum of five hundred and ninety-nine dollars, with interest thereon from the fifth day of March, 1879, at the rate of 7 per cent. per annum, and for all costs of this action.

"HAYDEN & HAYDEN, Attorneys for Plaintiff."

Afterwards defendants filed their general demurrer to said petition, which said demurrer came on to be heard by the court, and was overruled, to which ruling defendants excepted, and thereafter filed their answer, which is as follows:

"(1) Now come the defendants, and deny each and every allegation of the plaintiff's petition. (2) Defendants say that plaintiff's petition ought not to have his action herein, because he did not commence the same until more than five years after the same accrued, and by statute his alleged claim is barred.

"LOWELL & WALKER, for Themselves."

The cause was tried at the June, 1885, term of the district court, without a jury. The court found in favor of the plaintiff, and against defendant Walker, and in favor of Lowell and against the plaintiff, and gave judgment thereon for the plaintiff against Walker for \$861.80 and costs, and judgment for costs in favor of Lowell. Walker filed his motion for a new trial, which was overruled. He now brings the case here for review.

Lowell & Walker, for plaintiff in error. *Hayden & Hayden*, for defendant in error.

CLOGSTON, C. The plaintiff in error contends that the petition does not state facts sufficient to constitute a cause of action—*First*, for the reason that if, at the time of making the deed, there was a tax lien, as alleged, against the land conveyed, then the covenant was broken as soon as the deed was made, and the lien, as alleged, after making said deed, was merged into a tax deed; *second*, because no action was brought by the tax-title holder within two years after taking out a tax deed; *third*, that the tax title was barred by the 15-year statute of limitation. The demurrer was properly overruled. The plaintiff stated the fact; and although a pleader may say that the action was for damages for money paid to extinguish a tax lien on the land purchased, instead of alleging the purchase of an outstanding tax title to the premises, this would not change the nature of the cause of action when all the facts were stated, and these facts show a cause of action in favor of the plaintiff and against the defendant. The petition alleges a valid outstanding tax-sale certificate against the land at the time of making the deed, the subsequent taking out of a tax deed, and the purchase by plaintiff of this tax lien; and because plaintiff described the tax title as a tax lien would make no difference, and could not change the legal effect of his petition. The facts themselves determine what cause of action the petition states, and not what the pleader may call the cause of action founded upon those facts.

As to the second and third objections urged against the petition, we think the counsel was wrong in his conclusions. The petition does not state such facts upon its face as show that the statute of limitation had run either against the tax deed or tax lien. Nothing was alleged that could be construed as stating that possession was held by the plaintiff or his grantors during the time the tax-sale certificates were held, or after the deed was taken out on said sale certificates; and, for all the allegations in the petition, the premises may be unimproved and unoccupied; and, if so, the tax-deed holder would be presumed to be in possession. And, because there is no allegation in the petition of a breach of covenant of possession, that omission cannot be taken as an admission that the possession was in the plaintiff, and raised no presumption of fact that he was in possession. True, he makes no complaint about the possession, but only claims damages for money paid in extinguishing this tax lien and title, and a demurrer can only be sustained on the ground that the cause of action is barred, when it clearly appears upon the face of the petition; and, if not so shown, must be raised by answer. This is also true of the 15-year limitation urged by counsel. No possession is alleged or claimed by plaintiff, which must be shown, with the claim or color of title, before the statute could be pleaded as a bar. Therefore the court committed no error in overruling the demurrer.

At the trial, objection was made by the defendant (plaintiff in error) to the receiving in evidence the tax-sale certificate, the indorsements thereon, and the assignments of the same; also to the tax deed issued upon said tax-sale certificates, and in fact all the evidence tending to establish a tax title or lien on the premises in question; and each of these objections is now urged as a reason for the reversal of the judgment rendered in the court below. The first question is, can any of these objections avail the defendant? The defendant's answer set up but two defenses—*First*, a general denial; *second*,

the statute of limitation. As to the last, it being a question of fact, and the trial court having found in favor of the plaintiff and against the defendant, (plaintiff in error,) we will not consider this defense; and in fact no error is urged or claimed by reason of the finding of the court thereon. This leaves an issue of fact only as presented by the defendant's general denial; and this brings us to the inquiry, what question of fact the denial raised; and, after a careful examination of the petition, we are of the opinion that no question of fact was put in issue thereby.

The petition alleges the lawful assessment and levy of the taxes on the premises for all the years from 1861 to 1878, both years inclusive, and lawful tax sales thereunder for the taxes for the years 1861 and 1865; the execution and delivery of the tax-sale certificates based upon said sales for said years 1861 and 1865; that said tax-sale certificates were then outstanding, in full force and effect, and were duly held by Medad Harvey, and the payment of all the taxes, penalties, and charges under and by reason of the holding of said tax-sale certificates; the assignment and delivery of the certificates by Harvey to Mills; the execution and delivery by the county clerk of tax deeds based on said tax-sale certificates in due form.

Section 128 of the Code of Civil Procedure provides "that every material allegation of the petition not controverted by the answer shall, for the purposes of the action, be taken as true." And section 108 of the Code reads as follows: "Sec. 108. In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney." The defendant's denial not being verified, as provided by section 108, was of no avail to them, for it admitted the execution of the tax-sale certificates, indorsements thereon, the assignment of the same, and the execution of the tax deeds. This was an admission, not only of their execution, assignment, and indorsement, but the legal effect of said instruments, and what they would fairly prove and establish.

In the case of *Reed v. Arnold*, Justice VALENTINE says: "When the execution of a written instrument is admitted by the pleadings, its legal effect must of necessity follow; and what its legal effect is, is purely a question of law for the court to determine. There is, then, no issue of fact with reference to the existence or effect of the written instrument upon which evidence can be introduced to the jury; and evidence can never be introduced to a jury except in support of some issue of fact made by the pleadings." 10 Kan. 104. Also see *Barkley v. State*, 15 Kan. 100; also *Pears v. Wilson*, 23 Kan. 346.

So, in this case, the execution and authority being admitted, the legal effect would be a regular assessment and levy, and regular sale; and the issuing of tax-sale certificates based thereon, their assignment and indorsement of taxes paid, and the assignment of said certificates, and deed duly issued thereon, in due form, is a legal admission of a perfect tax record; and, this tax title being admitted by the defendant's answer, the court should have sustained defendant's objections to their introduction, not upon the grounds urged, but only for the reason that they were not controverted by the answer. But the introduction of said record by the plaintiff was not such an error as would work any injustice to the defendant. It was simply proving what the defendant had admitted. It was unnecessary and immaterial; therefore no material error.

It is therefore recommended that the judgment of the court below be affirmed.

By THE COURT. It is so ordered; all the justices concurring.

DEATHERAGE and another v. Woods and others.

SAME v. HENDERSON and others.

(Supreme Court of Kansas. July 9, 1887.)

1. MECHANIC'S LIEN—STATEMENT.

A statement for a mechanic's lien shows, among other things, as follows: "Name of owner, George A. Woods. * * * Said contractors and claimants [Deatherage & Ewart] claim a lien upon the following described property, [here the property is described,] for that they did, under contract with said owner, furnish material for erecting the two-story frame building in and upon said property." *Held*, that the statement sufficiently shows the owner's name.

2. SAME.

The statement itself is not signed by the claimant, but immediately following the statement is the affidavit, which is signed. *Held*, that the failure to sign the statement is unimportant.

3. SAME.

The claimant is a firm, and the statement is verified by a member of the firm. *Held* sufficient.

4. SAME.

The statement, as thus made out, signed, and verified was filed in the office of the clerk of the district court. *Held* a sufficient filing.

5. SAME.

Where a statement for a mechanic's lien is subject to no objections except those above mentioned, *held*, that it is material error to exclude it on the trial of a case. (Syllabus by the Court.)

Error from district court, Wabaunsee county.

This action was brought in the district court of Wabaunsee county by Charles P. Deatherage and William I. Ewart, partners, under the firm name of Deatherage & Ewart, against George A. Woods and others, upon an account for lumber and building materials sold to Woods, and to enforce a mechanic's lien. The statement for the mechanic's lien was filed in the office of the clerk of the district court on July 8, 1885, and it reads as follows:

"Name of owner, George A. Woods; name of contractors, Charles P. Deatherage and William I. Ewart, partners, doing business in the firm name of Deatherage & Ewart; name of claimants, Charles P. Deatherage and William I. Ewart, partners, doing business under the firm name of Deatherage & Ewart. Said contractors and claimants claim a lien upon the following described property, to-wit: Lots No. 19 and 20, of block number 5, in the town of Harveyville, in the county of Wabaunsee, and state of Kansas, as platted in the recorded plat of said town now on record in the office of register of deeds for said county and state, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, for that they did, under contract with said owner, furnish material for erecting the two-story frame building in and upon said property. The amount claimed for said materials, etc., and the items thereof, as nearly as practicable, are as follows, as shown by exhibits A, B, C, and D, hereto attached and made a part hereof, amounting in the aggregate to the sum of \$623.19, being respectively for the following amounts, to-wit: Exhibit A, \$251.18; Exhibit B, \$356.71; Exhibit C, \$5.30; Exhibit D, \$10. All of said material furnished, and the same fully completed, on the twenty-sixth day of May, 1885.

"State of Kansas, Wabaunsee county—ss.: I do solemnly swear that the foregoing statement is true in every particular, and that said material was used in the construction of said buildings and improvements, and that a true list of the items, used therein is also indorsed hereon, marked 'Exhibits A, B, C, and D.' So help me God.

"WILLIAM I. EWART, for Deatherage & Ewart, Claimant.

"Subscribed and sworn to before me this eighth day of July, A. D. 1885. [Seal.] "THEO. S. SPIELMAN, Clerk Dist. Court."

The Exhibits A, B, C, and D are as stated.

On the trial of the case, which was before the court without a jury, the plaintiffs offered to introduce this statement, with the exhibits thereto, in evidence, but the defendants objected upon the following grounds, to-wit: "That said statement is incompetent, irrelevant, and immaterial, and does not contain the name of the owner of the property sought to be charged with plaintiffs' lien; that said statement was not signed; that said statement was not filed by the firm of Deatherage & Ewart; that said statement was filed by William I. Ewart in his individual capacity; and that said statement does not show that it was verified by the affidavit of said Ewart, either as a partner or agent for said firm." The court below sustained the objection, and excluded the evidence.

Upon the evidence introduced, the court below rendered judgment in favor of the plaintiffs, and against the defendant Woods, for the amount claimed, but rendered judgment in favor of the defendants, and against the plaintiffs, with regard to the mechanic's lien, and the plaintiffs bring the case to this court for review.

Botsford & Williams, for plaintiffs in error. *Wm. Thomson, G. G. Cornell, W. A. Doolittle, and Hazen & Isenhardt*, for defendants in error.

VALENTINE, J. The only question involved in this case is whether the plaintiffs' statement for a mechanic's lien is sufficient or not. The court below held that it is not.

1. It is claimed that the statement is not sufficient because it does not contain the name of the owner of the property sought to be charged with the plaintiffs' lien. We do not think that this claim is tenable. The state shows, among other things, as follows: "Name of owner, George A. Woods. * * * Said contractors and claimants [Deatherage & Ewart] claim a lien upon the following described property, [here the property is described,] for that they did, under contract with said owner, furnish material for erecting the two-story frame building in and upon said property." This is certainly a sufficient statement of the name of the owner of the property. It is fully as definite as the statute itself is.

2. It is claimed that the statement is insufficient because it was not signed. Now, the statute does not require that the statement shall be signed; and, if the statement is otherwise sufficient, the signature is unimportant. *White v. Dumpke*, 45 Wis. 454. The statute, however, requires that various things shall be shown by the statement, as "the amount claimed and the items thereof as nearly as practicable, the name of the owner, the name of the contractor, the name of the claimant, and a description of the property subject to the lien, verified by affidavit;" all of which the statement in this case shows. The affidavit in this case follows immediately after the statement, and the affidavit is signed by one of the plaintiffs, who are partners in the business of furnishing lumber and building materials. This would seem to be sufficient. *White v. Dumpke, supra*; *Hicks v. Murray*, 43 Cal. 515.

3. It is claimed, however, that the statement is not properly verified by affidavit. The verification may be a little irregular or a little informal, and yet we think it is sufficient. It was verified by William I. Ewart. He is one of the plaintiffs in this action, and is one of the partners who furnished the building materials for which this action is brought, and for which this lien is claimed. His name indicates who he is, and the evidence shows it. The verification itself shows that he verified the statement "for Deatherage & Ewart, claimant." This, we think, is sufficient. *White v. Dumpke, supra*. We suppose it will not be claimed that the verification for a firm should be made by all the members of the firm. A verification by any one of them would be sufficient; and probably a verification by any agent of the firm would be sufficient.

4. It is further claimed that the statement is insufficient, for the reason that it was not filed by the firm of Deatherage & Ewart, but was filed by William I. Ewart in his individual capacity. We do not think that this claim requires any discussion. It is not good.

The case of *Deatherage v. Henderson* involves the same questions as are involved in the case which we have just been considering, and the two cases were submitted to this court at the same time. In the last-mentioned case still another question is presented. It is urged that, even if it was error on the part of the court below to exclude the statement for the mechanic's lien, still that the error was immaterial and harmless. Now, we cannot say that the error was immaterial or harmless. By the exclusion of the plaintiffs' statement for a mechanic's lien, their power to maintain or enforce their lien was utterly and hopelessly overthrown and defeated, whatever other evidence they might have had or might have introduced, and we cannot know what evidence they would have introduced if their statement for a mechanic's lien had not been excluded. Possibly they might have introduced a great deal more. We can say this, however: The evidence which they did introduce did not necessarily defeat or destroy their mechanic's lien; but, on the contrary, it tended to sustain and support it. It is useless to comment upon this evidence, however; for, when the entire evidence is introduced of both the plaintiffs and the defendants, it may make a very different showing from what this portion of the evidence already introduced by the plaintiffs does. With reference to the questions that might arise upon the evidence we would refer to Phil. Mech. Liens, §§ 124-127.

The judgments rendered in both the above cases, so far as they affect the plaintiffs' alleged mechanic's lien, will be reversed, and both causes will be remanded for further proceedings.

(All the justices concurring.)

TAYLOR v. RILEY.

(Supreme Court of Kansas. July 9, 1887.)

HUSBAND AND WIFE—SEPARATE ESTATE—ESTOPPEL.

Where a husband executes a chattel mortgage upon the property of a wife to secure a debt of the husband, without the knowledge or consent of the wife, and before the mortgage becomes due she is informed by the husband of the mortgage, but she does not inform the mortgagee of the fact that she is the owner of the property, and did not consent to the mortgage, but does declare these facts when the mortgagee takes possession of the mortgaged property, *held*, that the wife is not estopped from setting up her ownership and right of possession to the property.

(*Syllabus by Clogston, C.*)

Error from district court, Jackson county.

Keller & Noble, for plaintiff in error. *Hoaglin & Crawford*, for defendant in error.

CLOGSTON, C. This was an action in replevin to recover the possession of certain personal property in possession and claimed by defendant. Plaintiff's petition is in the usual form in replevin. The answer of the defendant was a general denial. Trial by jury; and, at the close of the testimony of the plaintiff, the defendant demurred to the evidence of the plaintiff, which demurrer was by the court sustained. And this ruling of the court sustaining this demurrer is the only question presented in the record. The court, in overruling the demurrer, stated that the demurrer to the evidence was sustained upon the sole ground that the testimony of the plaintiff herself showed that she knew, before the expiration of the lease, that the property had been mortgaged to the defendant to secure the rent, and that she did not inform the defendant it was her property, or that she objected to the mortgage, although she had ample opportunity to have done so.

The evidence in this case discloses the fact that the husband of the plaintiff rented a farm of the defendant, on or about March 1, 1884, for one year, and to secure the rent executed his note and a chattel mortgage upon the property in controversy. The evidence further shows that this property was the sole and separate property of the plaintiff in error. The plaintiff testified in her own behalf as follows: "I did not mortgage the property to Riley. I never saw him until after he came back from California. He went to California, so I was told, soon after his sale of February, last year, 1884. He came back in September, last year, so I heard. I saw him soon after his return from California, and frequently afterwards, before March 1, 1885, but did not speak to him about the property until the day he and a constable came to get the property. I forbid the constable or Mr. Riley from taking the property. I never gave my consent to this mortgage. I never knew in fact that the mortgage was made until Mr. Riley and the constable came after the property. My husband said he would mortgage it. I told him he should not. I don't know when the mortgage was made. I had reason to believe, and was informed by my husband before Riley returned from California, that a mortgage had been made."

Now, the only question for consideration is, under this testimony of the plaintiff, did the court commit error in sustaining the demurrer to the evidence? The defendant in error insists that the plaintiff was estopped from denying the mortgage, although the property belonged to her, because she had knowledge that it had been mortgaged, and did not disclose her ownership to Riley when he returned in September. In this we think the counsel is in error. There was no legal or moral obligation resting upon the plaintiff to compel her to disclose the fact that this was her property, and mortgaged without her authority. She was in possession of the property, and, being in such possession, might rest secure until the mortgagee attempted to take the property from her possession. When he did this, she stated her right and ownership to it. Before plaintiff could be estopped, she must have done some act, or had knowledge of acts being done, in relation to this property, which, at the time they were done, led Riley to believe that the property passed by the mortgage. She shows that she had no knowledge when the mortgage was given. Riley, then, did not accept the security and mortgage, for the reason of any act, knowledge, or consent of the plaintiff; and he parted with no property or right by reason of anything she did or omitted doing; and there is no evidence tending to show that any benefit resulting from this mortgage passed to the plaintiff. Then, how can it be said that she was estopped from setting up her claim and right to the property in controversy?

We therefore recommend that the cause be reversed, and remanded to the court below, with the direction to overrule said demurrer, and for further proceedings in accordance with the views herein expressed.

BY THE COURT. It is so ordered; all the justices concurring.

SHANE, by her Next Friend, v. SMITH.

(*Supreme Court of Kansas. July 9, 1887.*)

1. **ASSUMPSIT—SERVICES.**

Where a girl came from another state at the request of her uncle, to stay in his family and work for him, under a promise that she should be taught to play the organ and sent to school, and she came and performed, not only the ordinary duties of the household, but other work in addition thereto, for her uncle, the usual presumption, that where a near relative is taken into the family of another no compensation was intended to be made for services by one to the other, beyond that received during the time they were rendered, is overcome by such promise.

2. SAME.

Where an uncle charges his niece for the time she is absent from her ordinary work, and with articles of clothing furnished her, and with other items, it is some evidence that he regards and treats her as a servant as contradistinguished from a relative living in the family.

3. SAME.

Where one performs services for another, to be paid for in a particular way, upon refusal to pay in the manner agreed upon, the one performing such services is entitled to compensation in money for what such services are reasonably worth.

(*Syllabus by Holt, C.*)

Error from district court, Graham county.

This case was first tried in a justice's court. Judgment for plaintiff in error. Appealed to the district court of Graham county, and at the November term was tried by the court, a jury being waived. Plaintiff introduced his testimony. No testimony was offered by defendants. Judgment was rendered against plaintiff for costs. Motion for a new trial overruled. Plaintiff brings the case here for review. The testimony introduced showed that defendant and his wife lived in Graham county, Kansas. He sent a letter to plaintiff, who is a niece of defendant's wife, with fifteen dollars inclosed, to pay her fare from Missouri, where she lived, to the home of defendant. He promised in the letter that if she would come to Kansas he would teach her to play the organ, and send her to school. She came in March, 1884, and staid with the defendant until June, 1885, when she left, because her aunt whipped her for keeping company with a young man who was objectionable to her aunt. It appears in testimony that she did not learn to play the organ, but, in attempting to play at one time, she in some way injured the pedal, and her aunt would not let her go near the organ after that; that she did not go to school, although a school was being kept about a mile and a quarter from the home of the defendant. When she asked if she might go to school, she was told that they were too busy to have her go at that time. The girl did the ordinary work of the house, and in addition herded the cattle of the defendant both in summer and winter. The defendant, who carried the mail, was absent from home a good part of the time. They had not paid her any wages, nor had she asked for any, and she said she was used and treated as one of the family in one part of her testimony, and in another part that she was treated as a hired girl. At one time she was offered two dollars per week if she would work elsewhere. She left, she testified, not because she had not received wages, nor because she had not been sent to school, nor yet because she had not been taught to play the organ, but because she would not take a whipping from any one. On the trial of the case before the justice, the defendant introduced a kind of *memoranda*, as he called it, not as a set-off or counter-claim, although it was filed with the justice; and on that paper, whatever it may have been, there was a statement of items furnished to the plaintiff, including clothes, shoes, and gloves. She was also charged with the days that she was absent from her work, and weeks that she was sick, medicine that they had furnished her, and chairs that she had broken by her carelessness, etc.

H. J. Harwi, for plaintiff in error. *F. D. Turk* and *S. J. Osborne*, for defendant in error.

HOLT, C. The evidence shows that plaintiff came from Missouri at the request of defendant, and performed the ordinary household work in defendant's family and also herded his cattle at all seasons of the year, under the promise of being sent to school and taught to play the organ. Defendant neither sent her to school, nor taught her to play the organ, but failed in every way to fulfill his contract with her. Upon the failure of the defendant to pay in the particular way agreed upon, then the plaintiff is entitled to compensation in money upon refusal to pay in the way specified. *Stone v. Stone*, 43 Vt. 180. There was no time agreed upon that she should work for defendant. When

one is hired for an indefinite period, the party employed can leave at any time, without giving any reason therefor. *Kirk v. Hartman*, 63 Pa. St. 97.

The defendant in error urges that because of the relation existing between plaintiff and defendant, and the fact that plaintiff was one of the defendant's family, she ought not to recover in this action. We believe that where a near relative is taken into the family, and treated as a member thereof, there is a strong presumption created that no payment or compensation was intended to be made for services by one to the other, beyond that received during the time they were rendered; and it will take clear and satisfactory proof to remove the presumption that their relation was one of near relatives in the same family, rather than of master and servant. *Ayres v. Hull*, 5 Kan. 419; *Greenwell v. Greenwell*, 28 Kan. 413, 675; *Hall v. Finch*, 29 Wis. 278; *Williams v. Hutchinson*, 3 N. Y. 319. The nearer the relation the stronger the presumption that they regard themselves, and are to be treated, as members of the same family, and not as master and servant. On the other hand, the more distant the relation the weaker the presumption that they are to be treated as members of the same family. In the case of *Ayres v. Hull*, cited and relied upon by defendant, the relation of brother and sister existed; very much stronger than that of uncle and niece by marriage, as in this case. In recognizing the ordinary rule, the court says in that case: "So many considerations, other than those of a mere pecuniary character, enter into the minds of persons closely related in making up the family, that it would be both dangerous and violent to infer a promise from the kindly and sociable acts growing out of such relations." But the court also says in the same opinion: "* * * There is not one word of testimony tending, in the slightest degree, to show either an express promise to pay, or a specific contract, or that there was any understanding that the decedent was to pay for the services rendered, or that the relation of debtor and creditor was growing up between the parties."

In this case there was a distinct promise to pay, not in money, but payment that would have been of as much value, at least to a girl just growing into young womanhood. Some of the evidence tends to show that she was required to do and did do more than the ordinary labor of a well-ordered household, and the paper that defendant filed with the justice of the peace before whom this cause was first tried, whether an account kept against plaintiff, or a simple *memoranda*, as he claimed it to be, plainly shows from the items therein contained that at one time he regarded her as his hired servant. He charged her for clothing, medicines, doctor's bills, lost time, and furniture she carelessly destroyed.

There was testimony showing the value of plaintiff's services sufficient to have authorized a judgment in her favor. The plaintiff was only 13 years old when she began to work for defendant, and it may be, when the evidence of defendant is offered in another trial of the case, the cause of action established by the evidence of plaintiff may be fully met and overborne; but, under the testimony brought here, the court erred in rendering judgment for the defendant.

It is recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

DUNCAN v. GILLETTE.

(Supreme Court of Kansas. July 9, 1887.)

TAXATION—TAX DEED—VALIDITY.

A tax deed executed in pursuance of chapter 196 of the Laws of 1872, which fails to recite that the prescribed notice had been given, that payment was made by the

purchaser of the price bid for the land, that the treasurer had made to the purchaser a certificate of the sale, and that such certificate had been presented to the county clerk for the purpose of obtaining a deed, is void upon its face, notwithstanding that it recites the conclusion that the sale was begun and held in conformity with the provisions of the act.

(Syllabus by the Court.)

Error from district court, Shawnee county.

This was an action in the nature of ejectment, brought by Kate Gillette against Charles N. Duncan to recover possession of the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 28, in township 12, range 15, in which the plaintiff alleged that she was the owner in fee of the premises, and entitled to their possession, and that the defendant unlawfully kept her out of it, which averments were denied in the answer of the defendant. On January 4, 1886, the cause came on for a second trial in the superior court without a jury, and upon the trial it was stipulated and agreed by the parties that the plaintiff was the owner in fee and entitled to recover, unless a certain tax deed was valid on its face; and that, if said tax deed was good upon its face, the defendant was entitled to recover. The following is said tax deed:

"Know all men by these presents that whereas, the following described real property, viz., the south-west quarter of the south-east quarter of section 28, township 12, range 15 east, situated in the county of Shawnee and state of Kansas, was subject to taxation for the year A. D. 1868; and whereas, the taxes assessed upon said real property for the year 1868 aforesaid remain due and unpaid at the date of the first sale hereinafter mentioned; and whereas, the treasurer of said county did, on the sixth day of May, A. D. 1869, by virtue of the authority in him vested by law, at the sale begun and publicly held on the first Tuesday of May, 1869, expose to public sale at the county-seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the payment of taxes, interest, and costs then due and unpaid on said property; and whereas, at the time and place aforesaid, the real property above described could not be sold, for the amount of said taxes, penalty, and charges thereon, to any person or persons, in any parcel or parcels, at said public sale, or any adjourned sale thereof, the said lands above described were bid off by H. T. Beman, county treasurer of Shawnee county, state of Kansas, for the sum of three dollars and fifty-nine cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said real property, for said county of Shawnee, in said state of Kansas; and whereas, the said real property remained unredeemed for the term of five years next preceding the sale next hereinafter mentioned, and, no person having offered to redeem or purchase the same for the taxes, costs, and penalties due thereon, the treasurer of said county of Shawnee did, on the seventh day of May, A. D. 1875, at the sale begun and publicly held on the seventh day of May, A. D. 1875, at the front door of the court-house of said county, at the county-seat of said county, in conformity with all the provisions of an act entitled "An act to provide for the sale of lands for taxes due and unpaid thereon," approved February 27, 1872, sell said real property at public auction to J. B. Webber for the sum of two and 25-100 dollars, the said J. B. Webber being the highest bidder for cash for said real estate at said sale; now, therefore, I, P. I. Bonebrake, county clerk of the county aforesaid, for and in consideration of the sum of two dollars and twenty-five cents to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said J. B. Webber, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said J. B. Webber, his heirs and assigns, forever, subject, however, to all rights of redemption provided by law.

"In witness whereof I, P. I. Bonebrake, county clerk as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name, and affixed the official seal of said county, on this twenty-sixth day of May, A. D. 1875.

"P. I. BONEBRAKE, County Clerk.

"GEO. B. HOLMES,

"R. H. WATERMAN,

"Witnesses."

(Here follows acknowledgment.)

The foregoing tax deed was all the evidence offered by either party, and thereupon the court found that the tax deed was void upon its face. The defendant moved to vacate and set aside the finding, and also for a new trial. These motions were overruled by the court, and judgment entered in favor of the plaintiff according to the prayer of her petition. Exceptions were taken to the rulings of the court, and the defendant is prosecuting this proceeding for a reversal of that judgment.

H. H. Harris, for plaintiff in error. *A. Bergen*, for defendant in error.

JOHNSTON, J. The decision of this case depends upon the validity of a tax deed executed on May 26, 1875, by P. I. Bonebrake, who was then county clerk of Shawnee county, to J. B. Webber, who subsequently conveyed the land to the plaintiff in error. According to the stipulation of the parties, the plaintiff in error is entitled to recover, unless the tax deed is void on its face, in which event the judgment should be in favor of the defendant in error, who claims title under the original patentee of the land. The tax deed purports to have been issued under chapter 196 of the Laws of 1872, which provides that where lands or town lots that have been sold for any taxes due thereon are bid in by the county, and have remained unredeemed for five years after such sale, without any one offering to purchase the same for the taxes, penalties, and costs, it becomes the duty of the county treasurer to sell such lands or town lots at public auction to the highest bidder for cash. A prerequisite to the sale is stated in section 1 of this act, where it is said that the treasurer may sell, "after having first given at least four weeks' notice of such sale, and of the property to be sold, with a statement of the taxes, penalties, and costs due on such lands or town lots to the date of such sale, in some newspaper of general circulation in such county, or, if there be no such newspaper in such county, then by written or printed hand-bills put up in one or more public places in each township in such county." In section 2 authority is given for the making of the tax deed, and some of the acts precedent to its execution are stated as follows: "On payment, by the purchaser, of the price bid for any such land or lot, the treasurer shall make to such purchaser a certificate in writing of such sale, on presentation of which to the clerk of the county commissioners of such county it shall be the duty of such clerk to execute to such purchaser a deed under the seal of said county conveying such land or lot to such purchaser," etc. The validity of the deed before us is challenged because it fails to show that the required notice was given, that the payment was made by the purchaser of the price bid for such land, that the certificate in writing of such sale by the treasurer had been made to the purchaser, and the presentation of the certificate to the county clerk of the county in which the land is situate. We regard these omissions to be fatal to the tax deed. It should show upon its face that the requirements of the statute had been substantially complied with. No sale could be made until the statutory notice had been given. The county clerk had no authority to execute a deed until payment had been made by the purchaser of the amount of his bid, nor until the treasurer had made a certificate to the purchaser of such sale and payment, and not then until the certificate had been presented to him for that purpose.

Douglass v. Wilson, 31 Kan. 565, 3 Pac. Rep. 330, is quite analogous to the present case. It arose under chapter 43 of the laws of 1879, which was enacted for substantially the same purpose as the act of 1872. It was there provided that where lands or town lots have been sold for taxes and bought in by the county, and shall be unredeemed for three years from the date of the sale, and no person should offer to purchase the lands or lots for the taxes, penalties, and costs due thereon, that the county commissioners of the county where the lands or lots are located might permit the owner, his agent or attorney, to redeem the same, or might authorize the county treasurer to execute, and the county clerk to assign, tax-sale certificates for such lands or town lots, for any sum less than the legal tax, and interest thereon, as in their judgment should be for the best interest of the county. The court held that, in order that a tax deed executed under that law shall be valid, the lands or lots sold must have remained in the hands of the county unredeemed for at least three years after the date of the sale before any authority can be given by the county commissioners to the county treasurer, or the county clerk, to assign the tax-sale certificate; and also held that a deed which failed to show that no person offered to pay the whole amount of such taxes, penalties, and costs, and that the county commissioners had authorized the county treasurer to receive a less amount than the amount of the taxes, penalties, and costs, and that the county commissioners had authorized the county treasurer to execute, and the county clerk to assign, the tax-sale certificate, and that the same was done in pursuance of such authority, is void upon its face. The omitted recitals thus held to be fatal to that deed are no more important or essential than those which are lacking in the present one, and therefore that decision practically disposes of this case.

The plaintiff in error claims that the defects in the deed are remedied by the general recital therein that the sale was begun and publicly held in conformity with the provisions of the act of 1872. It is to be observed that this recital refers only to the commencement and holding of the sale, and has no reference to the necessary steps to be taken before and after the sale; nor does it state that the sale itself conformed to the requirement of the statute. However, if it were applicable to all the acts and proceedings of the officers, we think it would still be insufficient to accomplish the purpose claimed for it. The officer exercised a naked statutory power, and he should recite in the deed all facts essential to the sale and conveyance of the land. It is not enough for the officer to state his mere conclusion that he has complied with the law in exercising the power conferred by the statute. The deed should state facts, and not opinion, and should recite all prerequisite facts, leaving to the proper tribunal the determination as to whether those facts show a sufficient compliance with the law. We must hold the deed to be void upon its face; and, in support of our conclusion, we refer to the well-considered opinion of the judge of the superior court in delivering the judgment in the case, (3 Kan. Law J. 56,) and also *Spurlock v. Allen*, 49 Mo. 178; *Abbott v. Doling*, Id. 302; *Large v. Fisher*, Id. 307; *Cooley, Tax'n*, 353.

The judgment of the superior court will be affirmed.

(All the justices concurring.)

VAN VLIET and another v. HALSEY and others.

(Supreme Court of Kansas. July 9, 1887.)

1. FRAUDULENT CONVEYANCES—INTENT.

Real property conveyed before judgment cannot be subject to the payment of such judgment, without it is alleged and proved that it was conveyed with intent to prevent the judgment being enforced against it.

2. SAME.

Held, in this case, that there is no such cause of action stated in the petition of the plaintiff in error.

(*Syllabus by Simpson, C.*)

Error from district court, Leavenworth county.

On the eighteenth day of February, and at the February term, 1873, of the district court of Leavenworth county, Stewart Van Vliet recovered a judgment against Madison Mills for the sum of \$2,575.21. At this time Madison Mills was the owner of the S. E. $\frac{1}{4}$ of section 13, township 9, of range 22, of land situated in Leavenworth county. This judgment became a lien on said land. On the eighteenth day of April, 1873, Madison Mills, while on his death-bed, and a few days before his death, without any consideration, other than the promise of Robert Halsey, a brother-in-law, to pay the incumbrances and liens on the lands of Mills in Leavenworth county, conveyed this land, with other tracts, to Robert Halsey. Madison Mills died on the twenty-eighth day of April, 1873. That execution was issued on said judgment of Stewart Van Vliet against Madison Mills. On the twentieth day of May, 1873, A. C. Van Duyn was duly appointed administrator of the estate of Madison Mills. On the eleventh day of October, 1875, said judgment was revived against the administrator of the estate of Madison Mills. May 3, 1880, the land was sold under an execution issued on said judgment, to Levi Wilson, to whom said judgment had been assigned for collection only, he being a friend of said Van Vliet, and consenting to act as a trustee for him. This sale was held void, and the judgment declared not to be a lien on said land by this court in the case of *Halsey v. Van Vliet*, 27 Kan. 474.

On the third of April, 1874, the judgment of Van Vliet against Mills was duly exhibited in the probate court of Leavenworth county against the estate of Madison Mills, and on the sixth day of April, 1874, said judgment was allowed as a demand against said estate for the sum of \$2,843.43, and assigned to the fourth class of debts, and ordered paid in the due course of administration. There was not sufficient personal property belonging to the estate of Madison Mills in Kansas to pay the costs of administration. That, at the time of the conveyance of this land by Mills to Halsey, both the grantor and the grantee were non-residents of the state of Kansas, and all the defendants except Van Duyn and Kelly are non-residents.

When Mills conveyed this tract to Halsey he owned other lands, on which Halsey held a mortgage to secure a note for \$18,000, then due from said Mills. This mortgage and note Halsey assigned to Dennistown, who commenced an action to foreclose said mortgage in the Leavenworth district court on the seventh day of July, 1873, and this action resulted in a judgment against A. C. Van Duyn, as administrator of the Mills estate, and a decree ordering the sale of the mortgaged premises. The amount realized from the sale of the mortgaged premises was not sufficient to pay the judgment and costs, and a general execution issued for the balance on the eleventh day of August, 1874, and the land sought now to be subjected to the payment of Van Vliet's judgment was levied upon and sold as the property of the estate of Mills; and it is alleged that this was done by direction of Robert Halsey, who was not a party to the foreclosure action.

This land was bid off to Dennistown, the sale confirmed, and a sheriff's deed executed to Dennistown on the fifteenth of January, 1875. Dennistown died during the year 1875. Mrs. C. M. Bell and Mrs. Margaret Morris are the heirs at law of Dennistown. Dr. C. M. Bell, the husband of one of the daughters of Dennistown, claims to have obtained a deed of Robert Halsey, during the year 1883, for the land; that Washington D. Kelly is the agent of Dr. C. M. Bell, and is in the possession and control of said land, and to strengthen the title of Bell has purchased tax-sale certificate of 1882, and re-

fuses to permit the plaintiff to pay the same. On the eighth day of March, 1876, Robert Halsey made a general assignment of his property, both real and personal, for the benefit of his creditors, and returned an inventory into court in the city of New York of the same under oath; stating that he owned real estate in New York and Pennsylvania, but making no mention of any real estate owned by him in Kansas. Afterwards, in 1877, he made a supplement inventory under oath of property omitted in the first, and no mention is made of this particular tract of land. At the same time he made schedules of all debts due him, with the name of the debtors, but did not assert or pretend that Madison Mills owed him one cent. That Geo. W. Powers, who was originally the assignee of Halsey, was succeeded by James S. Greeves, who is now assignee, and represents the property of the estate of Halsey; and that the outstanding debts of Halsey amount to many thousand dollars.

The plaintiffs in error aver that they are judgment creditors of Madison Mills, and of his estate; that said judgment has been revived, probated, and allowed against the administrator of the estate of Mills; that said administrator refuses to take any steps to subject said land to the payment of the debts of said Madison Mills, and to the payment of said judgment, allowance, and demand of Van Vliet; that said administrator has not now, or never had, any money or property of the estate of Madison Mills which could have been applied to the payment thereof.

The plaintiffs pray that they have judgment for the amount due Van Vliet, and that they be declared judgment creditors of Mills, and his estate, for the amount due Van Vliet; that the plaintiffs in error's demands be declared a lien upon said land; that said land be declared the property of the estate of Madison Mills; that the improvement made upon said land be declared an equitable lien thereon, and the value thereof be decreed to be paid to the plaintiffs in error; that all of said defendants be required to set up their rights and equities to said land; that the deeds thereto held by said defendants be declared void, and that the said defendants, and all others claiming under them, be barred and foreclosed of any and all right, after a sale of the same under plaintiffs' judgment and demand; and for costs and other relief; and that said land may be ordered sold to pay the judgment in error.

The defendants in error demur to the petition, and assign the following causes: (1) That the court has no jurisdiction of the subject of the action; (2) that there is a defect of parties plaintiff; (3) that there is a defect of parties defendant; (4) that several causes of action are improperly joined; (5) that the petition does not state facts sufficient to constitute a cause of action.

The demurrer was sustained, and the plaintiffs bring the case here, assigning as error the ruling of the district court sustaining the demurrer.

W. Green, for plaintiff in error. *Lucien Baker, E. Stillings, and J. H. Gilpatrick*, for defendants in error.

SIMPSON, C. We confess our inability to determine with any degree of precision the cause of action stated, or attempted to be set forth, in the petition filed in this case in the district court of Leavenworth county by the plaintiff in error. The prayer for relief, instead of affording some indication to the cause of action alleged, is as confusing as the statement of facts, and all we can do is to pass upon all the allegations of the petition as they are recited. The plaintiff in error Van Vliet alleges that he recovered a judgment against Madison Mills at the February term of the district court of Leavenworth county, and on the eighteenth day of February, for \$2,575.21 and costs, and that said judgment has not been paid or reversed, and that the same is in full force and effect; that Mills died on the twenty-eighth day of April, 1873, at his residence in New York city; that on the twentieth day of May, 1873, A. C. Van Duyn was duly appointed administrator of the estate of Mills by the probate court of Leavenworth county; that on the eleventh day of Octo-

ber, 1875, said judgment in favor of Van Vliet was revived against Van Duyn as administrator of the estate of Mills; that on the third day of April, 1874, the said judgment was duly exhibited against the estate of Mills in the probate court of Leavenworth county, and on the sixth day of April, 1874, was duly probated and allowed, and the estate was adjudged to be indebted to Van Vliet in the sum of \$2,843.43; and said judgment was assigned by said probate court to the fourth class of debts against said estate, and ordered to be paid in due course of administration.

Among the numerous prayers for relief contained in the petition is one for judgment for the amount due and allowed and adjudged to said Van Vliet by the courts aforesaid, (meaning the probate and district courts of Leavenworth county.) Now, whatever had been in the mind of the pleader, it is perfectly evident that this action was not intended as a suit on the judgment of Van Vliet against Madison Mills. It alleges the judgment; its revivor against the administrator; that it has never been paid or reversed; and that it is in full force and effect; and these, coupled with other allegations, seem to us to conclusively negative any presumption; that it was intended to state a cause of action on the judgment. This disposes of the first prayer for relief, and the allegations of the petition supposed to authorize such a judgment.

The next prayer is that the plaintiffs be declared to be judgment creditors of Madison Mills, and his estate. If it be true that they have such a judgment against Mills, duly revived against his administrator, they are judgment creditors to all intents and purposes, and could not be benefited by such a declaration. No additional rights could be given them by a naked declaration of the district court of Leavenworth county. They come within the definition of judgment creditors, by virtue of the fact that they have in full force and effect a judgment rendered against Madison Mills in his life-time, and duly revived against his regularly appointed administrator.

The next series of allegations in the petition seem to be directed to the statement of facts, to establish the proposition that this judgment is a lien on the land described, and there is a prayer that the court so declare. This court held in the case of *Halsey v. Van Vliet*, 27 Kan. 474, that this judgment was not a lien on the land, and as there has been nothing done since the rendition of that opinion except to exhibit the judgment against the administrator of Mills, and have it classified by the probate court of Leavenworth county as a demand against the estate of Mills, this certainly would not have the effect to make it a lien.

There are numerous allegations in the petition, reciting a state of facts upon which it is contended that the court would be empowered to make such a decree, and among them are the following: That the land was conveyed to Halsey by Mills, with the expressed agreement that Halsey should pay the liens of this and other incumbrances upon it; that Halsey directed this land to be sold at sheriff's sale to pay the balance of the judgment in the foreclosure action of *Dennistown v. Mills, Adm'r, and others*; that in the assignment of Halsey and in the schedule of his creditors no mention is made of his ownership of this land, and of the indebtedness of the Mills estate to him.

Disposing of these in their order, it is only necessary to say of the first allegation that, if Halsey accepted the conveyance of this land with the agreement to pay the lien of the judgment, he has been relieved of that by a decision of this court, and if he agreed to pay the judgment a direct action against him would be the proper remedy.

The second proposition is that Halsey directed that this land be sold by the sheriff, to pay the balance of the judgment in the foreclosure action of *Dennistown v. Van Vliet, administrator of Mills and others*. The pleader makes this allegation with the view that it is an admission by Halsey that this land belongs to the estate of Mills, and that he is therefore estopped from denying it in this action. If the plaintiff in error Van Vliet had been a party to that

action, there would have been some foundation for such a belief, but as he was not, the element of mutuality that is characteristic of estoppel is wanting.

Other allegations of the petition furnish a very good reason why Halsey should direct this quarter of land to be sold to satisfy the balance of the Dennistown judgment. It is stated that Halsey had a note for \$18,000 against Mills, secured by other real estate owned by Mills in Leavenworth county; that after Mills' death this mortgage was assigned by Halsey to Dennistown, and an action for the foreclosure commenced in the district court of Leavenworth county. The mortgaged premises did not sell for a sufficient sum to satisfy the judgment, an execution was issued for the balance, and the quarter section of land sold. This petition does not allege that the assignment of Halsey to Dennistown was only colorable, and made with the intent and for the purpose of having this land sold, and thus depriving the plaintiff in error, Van Vliet, from subjecting it to the payment of his judgment; but does allege that there was an assignment of the note and mortgage to Dennistown. In the absence of any claim to the contrary, it must be assumed that the assignment was in good faith, and for a valuable consideration, and that, to prevent recourse on him, Halsey could have this land sold for the benefit of Dennistown, to pay him in full, and to relieve Halsey of any liability on the assignment.

This land was bid off to Dennistown, the sale confirmed, and a sheriff's deed made to him on the fifth day of January, 1875; and at that time, by the decision of this court, the plaintiff in error had no lien on the land, and his judgment had not been revived against the administrator of Mills. Under the state of facts alleged in the petition, showing that the title to this land had passed to and been vested in Dennistown, with no allegations respecting him as participating in any attempt to deprive the plaintiff in error from enforcing his judgment by the sale of this land, with his heirs at law parties to this action, and made so probably for this purpose, and yet not charged through their ancestors with notice or knowledge, how could the court grant the prayer for relief? The plaintiff in error also alleges that Halsey made a general assignment for the benefit of his creditors, on the fifth day of March, 1876, and that he filed an inventory under oath of his property, and a schedule of all debts to him, verified by his oath. There was no mention of this land in his inventory, and no reference to the debt Mills owed him in the schedule.

Accepting the other facts recited in the petition as true, being admitted by the demurrer, they furnish a complete answer to all allegations. They recite the assignment of the note and mortgage for \$18,000 by Halsey to Dennistown long before this assignment for the benefit of the creditors is made, and this is all the indebtedness by Mills to Halsey that is described. They recite the sale of this particular quarter section of land on the Dennistown judgment by the direction and consent of Halsey; and thus the petition shows that the statement made by Halsey, both in his inventory and schedule, was in exact accordance with the facts recited.

It is claimed in the brief of counsel for plaintiff in error that the action is one to set aside a fraudulent conveyance made by Mills to Halsey of the land described; but there is not a single allegation in the petition that authorizes even an inference that this was the intention of the pleader. On the contrary, the petition distinctly avers that the conveyance was made for the consideration and on the promise of Robert Halsey to pay the incumbrances and liens on the lands of Mills in Leavenworth county.

If we should adopt the theory that the sale to Mills by Halsey, and the assignment of the mortgage by Halsey to Dennistown, the foreclosure by Dennistown, and the subsequent sale of this land to pay the unsatisfied balance of the judgment in the foreclosure action, were but parts and parcels of a general plan to cover the property of Mills for his benefit, or the benefit of

his heirs, there is no such statement of facts recited as would authorize a judgment to that effect.

There are many different views that can be taken of the various statements in this petition, and much speculation as to what was intended; but it does not state a cause of action against any one or all the defendants in error, but, on the contrary, it does state that the land that is sought to be subjected to the payment of the demand of the plaintiff in error Van Vliet, against the estate of Madison Mills, has been sold at a judicial sale long before the commencement of this action.

We do not doubt the power of a court of equity to reach the property of a debtor, justly applicable to the payment of his debts, however elaborately it may be covered over with conveyances, decrees, or judicial sales, all made and procured to avoid payment of such demands; but the exercise of such a power must first be invoked by the statement of such facts as will constitute a cause of action against all persons who are parties to such a transaction. There is no view to be taken of this petition wherein it states a cause of action, and with this conclusion there is no necessity for a discussion of other questions raised on the argument. We see no error in the ruling in the district court of Leavenworth county, sustaining the demurrer, and therefore recommend that it be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

RANSOM v. GETTY.

(*Supreme Court of Kansas. July 9, 1887.*)

1. BAILMENT—LIABILITY OF BAILEE.

Where a bill of particulars alleges that defendant contracted to take good care of a horse and colt of plaintiff intrusted to his keeping, it will be held that such pleading states a contract for only ordinary care; and, where said bill of particulars further states that said mare and colt sickened and died for want of proper care and attention, it is error to admit evidence, over objection of defendant, of a contract for special and extra care of said mare and colt. It is also error for the court to instruct the jury under such pleadings and evidence, over the objection of the defendant, what the duty of the defendant would have been, if they should find that special and extra care had been contracted for.

2. SAME.

Where an instruction is given by the court not applicable to the evidence introduced, and contains an inference that defendant has been guilty of fraud in his contract with plaintiff, which inference is wholly unsupported by evidence, such instruction is misleading and erroneous.

(*Syllabus by Holt, C.*)

Error from district court, Ellsworth county.

Garver & Bond, for plaintiff in error. *Lloyd & Evans*, for defendant in error.

HOLT, C. This case was first tried before a justice of the peace and a jury, and a verdict and judgment for plaintiff in error for \$66. Defendant in error (plaintiff below) appealed to the Ellsworth county district court, where the case was again tried to a jury at the October term, 1885. Verdict for plaintiff for \$80, and judgment thereon. Motion for a new trial overruled. The defendant below is plaintiff in error. This action grew out of the following facts: In the year 1884 plaintiff placed his mare and colt in the possession of the defendant, for the purpose of breeding the mare to a horse of the defendant. About the first of August, the same year, the mare and colt were taken sick, and both died while in the possession of the defendant. Plaintiff claims that they died for want of proper care and attention, and brought suit against the defendant. The defendant answers by a general denial, and also asks judgment against the plaintiff for the care and keeping

of the mare and colt. Plaintiff makes four assignments of error. We shall consider only a part of them.

The plaintiff, in his bill of particulars, in which his cause of action was formally stated at some length, claims that the contract between himself and defendant was that he should take good care of said mare and colt, and return them to plaintiff in good condition. He further alleges that defendant neglected said mare and colt, and by reason of such neglect they sickened and died. Testimony was introduced, over the objection of the defendant, showing that plaintiff stipulated for special and extra care of said mare and colt on the part of the defendant. The instructions to the jury by the court were upon the theory that the defendant had introduced evidence showing that he had contracted to give more than ordinary care to the animals while in his possession. The findings of fact by the jury also seemed to follow the same theory. The first question answered was: "Did the defendant agree to take more than ordinary care of the mare and colt?" *Answer.* Yes." The second question was: "If above is answered yes, state what care was contracted for?" *Answer.* Good care." While we believe that ordinary care is good care, and a claim in the bill of particulars that the defendant contracted to give good care to the mare and colt of the plaintiff was simply an allegation that it was a contract for ordinary care, yet it is evident from the questions answered that the jury, at least, made a distinction between ordinary care and good care. They very naturally made that mistake under the instructions of the court, and the manner of introducing the evidence, a portion of which was offered to show that a greater degree of care than ordinary care was agreed upon between the parties in the keeping of the mare. Such evidence ought not to have been admitted under the pleadings. There were a number of instructions given on the theory that more than ordinary care was contracted for. They were erroneous.

The defendant also complains of special instruction number 4 given by the court to the jury. The instruction is as follows: "Should you believe from the evidence that before the mare and colt were taken by defendant, that there was distemper or other disease among the horses or colts of the defendant, and that such fact was not communicated to the plaintiff, and that, by reason of such disease being communicated to the colt, it became sick, and by reason of such sickness it died, and also caused the death of the mother by its not sucking the mother, and that disease was of a dangerous and contagious kind, then the court instructs you that it was a fraud for the defendant not to inform the plaintiff of such facts, if the same were known to defendant, or if the defendant, by the exercise of reasonable diligence, would have known the same; and the failure of the defendant so to do would be negligence, if you find that from such failure the plaintiff has sustained a loss."

We believe that instruction is misleading, and not applicable to the facts in the case. There was nothing either in the pleadings in this action, nor the evidence as it appears in the record brought here, that would suggest an instruction relating to fraud, much less justify or warrant such a one; and taken in connection with the other part of the instruction, and the testimony bearing upon the question of the distemper among the horses of the defendant, we think it was erroneous. The contract was made by plaintiff and defendant in June, and the horses were taken there almost immediately thereafter. The plaintiff states that the horses and colts of the defendant had had the distemper, the disease of which the colt died, in the spring previous, while the defendant testified that the disease had been among his colts the fall and winter before. There is no testimony showing that for a considerable length of time prior thereto there had been any distemper at all among the horses of defendant. There is nothing in the evidence in this case that would indicate that it was the duty of defendant to have said anything about the distemper that had been among his colts some time previous, much less could

any fraud have possibly been inferred from his silence on that subject. There is no allegation in the bill of particulars that the mare died from the distemper, and the fact that she did die because the colt was sick with the distemper was not the necessary and natural result of such sickness of the colt. The plaintiff, as a matter of fact, does allege that the mare died "wholly by reason of the carelessness and neglect of said defendant." The mare died, as the evidence introduced tends to show, because her milk gathered in her bags, causing them to cake, on account of the colt being unable to suckle the mare because the distemper affected his throat, and because the defendant neglected to give her proper care. It is certainly reasonable to believe that the instruction complained of would, under the evidence, confuse and mislead the jury.

It is recommended that the judgment of the court below be reversed, and cause remanded.

BY THE COURT. It is so ordered; all the justices concurring.

SPERRING v. HUDSON.

(*Supreme Court of Kansas. July 9, 1887.*)

JUDGMENT—VACATION.

A judgment was obtained upon service by publication alone. Subsequently, the defendant applied, under section 77 of the Code, to open up the judgment, and be let in to defend. The application was allowed, and upon the final trial judgment was rendered in favor of the defendant and against the plaintiff. The plaintiff prosecuted his writ of error to the supreme court, claiming that the application and order to open the judgment were made after the lapse of three years, and therefore too late. He attached to his petition in error only a copy of the entries upon the journal of the district court. These entries show that the final action in opening the original judgment was taken by the district court after the lapse of three years from the date of the judgment; but the court recited in the journal "that the defendant gave due and legal notice to the plaintiff of his intention to make his application," and also recited "that three years had not elapsed since the judgment was rendered." The application of the defendant and the notice given by him to the plaintiff were wholly omitted from the record. *Held* that, upon the record so presented, it does not clearly appear that the application and notice of the defendant were not filed and served within three years from the date of the original judgment. Therefore it cannot be said that the order of the district court is erroneous.

(*Syllabus by the Court.*)

Error from district court, Greenwood county.

E. A. Barber and *R. C. Summers*, for plaintiff in error. *Z. Harlan*, for defendant in error.

HORTON, C. J. On May 4, 1882, the plaintiff obtained in the district court of Greenwood county a judgment against the defendant quieting his title to certain real estate in that county. The only service made was by publication, and there was no appearance on the part of the defendant. Afterwards the defendant filed his application to have the judgment opened, and that he be permitted to defend. This application came up for hearing at the May term of the district court for 1885, and the court made the following order: "Now, on this sixth day of May, 1885, the second day of the May, 1885, term of this court, comes the said defendant, W. H. Hudson, by his attorney, Z. Harlan, and by motion makes application to have the judgment heretofore, to-wit, on the fourth day of May, 1882, and at the May, 1882, term of this court rendered and entered in this action, opened, and to be let in to defend; and, it appearing to the court that three years have not yet elapsed since said judgment was rendered, and that the same was rendered against the defendant without other service than by publication in a newspaper, and it further appearing to the court here that the said defendant has given due and legal notice to the said plaintiff of his intention to make said application at this time, and it

further appearing to the satisfaction of the court, by affidavit and otherwise, that during the pendency of this action the said defendant had no actual notice thereof in time to appear in said court and make his defense, and the said defendant having filed a full answer to the plaintiff's petition in said action, and it appearing from said answer that the said defendant has a just, legal, and sufficient defense to said action, it is therefore ordered and adjudged by the court that the judgment heretofore, to-wit, on the fourth day of May, 1882, and at the May, 1882, term of this court, rendered and entered herein in favor of said plaintiff and against said defendant, be, and the same is hereby, opened, and the said defendant let in to defend, and it is further ordered that the said plaintiff demur or reply to said answer on or before the twenty-second day of May, 1885."

Subsequently the plaintiff filed a motion to vacate and set aside the order of May 6, 1885, but this motion was overruled, and thereupon the plaintiff obtained leave to file a reply to the answer of the defendant on or before June 20, 1885. At the trial upon the merits on September 7, 1885, the judgment of May 4, 1882, was vacated, and judgment rendered in favor of the defendant for costs. The plaintiff excepted, and brings the case here. He alleges that neither the application of the defendant to have the judgment opened, nor the order of the district court opening the judgment, were made within three years after the date of the judgment of May 4, 1882.

The record in this court is in such a condition that we cannot consider the merits of the question presented. There has been no transcript filed in this court of all the proceedings of the district court, and the proceeding is not brought here upon a case made. The only certificate to the transcript is as follows:

"I, W. S. Robinson, clerk of the district court within and for the county of Greenwood, state of Kansas, do hereby certify that the above and foregoing contains a true, complete, and full copy of the entries on journal records in the above-entitled cause now in my office.

[Seal.]

"W. S. ROBINSON, Clerk, Dist. Court."

The application of the defendant, and the notice given by him to the plaintiff, are omitted from the record, but the court makes a finding in the journal entry as follows: "That the said defendant has given due and legal notice to the said plaintiff of his intention to make said application at this time;" and in the journal entry it is also recited "that three years have not yet elapsed since the judgment of May 4, 1882, was rendered." It was decided, in *Albright v. Warkentin*, 31 Kan. 442, 2 Pac. Rep. 614, that where the application is made in time, and, on account of certain proceedings had, no final action is taken by the court to open the judgment, such delay does not necessarily deprive the defendant of his right to have the judgment opened. The record, defective as it is, shows that some proceeding in the case was pending on December 24, 1884, and that a continuance of the matter then pending was had, upon the application of the defendant, until the May term of the court for 1885. To do justice to both parties the provisions of section 77 of the Code should be construed in no technical way, but fairly and reasonably. So, also, the journal entries should be construed to uphold, if possible, the order of the district court. Not being able to say from the record as presented that the original application and notice were not filed and served within the time, the judgment of the district court will be affirmed.

(All the justices concurring.)

MCGARRY and others v. STATE.

*(Supreme Court of Kansas. July 9, 1887.)***BASTARDY—RECOGNIZANCE.**

Under section 5 of the act relating to illegitimate children, the words in the recognizance requiring the defendant to "abide the judgment and orders" of the court do not mean that the defendant or his sureties shall pay or satisfy the final judgment rendered in the case, but that, when such judgment is rendered, he will surrender himself into the custody of the court, ready and willing, as required by section 13 of the act, to secure the payment of such judgment by good and sufficient sureties, or, in default thereof, to be committed to jail until such security be given.

(Syllabus by the Court.)

Error from district court, McPherson county.

Grattan & Grattan, for plaintiffs in error. *D. P. Lindsay*, for the State.

VALENTINE, J. This was an action brought in the district court of McPherson county by the state of Kansas against H. McGarry, J. McDermid, and W. J. Lloyd, on a bond given by the defendants in a bastardy proceeding. The case was tried by the court without a jury, and judgment was rendered in favor of the plaintiff, and against the defendant, for \$400 and costs, and the defendants, as plaintiffs in error, bring the case to this court.

It appears from the pleadings, the admissions of the parties, and the evidence in the case, among other things, as follows: Jasper M. Stebbins was charged with bastardy by Clara Wilson, the mother of the bastard child, before FREDERICK SALTER, a justice of the peace in and for McPherson county, Kansas. A hearing was had before the justice, and the justice adjudged that Stebbins was the father of the bastard child, and ordered and required that he, with sufficient sureties, should enter into a recognizance, as required by law, in the sum of \$400. In pursuance of such order of the justice, the defendants in this action, McGarry, McDermid, and Lloyd, on January 11, 1883, entered into the bond sued on in this action in the sum of \$400, conditioned that said Stebbins would appear in the district court of such county on January 16, 1883, to answer the aforesaid complaint, and not depart without leave, and abide the judgment and orders of such court. Only the sureties signed the bond. Stebbins himself did not sign it. Stebbins appeared in person in the district court, and answered said complaint. The hearing was had on January 17, 1883, before the court and a jury, and Stebbins was again adjudged to be the father of the bastard child, and judgment was rendered accordingly. He remained in court, and did not depart therefrom without leave of the court; and, when the aforesaid judgment was rendered, he asked the court to fix a bond to satisfy the judgment, which the court refused to do, and forced Stebbins to go hence on the bond already given in the justice's court. Stebbins has all the time remained in McPherson county, and has at no time been imprisoned on any of the aforesaid bastardy proceedings. The district court, in rendering judgment in the bastardy proceedings, ordered that Stebbins should pay certain sums of money, which he failed to do, and the same has not been paid; and these failures of payment are the only breaches of the bond alleged in this action.

Sections 5, 9, 13, and 14 of the act relating to illegitimate children read as follows:

"Sec. 5. If the justice, on the hearing, adjudge the defendant to be the father of such child, he shall require him to enter into a recognizance in a sum not less than two hundred nor more than one thousand dollars, with sufficient sureties, payable to the state of Kansas, and conditioned that he will appear at the next term of the district court of such county to answer such complaint, and not depart without leave, and abide the judgment and orders of such court; and, if the defendant fail to enter into such recognizance, the justice shall commit him to jail until he be discharged by due course of law."

"Sec. 9 Upon any continuance granted either party, the court or justice granting the same shall require the defendant to enter into recognizance for his appearance at the time to which the cause may be continued; and, in default of such recognizance, shall commit him to jail until he shall give such recognizance, or be discharged by due course of law."

"Sec. 13. Such court shall, on such finding or confession, render such judgment and make such order as may seem just for securing the maintenance and education to such child, by the annual payment to the mother, or, if she be dead, or an improper person to receive the same, to such other person as the court may direct, and of such sum or sums of money as the court may order, payable at such time or times as may be adjudged proper. The judgment shall specify the terms of payment, and shall require of such defendant, if he be in custody, to secure the payment of such judgment by good and sufficient sureties; or, in default thereof, he shall be committed to jail until such security be given.

"Sec. 14. No person adjudged to be the father of a bastard child shall be imprisoned for any failure to comply with any order, direction, or judgment of the court of justice for a term exceeding one year."

This same act recognizes the hearing before the justice of the peace as a preliminary examination, and the hearing in the district court as the final trial of the case. Section 21 of the act mentions the hearing before the justice as a "preliminary examination."

The main question involved in this case is, what do the words "abide the judgment and orders of such court," as used in section 5 of the bastardy act, mean? Does the word "abide" mean pay or satisfy, or does it mean endure or suffer or acquiesce in, or something else? It is believed that the word "abide" never means pay or satisfy, while it does sometimes mean endure or suffer. And to construe the word to mean to pay or satisfy is to give the statute in which it is found a harsh and needlessly severe construction. It would compel a party to enter into a recognizance with sufficient sureties to pay or satisfy a judgment, if any should ever be rendered against him, or to go to jail and be imprisoned possibly for months before any trial could be had, and although he might be ever so innocent. No statute so harsh as this would be under such a construction can be found even among the criminal statutes of the state. Besides, if the legislature, when they used the word "abide," meant pay or satisfy, why did they not use one of these words? And, if it was intended that the words "abide the judgment and orders of such court" should mean that the recognizers should pay or satisfy the judgment and orders of such court, what is the use of section 9 of the act? Suppose that the recognizance prescribed by section 5 of the act is entered into by the defendant and his sureties, and the case taken to the district court, and there called for trial, and continued at the instance of either party, and another recognizance under section 9 is given; then, has the first recognizance spent its force? If it has, of course the defendant's sureties upon it will never be required to pay or satisfy any judgment that might be rendered in the case. But, if it has not spent its force, then, why require this second recognizance? Section 9 requires that a recognizance shall be entered into or the defendant committed to jail at every continuance, whether the continuance is obtained by the state or by the defendant.

The decision in the case of *Towns v. Hale*, 2 Gray, 199, 201, supports the theory that the word "abide," as used in the bastardy act, cannot mean more than a willingness and readiness to have the judgment of the court enforced against the defendant; that it cannot mean that the defendant or his sureties shall perform the final judgment or order of the court; but only that the defendant will attend the court so long as the action is pending; and, when the final judgment is rendered, that he will surrender himself to the court to give bond to perform such judgment, or to be committed to prison. See, also, as

tending to support this view, the cases of *Shaw v. Hatch*, 6 N. H. 162; *Marshall v. Reed*, 48 N. H. 36.

The cases of *Jackson v. State*, 30 Kan. 88, 1 Pac. Rep. 317, and *Hodge v. Hodgdon*, 8 Cush. 294, 297, are not in point. In those cases there was an unquestionable breach of the recognizance or bond. The defendant did not wait in court until the final judgment was rendered, and then surrender himself into the custody of the court to endure or suffer the consequences of such judgment. In each of these cases the defendant was absent when his presence was required. It is true, in both cases language is used which would go to the extent of saying that the recognizance or bond is not satisfied unless the judgment is paid; but what is thus said is at most only *dictum*. There was no necessity for saying any such thing under the facts of either case. The *dictum* in the case of *Hodge v. Hodgdon* was overruled by the supreme court of Massachusetts in the subsequent case of *Towns v. Hale*. The supreme court of Maine, however, seems to hold that the word "abide" in a statute similar to ours means pay, and that, when the final judgment is rendered, the defendant and his sureties commit a breach of their bond unless they pay or satisfy the judgment. *Taylor v. Hughes*, 3 Greenl. 433; *Corson v. Tuttle*, 19 Me. 409. These cases were decided prior to the case of *Towns v. Hale*, *supra*, in which last-mentioned case the prior cases were cited and disapproved. We like the views expressed by the supreme court of Massachusetts better than those expressed by the supreme court of Maine.

In our opinion, when a recognizance or bond is given in bastardy proceedings by the defendant and his sureties, under section 5 of the bastardy act, and final judgment is afterwards rendered against the defendant, adjudging him to be the father of the bastard child, and in securing the maintenance and education of the child, the judgment requires that the defendant shall make certain payments of money, and the defendant then voluntarily appears and surrenders himself into the custody of the court, and, as required by section 13 of the act, offers to secure the payment of such judgment by good and sufficient sureties, or, in default thereof, to be committed to jail until such security be given, and he continues ready and willing to perform the judgment in this manner, no breach of the recognizance or bond has taken place.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

CORDES v. STATE.

(Supreme Court of Kansas. July 9, 1887.)

1. INTOXICATING LIQUORS—VIOLATION OF LAW—LESSEE'S LIABILITY.

Where an action is brought, under section 18 of the prohibitory liquor law, against the owner of premises that have been leased to another to enforce a lien for the fine and costs which have been adjudged against the occupant for the unlawful sale of intoxicating liquors, it is not essential to a recovery that the petition or proof should show that the owner of the premises witnessed or had knowledge of the particular sales upon which the occupant was convicted. It is enough to allege and prove that the premises had been leased to the occupant, and that the owner had knowingly permitted the occupant to use the premises for the unlawful sale of intoxicating liquors during the time the sales were made upon which the convictions were had.

2. SAME.

In establishing the ownership of property against which the lien is sought to be enforced, a deed purporting to convey property to the defendants is admissible in evidence, where the description therein given of the property, taken in connection with well-known facts that are in testimony, fairly designates the property described in the petition. *Seaton v. Hizon*, 35 Kan. 663, 12 Pac. Rep. 22.

3. SAME.

An owner of leased premises can only be made liable, under this statutory provision, when he knowingly permits the occupant to use the premises for the unlaw-

ful sale of intoxicating liquors; but knowledge sufficient to excite the suspicions of a prudent man, and to put him upon inquiry, is equivalent to knowledge of the ultimate fact.

(*Syllabus by the Court.*)

Error from district court, Wabaunsee county.

A. H. Case, for plaintiff in error. *W. A. Doolittle*, for the State.

JOHNSTON, J. The prohibitory liquor law provides that all fines and costs assessed against persons for a violation of the law shall be a lien upon the real estate of such persons; and it also provides that if any person shall let or lease his building and premises, and knowingly suffer the same to be used and occupied for the sale of intoxicating liquor contrary to the provisions of the act, the premises so leased and occupied shall be subject to a lien for, and may be sold to pay, all fines and costs assessed against the occupant for any violation of the act; and that such lien may be enforced by civil action in any court having jurisdiction. Laws 1881, c. 128, § 18. The present action is brought in the name of the state, in pursuance of that provision, to enforce a lien against certain real estate owned by C. A. A. Cordes in Wabaunsee county. The allegations of the petition in substance were that one Joseph Westende was prosecuted upon an indictment containing seven counts, in which he was charged with having sold intoxicating liquor, in violation of the law, on certain days in 1884, "in a frame building at that time known and commonly called the 'Cottage Hotel,' now the 'Eskridge Hotel,' situated on lot 1, in block 8, in the town of Eskridge, sometimes called 'East Eskridge,' in Wilmington township, in Wabaunsee county, in the state of Kansas." It was averred that Westende pleaded guilty upon two counts of the indictment, and was adjudged to pay a fine of \$200, and the costs of the action taxed at \$47.65, and also that the fine and costs had not been paid. The further allegation was made "that C. A. A. Cordes, the defendant in this action, was, at the time of the commission of the offense charged in said indictment, and now is, the owner of the premises described in said indictment, and leased said premises to said Joseph Westende for the sale of intoxicating liquors, contrary to law." A general denial closed the issues, and a trial before a jury resulted in a verdict and judgment in favor of the state. Cordes presents several assignments of error, which must be determined against him.

The first objection was to the admission of any testimony under the petition, because it was not alleged that the defendant knowingly permitted the premises to be used by Westende for the sale of the liquors for which Westende pleaded guilty and was convicted; in other words, he insisted that the lien could not be enforced unless it was alleged and proved that Cordes had knowingly permitted the particular sales upon which the conviction of Westende was had. The question was raised again in the refusal of instructions embodying the same idea which were requested by the defendant in error. The position of the plaintiff in error is not tenable. Nothing in the statute requires such an interpretation; and to hold it necessary to allege and prove that the lessor knew of and acquiesced in the particular sales on which the conviction of the occupant rested, would practically defeat the object of the legislature in framing the provision, as such proof could rarely be made. If the theory of plaintiff in error is correct, a person who had purposely leased his premises for such unlawful use could avoid liability under the statute by simply absenting himself from the premises while the sales were being made. It involves the absurdity of the owner knowing that the occupant was engaged in the business of selling liquor unlawfully every day and to all who would buy, and yet escape liability because he did not chance to see or learn to whom the sales were made. It is enough to aver and show that the premises had been leased to the occupant, and that the lessor had knowingly permitted the occupant to use the premises for the unlawful sale of intoxicating

liquors during the time the sales were made upon which the convictions were had. Reading all the allegations of the petition together, they sufficiently show that Cordes knowingly permitted the premises to be used and occupied for the unlawful sale of intoxicating liquors during the time that the sales in question were made, and the proof shows that Westende only occupied the premises about two months prior to the eleventh day of December, 1884, and during that time Westende sold intoxicating liquors to Cordes, and to others in his presence.

Another objection was made to the admission in evidence of a certain deed, which was offered for the purpose of showing a conveyance of the premises in question to Cordes, and that he was the owner thereof. The objection was that the description of the premises given in the deed did not conform to that stated in the petition and indictment. In the deed the description was "Lot No. 1, in block 8, in the town of East Eskridge, Wabaunsee co., and state of Kansas." The description in the petition in this case, and in the indictment in the prosecution against Westende, was: "In a frame building at that time known and commonly called 'Cottage Hotel,' now the 'Eskridge Hotel,' situated on lot 1, in block 8, in the town of Eskridge, sometimes called 'East Eskridge,' in Wilmington township, in Wabaunsee county, and state of Kansas." It will be observed that in both the deed and the petition the lot is designated by the same numbers, and clearly designated as a portion of East Eskridge. It appears from the testimony that two town-sites have been platted in Wilmington township, Wabaunsee county, one as Eskridge and the other as East Eskridge. They lie together, and form one town, which is commonly called "Eskridge" by the people of the town and neighborhood. There are still other facts, which leave no doubt that the lot described in the deed is the same as that mentioned in the petition; and any one acquainted with these facts, and with the descriptions given, will have no difficulty in locating it. The hotel mentioned in the petition is well described, and it stands on lot 1, in block 8, in that part of the town called "East Eskridge," and there is no hotel of that name or description elsewhere in the town, or even in the township. Then, again, there is no lot 1, in block 8, in the town-site which was platted as Eskridge, and the only premises in the county of Wabaunsee to which the description given in the petition could and did apply was the lot described in the deed. Under this state of facts it is clear that both the descriptions fairly designate the same lot, and that the ruling of the court in admitting the deed in evidence was correct. *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. Rep. 22.

An exception was taken to the last clause of the following instruction which was given by the court: "I further instruct you that the defendant knowingly suffered the premises described in the petition to be occupied for the sale of intoxicating liquor may be shown either by positive proof or circumstantial evidence, or by both; and, in determining this question, you may take into consideration all the circumstances which have been proven to exist, tending to show that the defendant actually had some knowledge that intoxicating liquor was being sold on the premises prior to the time already indicated; and *I further instruct you that, under the circumstances of this case, knowledge sufficient to excite the suspicions of a prudent man, and to put him upon inquiry, would be equivalent to knowledge of the ultimate fact.*" This is a correct statement of the law, and under the pleadings and evidence it was applicable to the present case.

We find no error in the record, and will affirm the judgment of the district court.

(All the justices concurring.)

RATTS v. SHEPHERD and others, Partners, etc.

(Supreme Court of Kansas. July 9, 1887.)

PRINCIPAL AND AGENT—SALE OF REALTY—COMMISSIONS.

Where a real-estate agent advertises land, calls the attention of a purchaser to it, directs him to the home of the owner, with a description of the premises, and the owner completes the sale at a less price than the agent was authorized to sell for, the agent can recover his commission on the amount received by owner. This case distinguished from *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. Rep. 316.¹

(Syllabus by Simpson, C.)

Error from district court, Chase county.

Action in the district court of Chase county, commenced in 1885 by defendant in error against the plaintiff in error, to recover the sum of \$300, commission as real-estate agents, for the sale of a farm, containing 837 acres, for the plaintiff in error. The answer was a general denial. The case was tried to a jury at the December term, 1885, and resulted in a verdict for the defendants in error for the sum of \$283 and costs. Motion for a new trial filed, argued, and overruled. The assignment of error here insisted upon by the plaintiff in error in his brief are that there is not sufficient evidence to sustain the verdict, and that the court erred in giving instruction No. 10.

Peyton, Sanders & Peyton and *C. H. Carswell*, for plaintiff in error.
Kellogg & Sedgwick, for defendants in error

SIMPSON, C. The assignment of error to which most of the brief of the plaintiff in error is devoted is that there is not sufficient evidence to sustain the verdict of the jury. The facts, as proven at the trial, are as follows: The defendants were in the real-estate agency business at Emporia. The plaintiff in error was a resident of Chase county and possessed a farm that he desired to sell. In December, 1884, he placed this land in the hands of the defendants in error for sale, at \$10,500, and was to pay 3 per cent. commission in the event they sold it for him. They advertised the land in a newspaper; called the attention of the purchaser, Morris, to it; offered to take him to see the premises; directed him to the house of the plaintiff in error; and gave him a copy of the paper containing a description of it. The plaintiff in error sold the land to Morris for the sum of \$9,500, and included in the sale some corn, plows, and feed. The disputed question of fact on the trial, and around that clustered all the contention, was whether Ratts limited the time within which the sale was to be made to the first day of March, 1885; and there was also a dispute as to the commission that was to be paid, the plaintiff in error contending that he was to receive the sum of \$10,500 exclusive of all commission.

The evidence was confined to the parties on these questions, and the jury very properly, as it seems to us, in view of all the facts, decided that the statements by the defendants in error gave the true history of the transaction, and returned a verdict in their favor.

That verdict is sufficiently supported by the evidence. The defendants in error furnished a purchaser, and sent him to view the land. This resulted in a sale, and is sufficient to entitle them to a commission. As to the other assignment of error, with reference to the tenth instruction, it may be remarked that the verdict of the jury, sustained by sufficient evidence, as we have seen, necessarily determines that there was not a limit of time within which the sale was to be made as claimed by the plaintiff in error, and, this being so, this case does not come within the rule as laid down by *Fultz v. Wimer*, 34 Kan. 576, 9 Pac. Rep. 316. In the *Fultz Case* there was a written

¹Respecting the right of real-estate brokers, and when their commissions are earned, see *Jarvis v. Schaefer*, (N. Y.) 11 N. E. Rep. 634; *Robinson v. Kindley*, (Kan.) 12 Pac. Rep. 587.

contract authorizing a sale to be made within two months from the eighteenth of June, and further providing that if the owner or others should make a sale within that time a commission should be paid the real-estate agent. Within that time Fultz took a purchaser to see the land, and made a contract of sale with him satisfactory to the owner. The sale was negotiated within the time, and the agent applied for and received an extension of ten days within which to complete it. Then a further extension was asked and refused. An agent of the purchaser and the owner made a subsequent contract of sale, and Fultz sued for his commission, and this court decided that, under the terms of the special contract, he could not recover.

This is not a parallel case. Here the jury found that there was no special contract as to the time within which the sale was to be made, and hence the rule in the *Fultz Case* can have no application. There is another very material difference in the circumstances of these cases. In the *Fultz Case* the agent not only found the purchaser, but made the contract, and was personally supervising the details of the purchase. All the owner was doing was to acquiesce in the acts of the agent, and granting a reasonable extension of time for the completion of the contract. In this case the owner was conducting the details of the sale, and from the indefinite account of the time at which the sale was made, given both by the seller and the purchaser at the trial, it would seem as if the delay in closing the sale was caused by the negligence or fault of Ratts, who no doubt acted with the idea that if the sale was not consummated by the first day of March the commission due the defendants in error would not have to be paid. Even in such a contract as that of *Fultz v. Wimer* it is expressly declared by the court that where a purchaser is found within the time specified, but delay in closing the sale is caused by the negligence, fault, or fraud of the seller, the agent who finds the purchaser is entitled to the commission. Construing the tenth instruction with reference to the particular facts in the case, we see no error in giving it to the jury, nor do we discover any disagreement between the rule laid down in that instruction and the decision in the case of *Fultz v. Wimer*. They must both be read and construed in the light of the facts and attending circumstances of the cases in which they are used.

In this case we think the evidence warrants the inference that the delay by Ratts in losing the sale to Morris resulted from his belief that, by a postponement of its completion until after the first of March, he could escape the payment of a commission to his agents. Indeed, a fair construction of the testimony strongly leads to the belief that the sale had been completed, and part possession of the farm yielded to Morris, at the time of Bucher's visit there on or about the twenty-second day of February. The verdict of the jury is clearly right, and the seventh and tenth instructions taken together, and considered with reference to the facts proven on the trial, are, to say the least, not misleading, or so prejudicial as to be erroneous.

It is recommended that the judgment be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

MITCHELL v. ATEN.

(*Supreme Court of Kansas. July 9, 1887.*)

1. JUDGMENT—DEFAULT.

After constructive service is had upon the defendant, in accordance with the provisions of the statute, the fact that he is not given all the time allowed by the notice to plead to the action does not render the judgment taken by default against him void. A judgment thus rendered is irregular only.

2. MORTGAGE—RECORDING—PRIORITY.

Where a mortgage and deed were executed by the same grantor, upon the same day, and upon the same premises, to different parties, and the mortgage made no

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reference to the deed, nor the deed to the mortgage, and the agent of the party taking the mortgage was guilty of negligence or bad faith in not recording the same until after the deed was filed for record, such agent cannot, by purchasing from the grantee of the deed, be considered an innocent and *bona fide* purchaser, because the priority of the record of the deed is founded upon his own negligence or wrong, and in taking title under the deed he takes the land subject to the rights of the mortgagee for whom he acted as agent in taking and recording the mortgage.

(Syllabus by the Court.)

Error from district court, Osage county.

A. J. Utley, for plaintiff in error. J. W. Lord and Wm. Thomson, for defendant in error.

HORTON, C. J. The facts in this case are substantially as follows: On November 23, 1858, William J. Turner was the owner of the real estate in controversy. Upon that day he executed a mortgage upon the real estate to Henry Aten to secure the payment of \$200, which mortgage was recorded on December 2, 1858. Upon the same day he conveyed to John N. Jefferson the real estate by warranty deed, which was recorded November 29, 1858. Henry Aten assigned his mortgage to C. M. Aten, who brought an action to foreclose the same, and recovered judgment thereon, October 13, 1863. In that action William J. Turner and Henry Aten were made defendants. Under a sale upon the foreclosure of the mortgage C. M. Aten obtained a sheriff's deed to the real estate, on December 12, 1863. David T. Mitchell obtained a warranty deed of the real estate from John N. Jefferson on March 28, 1884. C. M. Aten filed his petition against David T. Mitchell for the purpose of quieting title in himself to said real estate. Upon the trial the court rendered judgment for the plaintiff, as prayed for. Mitchell excepted, and brings the case here. The foreclosure proceedings in the action of C. M. Aten against William J. Turner *et al.* were received in evidence, without objection. After the argument of the case the plaintiff moved to strike from the evidence this record, for the reason that it was not signed by the district judge. This motion was sustained, and this ruling is complained of. The record was offered by Mitchell to prove that the judgment of foreclosure under which Aten claimed title was absolutely void. This, upon the ground that the judgment was taken by default, on October 13, 1862, when defendants had 20 days after October 25, 1862, in which to appear and answer.

It is not necessary for us to pass upon the question whether the district court erred in refusing to consider as evidence the record of the foreclosure case of *Aten v. Turner et al.* Turner was notified by publication to appear and answer the petition on or before 20 days after October 25, 1862. The service of publication was completed prior to October 13th, the date of the judgment. Judgment was not rendered, therefore, until several days after service. Jurisdiction having been obtained, the fact that the judgment was rendered sooner than it should have been does not make the judgment void. A judgment thus rendered is irregular only. It might have been set aside by motion, or upon proceedings in error, but the judgment is not vulnerable to a collateral attack. Section 569, Code; Freem. Judgm. §§ 119, 126, 135; *Town of Lyons v. Cooledge*, 89 Ill. 529.

The next complaint is that the findings of fact of the trial court do not support the conclusions of law. It is said that as the mortgage and the deed were both executed and acknowledged November 23, 1858, and as there is no reference in the mortgage to the deed, or in the deed to the mortgage, it must be presumed, in the absence of proof to the contrary, that the grantees acted in good faith, and as it appears that the deed was recorded November 28, 1858, and the mortgage December 2, 1858, the prior record of the deed to Jefferson gave him the superior equity, and, therefore, that the mortgage never had any validity as to Jefferson, or to Mitchell claiming under him. If we were to presume that the mortgage and deed were delivered at the same time, it

would necessarily follow that the grantees knew of the existence of the two instruments, and it would be a natural conclusion to say that Turner gave the mortgage first, and then sold the land to Jefferson with the understanding that he should pay the mortgage, as his warranty would oblige him to do. This view would be in favor of holding that Turner acted in good faith to all parties. But aside from this, the finding of the trial court that Mitchell was the agent of Aten in taking the mortgage from Turner, November 23, 1858, and was also his agent in recording the same, fully sustains the judgment rendered. The statute relating to the filing and recording of conveyances of real estate protects no one but innocent and *bona fide* purchasers and holders. If it be true that Jefferson had the superior equity on account of the priority of the record of his deed, he obtained this equity by the negligence or bad faith of Mitchell. It was the duty of Mitchell, as the agent of Aten, to have filed for record the mortgage within a reasonable time after it came into his possession. If Mitchell had done this, the mortgage would have been recorded within a day or two after November 23, 1858. It was not recorded, through the fault of Mitchell, until December 2, 1858, three days after the deed was of record. Mitchell cannot be permitted in a court of equity to profit by his own wrong against his principal. It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.

We are not passing upon the rights or equities of Jefferson, therefore it is immaterial whether he had the superior equity in the real estate or not. Mitchell, although he derived his title from Jefferson, cannot be protected by the priority of the record because such priority is founded upon his own negligence or wrong. He should suffer for this negligence or bad faith, and not his principal.

The judgment of the district court will be affirmed
(All the justices concurring.)

CITY OF WINFIELD v. WINFIELD GAS CO.

(Supreme Court of Kansas. July 9, 1887.)

MUNICIPAL CORPORATIONS—CONTRACTS—GAS COMPANIES.

Where a lighting company contracts with a city for the lighting of the streets of the city at a stipulated sum for each lamp per year, and to keep all lamps lighted every night in the year, except when the moon gives sufficient light, and a proviso is added thereto which provides that the city shall not be liable for rent for any lamp for any night when lamps are not lighted, *held*, that full force and effect must be given to the entire contract, including the proviso, and the city is not liable for rent of lamps on moonlight nights, when lamps are not lighted.

(Syllabus by Clogston, C.)

Error from district court, Cowley county.

Jos. O'Hare and W. T. Madden, for plaintiff in error. J. F. McMullen, for defendant in error.

CLOGSTON, C. The defendant in error brought an action against the city of Winfield to recover for rent of 60 lamp-posts alleged to have been rented by said plaintiff to said defendant at the yearly rental of \$30 per lamp-post. The contract under which plaintiff claimed was embraced in an ordinance passed by the said city, a copy of which was attached to and made a part of plaintiff's petition. To the petition so filed by the plaintiff the defendant demurred, on the ground that plaintiff's petition did not state a cause of action against said defendant; which demurrer came on to be heard, and was overruled by the court; and the ruling on this demurrer is the sole and only question in the case.

The record contains a stipulation that the only question for consideration in the court below was the construction to be given to section 1 of the ordi-

nance attached to the plaintiff's petition; and if the court construed the ordinance so as to make the city liable, as claimed by the plaintiff, then the demurrer to be overruled; but if the court construed the ordinance so as not to make the city liable for rent on any night that the moon gave sufficient light, then the demurrer to be sustained. Said section 1 is as follows:

"Section 1. That in consideration of the benefit that will accrue to the city of Winfield by the construction of gas-works, the laying of pipes, and the lighting of the streets, public buildings, and places of said city, the city of Winfield hereby agrees to rent, and does rent, from William Whiting, his heirs, executors, and assigns, for and during the term of twenty-one (21) years, sixty (60) lamp-posts, at an annual rental of thirty dollars for each lamp-post, payable in semi-annual installments, on the fifteenth day of January and the fifteenth day of July in each year, said rental to commence as follows: As to the posts on Main street, when the posts there contracted for shall be furnished with gas and ready for lighting; as to the balance, whenever a number of ten or more is ready for lighting, and the city notified of the same in writing; and for said rental said William Whiting, his heirs, successors, and assigns shall supply the necessary gas for said lamp-posts, and shall furnish a good gas-light, and shall at his and their own charge attend to the proper lighting and extinguishing the lights; said lights to be kept burning during the entire year, from dark until 11:30 (eleven-thirty) P. M., except when the moon shall furnish sufficient light; provided, the city shall not be liable to pay rent for any lamp-post during any time light shall not be furnished by the same."

The plaintiff claimed that under this ordinance it was entitled to receive \$30 per year for whatever time it became necessary to have the lamps lighted, and that the contract was made with this understanding; while it is contended by the defendant, on the other hand, that by the proviso to said ordinance they were not to be liable to pay rent except during the nights in which the lamps were lighted.

The ordinance contains all the necessary elements upon which the plaintiff bases its claim, and is in harmony and consistent with their construction; and, were it not for the proviso added to it, their claim would be tenable. But if it had been the intention of the parties to pay \$30 a year rent for each lamp-post, and to take no account of the nights in which the moon gave sufficient light, and the lamps by reason of said moonlight were not lighted, then why add the proviso? In construing contracts the rule is, and ought to be, that full force and effect will be given to each and all provisions of a contract, if the same can be done; and if, under any theory of the case consistent with the entire contract, force and effect can be given to all its parts, that construction ought to be adopted; unless, on the other hand, by giving force and effect to the entire contract, the contract thereby becomes unreasonable and inconsistent with the nature and character of the matters under consideration, or in the minds of the parties at the time the contract was made, and then such construction must be given it as will most clearly carry out the express intention of the parties making the contract.

Now, to give this contract or ordinance the construction that plaintiff seeks for it would be to entirely eliminate this proviso from the ordinance, because the ordinance would contain every element contended for by the defendant in error without it; while upon the other hand, if you give the entire ordinance, including the proviso, force and effect, you have adopted the construction claimed by the defendant, plaintiff in error; and this is also seemingly consistent with the nature and character of the business about which they were contracting. The city was renting lamps for public lighting. They were contracting for light. Now, what would be more reasonable than for them to add this proviso: that they were to pay for lights only when the lights would be a benefit to the city.

The ordinance provides that the lighting company are to keep the lamps lighted during every night in the year, from dark until 11:30 P. M., except such nights as the moon gave sufficient light. It became the duty of the plaintiff, by the terms of this contract, to light and extinguish the lamps. This would seem to give them the right to determine what nights the moon gave sufficient light, and what nights it was necessary to light the lamps. There would be no way of ascertaining or determining beforehand how many nights it would be necessary to have the lamps lighted. The contract does not provide that the lamps shall not be lighted on moonlight nights, but only on such nights as the moon does not give sufficient light. In view of this, the city made a proviso, not knowing how many nights the lamps would be lighted, or necessary to be lighted. They placed this proviso at the end of the contract as a wise protection; and this court cannot say that this proviso, as a part of the contract, was placed there to have no effect or meaning.

It is therefore recommended that the case be reversed, and the court below be directed to sustain the demurrer.

By THE COURT. It is so ordered; all the justices concurring.

UNION PAC. RY. CO. v. DUNDEN.

(Supreme Court of Kansas. July 9, 1887.)

1. EXECUTORS AND ADMINISTRATORS—GRANTING OF LETTER.

In an action brought by the personal representative of a deceased minor against a railway company to recover damages for the death of the intestate, an issue of fact was presented by the pleadings as to whether the letters of administration were properly granted upon the estate of the minor; it being claimed by the company that there was no estate to be administered. The records and findings of the probate court introduced in evidence made a *prima facie* case, showing that the minor died, leaving, among other things, "an estate of personal articles." The evidence of the father of the minor was introduced, which tended to prove that his child died without leaving any estate. *Held*, that the evidence of the father, as against the general finding of the jury, was not conclusive. And *held, further*, that it cannot be said as a matter of law, upon the record presented in this case, and against the general finding of the jury, that the letters of administration were granted without jurisdiction.

2. NEGLIGENCE—ACTION FOR WRONGFUL DEATH—DAMAGES.

In an action by the personal representative of a deceased minor to recover damages for the death of the intestate, it is within the province of the jury to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. In such a case the jury may estimate the pecuniary damages from the facts proved, in connection with their own knowledge and experience which they are supposed to possess in common with the generality of mankind, and it is not necessary that any witness should have expressed an opinion of the amount of such pecuniary loss. And *held*, as applied to this case, the instruction that the jury could use their common knowledge in assessing the damages, without evidence as to the amount thereof, was not erroneous or misleading.

3. SAME.

In an action to recover damages for the death of a minor, caused by the wrongful act or omission of another, the trial court commits no material error in refusing to require the jury to itemize, in separate or specific amounts, the value of the probable future services of the intestate to his next of kin.

4. SAME.

Where the plaintiff recovers a judgment for \$3,000 as the personal representative of a deceased minor, who, at the time of his death, was eleven years and eight months old, and was also intelligent, healthy, and promising, and left surviving him a father, who was a poor man, working as an engineer of steam machinery, and having a wife and three children, *held* not so grossly excessive as to require this court to reverse the judgment therefor.

5. SAME—CONTRIBUTORY NEGLIGENCE.

Although a minor, killed while playing upon a turn-table of a railway company, had sufficient intelligence to know that it was wrong to trespass upon the turn-table, yet, if he had no knowledge that playing upon the table was unsafe or dangerous, it cannot be said that he was guilty of contributory negligence.

(Syllabus by the Court.)

Error from district court, Leavenworth county.

J. P. Usher, A. L. Williams, and Charles Monroe, for plaintiff in error.
L. B. & S. E. Wheat, for defendant in error.

HORTON, C. J. Upon the general statement in this case the facts are as follows: William Dunden, Jr., was injured on August 16, 1884, on a turn-table located upon the grounds of the Fort Leavenworth military reservation, while playing with other children. From the injuries received he died the next day. At the time of his death he was eleven years and eight months old. Prior to his injuries he was intelligent, healthy, and promising. His father, William Dunden, lived at the time in Leavenworth city, and was not in the best of health. He was a poor man, not owning the house in which he lived. His occupation was that of an engineer of steam-machinery, and he received as wages for his services from seven to eight hundred dollars a year. After the death of his son, his family, other than himself, consisted of his wife and three children; the oldest being 16 years of age, and the youngest a year old. The father, as administrator, brought this action against the Union Pacific Railway Company to recover damages for the death of his son. In the petition it is alleged that the death occurred by reason of the negligence of the railway company in leaving the turn-table unlocked and unguarded. Judgment was rendered against the railway company for \$3,000, and that company now seeks to have the judgment reversed.

It is claimed that the probate court of Leavenworth county had no jurisdiction to issue letters of administration to William Dunden, upon the ground that his son left no estate. The authority for granting letters of administration is found in section 1 of chapter 37 of the Compiled Laws of 1885, which reads: "That, upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death."

The contention is that there is no provision in the statute for administration, either in the case of a resident or a non-resident, unless there is an estate to be administered. *Perry v. Railroad Co.*, 29 Kan. 420. Whether the rule announced in the foregoing case applies to the issuance of letters of administration upon the decease of an inhabitant of this state, we need not now decide. Letters of administration may be granted upon the estate of a minor, as well as upon the estate of any other person. To the claim that William Dunden left no estate the answer is that the records of the probate court of Leavenworth county made a *prima facie* showing of jurisdiction to issue the letters of administration. On February 7, 1885, William Dunden made an affidavit before the probate judge that his son William Dunden, Jr., died, leaving, among other things, "an estate of personal articles." The letters of administration recite "that William Dunden, late of the county of Leavenworth, an inhabitant of said county, died intestate, having at the time of his death property in this state which may be lost, destroyed, or diminished in value if speedy care be not taken of the same." The administrator gave bond, with two sufficient sureties, in the sum of \$200, as prescribed by the statute. The administrator also made an affidavit before the probate judge "that he would make a true and perfect inventory of and faithfully administer all the estate of the said deceased, and pay the debts as far as the assets would extend, and account for all assets which should come to his possession or knowledge." The records of the probate court were read to the jury. The only evidence offered to contradict or rebut the *prima facie* case made was in the cross-examination of the father of the deceased, who testified, among other things, that his son, at the time of his death, had "nothing other than some little change; that what he had in the way of personal effects and clothing he had provided him with; that he had worked at one time for a canning fac-

tory, and earned a little money; that he did not know how much of this he had, as that was a matter between the boy and his mother; that, when he earned money, he gave it to his mother; that, while working for the canning factory, he received twenty-five cents a day." Admitting that the evidence of the father was contradictory to and conflicting with the findings and records of the probate court, yet it was not conclusive. The personal representative, in cases like this, brings the action, not for himself nor in the right of the estate, but as trustee for the distributees, the next of kin. The jury had the right to pass upon the facts in issue; and, as was said in *Wheeler v. Railroad Co.*, 31 Kan. 640, 3 Pac. Rep. 297: "We cannot say, from the facts as found by the jury, that the letters of administration, issued to the plaintiff in error, ought to be revoked."

It is next claimed that the trial court erred in instructing the jury that, if they found for the plaintiff, they could use their common knowledge in assessing his damages, without evidence as to the amount thereof. The language of the instruction may, perhaps, be criticised; but the instruction, as applied to this case, was neither erroneous, nor misleading. In such a case as this the jury may estimate the pecuniary damages from the facts proved, in connection with their own common knowledge and experience in relation to matters of common observation. It is not absolutely necessary that any witness should have expressed an opinion of the amount of the pecuniary loss. Damages are to be assessed by the jury with reference to the pecuniary injury sustained by the next of kin in consequence of such death. This is not the actual present loss only which the death produces, and which could be proved, but prospective losses also. How this pecuniary damage is to be measured, or what shall be the amount, must be left largely to the discretion of the jury. The court undoubtedly intended by the instruction to inform the jury, and they must have so understood, that, if they found for the plaintiff, they could use their common knowledge in assessing his damages, without direct evidence of the specific pecuniary loss. The jury had presented to them evidence of the parents of the deceased, their position in life, the occupation of the father, the condition of his health, the age of his son, his intelligence, his ability to earn money, etc.; and it was their province, from this evidence and their general knowledge, to form an estimate of the damages with reference to the pecuniary injuries, present and prospective, resulting to the next of kin. It is impracticable to furnish direct evidence of the specific loss occasioned by the death of a child; and to hold that, without such positive proof, a plaintiff could not succeed, would, in effect, defeat any substantial recovery. *Ihl v. Railroad Co.*, 47 N. Y. 317; *City of Chicago v. Scholten*, 75 Ill. 469; *Railroad Co. v. Barker*, 39 Ark. 491, and cases cited; *Nagel v. Railway Co.*, 75 Mo. 653; *City of Chicago v. Hesing*, 83 Ill. 204; *Railroad Co. v. Richards*, 8 Kan. 101.

In the case of *Waite v. Teeters*, ante, 146, (recently decided,) the instruction that the jury might use their own knowledge in determining the value of the corn was held to be misleading; but in that case proof could easily have been offered of the value of the corn standing in the field, although it was distant from the railroad and market.

In *Railroad Co. v. Brown*, 26 Kan. 443, referred to as controlling this case, the deceased was 25 years of age, with a widowed mother and a sister who lived off the property they owned. In that case the testimony showed that the deceased had been worth nothing to his mother up to the time of his death, and it was well said "that, judging the future by the past, the life of the deceased was one which would have been of little value." In that case the deceased had lived long enough to establish that there could be no reasonable expectation of pecuniary advantage to the mother from his life.

In *Railroad Co. v. Weber*, 33 Kan. 543, 6 Pac. Rep. 877, also referred to as an authority, the jury found specially that the deceased was in the habit of

drinking intoxicating liquors to excess for years before his death, and that his life was of no pecuniary value to his next of kin. In such a case, clearly nothing but nominal damages could be recovered. In that case the principal contention was that, as no actual damage or pecuniary loss was sustained by the next of kin, not even nominal damages could be recovered.

It is next claimed that the trial court erred in refusing to require the jury to answer certain special questions. All of the questions which the railway company desired to submit, with one exception, were inquiries as to how much a year the deceased would have contributed to the support of his father if he had lived, and the items thereof. In refusing to submit these questions, we think there was no material error. Much that has already been said concerning the damages to be assessed by the jury in such a case as this applies with peculiar force to the questions proposed. As the jury may compensate for present and prospective pecuniary injuries, and as the amount of these injuries must be left largely to their discretion, it would be impossible, with any reasonable accuracy, to have answered the questions. The value of the probable future services of the deceased to his next of kin during his minority must, in the nature of things, have been largely a matter of conjecture. It would be impossible to itemize the value of such probable future services.

"In the very nature of things, it seems to us an exact and uniform rule for measuring the value of the life taken away to the survivors, is impossible. The elements which go to make up the value are personal to each case. All that can well be done is to say that the jury may take into consideration all the matters which go to make the life taken away of pecuniary value to the survivors, and, limited by the amount named in the statute, award compensation therefor. To go beyond this, and lay down an arbitrary rule for valuing the life of the deceased,—a rule applicable to all cases alike,—however satisfactory it might be because of its uniformity, would in many instances operate to defeat the accomplishment of the wholesome purposes sought by this act. It was well said by Mr. Justice NELSON in the case of *Railroad Co. v. Barron*, 5 Wall. 90, that 'the damages must depend very much on the good sense and sound judgment of the jury upon all the facts and circumstances of the particular case.'" *Railway Co. v. Cutter*, 19 Kan. 83.

As to the question whether the deceased knew it was wrong to play upon the turn-table, an answer either way would not have affected the case. He might have known that it was wrong to trespass upon the property of the railway company, and yet have had no knowledge that the use of the turn-table was dangerous or even unsafe. If the company had presented the inquiry whether the deceased knew that it was dangerous or unsafe to play upon the turn-table, a wholly different question would be before us for determination.

Further complaint is made that the damages are grossly excessive. We cannot say that the judgment, as rendered, is so excessive as to require this court to reverse the judgment. In Illinois, where the action was for the death of a boy between six and seven years of age, a verdict for \$2,000 was sustained. *Railroad Co. v. Becker*, 84 Ill. 483. In Tennessee a verdict for \$3,000 for the death of an infant child 18 months old was sustained. *Railroad Co. v. Connor*, 9 Heisk. 20. In New York, where the deceased was between six and seven years of age, the jury awarded \$1,300 as damages for loss of probable future services, and the court refused to set aside the verdict as excessive. In that case there was no proof that the child was earning anything at the time she was killed. *Oldfield v. Railway Co.*, 3 E. D. Smith, 103. In another case in the same state, where the action was for the death of a boy eight years of age, a verdict of \$2,500 was rendered, and the supreme court would not interfere. *McGovern v. Railway Co.*, 67 N. Y. 417. In another case in the same state a girl of six was struck by a locomotive and killed. The jury awarded \$5,000 damages. The court was asked to set aside

the verdict as excessive, but declined to interfere, saying that, as a matter of law, it was impossible to say that the actual pecuniary injuries resulting from the death of the infant might not be that amount. 15 Cent. Law. J. 286.

The judgment of the district court will be affirmed.

(All the justices concurring.)

PATEE v. ADAMS.

(*Supreme Court of Kansas. July 9, 1887.*)

1. ANIMALS—TEXAS CATTLE—ACTION FOR DAMAGES.

In an action brought against a person who drives or causes to be driven into any county of this state any cattle having the disease known as Texas, splenic, or Spanish fever, to recover damages that arose from the communication of that disease from the cattle so driven, it is essential for the plaintiff to allege and prove that the defendant knew, or had reason to know, that the cattle so driven were diseased with the fever, or were liable to communicate the disease to the domestic cattle of the state.

2. SAME.

In such an action the contributory negligence of the plaintiff is a competent defense.

(*Syllabus by the Court.*)

Error from district court, Shawnee county.

M. E. Patee filed a petition in the district court, and alleged substantially that on the first day of June, 1884, she was the owner of 12 head of domestic cattle in the county of Riley, of the value of \$1,200, and that the defendant, N. A. Adams, on or about the day mentioned, unlawfully drove into the county of Riley 200 head of diseased Texas or southern cattle, being cattle from the country south of the state of Kansas; that the last-named cattle were diseased with Texas, splenic, and Spanish fever, and were driven or caused to be driven into said Riley county from outside the state by the defendant, between the first day of March, 1884, and the first day of November, 1884, and that, by reason of such driving and the holding of said cattle in Riley county by said defendant, Texas, splenic, and Spanish fever was communicated to 12 head of the plaintiff's domestic cattle, which caused said 12 head to become sick and die, and the plaintiff was thereby damaged in the sum of \$1,200. The defendant demurred to the petition because it did not state that the defendant knew or had reason to know that the cattle alleged to have been driven were diseased with the fever mentioned in the petition. The demurrer was sustained by the court, and the plaintiff excepted to the ruling thereon, and subsequently amended her petition by adding the allegation respecting the knowledge of the defendant which was held by the court to be necessary. The defendant then answered by a denial of all the averments of the petition; and alleged that, about the time stated in plaintiff's petition, he purchased and shipped to Manhattan, Kansas, several car-loads of cattle, a portion of which were discharged at Manhattan into the stock-yards of the Union Pacific Railway Company, and before they were all unloaded, but still in the possession of the railway company, the sheriff of Riley county seized the cattle, and took and forcibly held the possession of the cattle for a long period of time, during which time the defendant, Adams, had no authority or control over the cattle; that the sheriff established an inclosure near the Kansas river, and turned the cattle therein; that the inclosure was surrounded by a strong and durable fence provided with gates for gaining entrance thereto; and that the sheriff put the cattle under the authority of his deputy, who guarded the same day and night, and refused to permit the defendant, Adams, or any other person, to assume control over them, and that the plaintiff carelessly, unlawfully, and negligently opened the gates into the inclosure, and turned her domestic cattle therein; and, if any disease was contracted by said cattle, it was the result of her own carelessness and negligence. At the trial the court refused to in-

struct the jury that the defendant was liable regardless of whether he knew, or had reason to know, that the cattle which he had purchased and shipped were diseased.

Upon this question the court charged the jury as follows: "If you believe from the evidence the defendant, Adams, brought, or caused to be brought, into the county of Riley, state of Kansas, Texas cattle or cattle liable to communicate Texas, Spanish, or splenic fever to the domestic cattle of this state, and that said cattle came from the country south of this state, between the first day of March, 1884, and the first day of November, 1884, and said defendant knew or had reason to know, or could by ordinary diligence have known, that said cattle were diseased cattle, or were cattle liable to communicate Texas, Spanish, or splenic fever to the domestic cattle of this state, or if the defendant knew, or could with ordinary diligence have known, that such cattle were diseased with such disease, and were liable to communicate it to the domestic cattle of this state, and such cattle so brought, or caused to be brought, into said Riley county, communicated such disease to the domestic cattle of the plaintiff, and thereby plaintiff's cattle died, you will find for the plaintiff, and the value of such cattle as she lost as shown by the evidence."

In another instruction the court said: "If you find from the evidence that the defendant, Adams, purchased the cattle described in the petition in good faith in Kansas City, this state, without any knowledge that said cattle were infected with Texas, splenic, or Spanish fever, and that he had no reason to know or believe that such cattle could or would communicate to the cattle of this state Texas, splenic, or Spanish fever, and that he did not know or have reason to believe or know that such cattle would or could communicate the said Texas, splenic, or Spanish fever to the cattle of this state, till they arrived at Manhattan, Riley county, and that the sheriff immediately seized said cattle by virtue of a process issued by WILDER, a justice of the peace, and before the plaintiff's cattle had been exposed, and were by the sheriff placed in quarantine, and the defendant, Adams, was deprived of any control over said cattle, and that during the time the said cattle were quarantined by the said sheriff, and the defendant deprived of the control of said cattle, the plaintiff's cattle took said disease by going upon said quarantined grounds, either while defendant's cattle were there in the custody of the sheriff or his deputy, or after they were removed therefrom, then the plaintiff cannot recover in the action."

The court also advised the jury that if the plaintiff opened the gates and turned her cattle into the inclosure where the diseased cattle were being held, as described in the answer, that she would be guilty of contributory negligence, and could not recover. The plaintiff excepted to the rulings of the court upon the instructions refused and given, and, the verdict and judgment being in favor of the defendant, the plaintiff brings the case to the supreme court for review.

A. H. Case and Chas. Curtis, for plaintiff in error. *J. B. Johnson, J. D. McFarland, and Green & Hessin*, for defendant in error.

JOHNSTON, J. There are really but two points in controversy between the parties in this case. One is whether a person who purchases or otherwise obtains cattle that are diseased with Texas, splenic, or Spanish fever, and who drives or causes them to be driven through any county of the state, shall be held liable for all damages that may arise by the communication of disease from the cattle so driven, without regard to whether he knew or should have known that the cattle were diseased, or liable to communicate disease to the domestic cattle of the state. The other point involved is whether the doctrine of contributory negligence is applicable to an action like the present one. The action was brought under the legislation enacted for the protection of cattle against contagious diseases. Laws 1881, c. 161; Laws 1884, c. 3. The act of

1881, in section 1, provides "that no person or persons shall drive or cause to be driven, into or through any county in this state, any cattle diseased with the disease known as Texas, splenic, or Spanish fever. Any person violating any provision of this act shall, on conviction, be adjudged guilty of a misdemeanor, and shall be fined not less than one hundred and not more than one thousand dollars, and be imprisoned in the county jail not less than thirty days, and not more than one year." The act then provides how such cattle, or the cattle of any person violating the act, shall be restrained and disposed of. In the sixth section it is provided that, in the trial of persons charged with a violation of the act, proof that the cattle driven are wild, and of undomesticated habits, shall be taken as *prima facie* evidence that the cattle are diseased with the fever. Section 7 of the act is as follows: "Any person or persons who shall drive or cause to be driven, into or through any county in this state, any of the cattle mentioned in section one of this act, in violation of this act, shall be liable to the party injured for all damages that may arise from the communication of disease from the cattle so driven, to be recovered in civil action, and the party so injured shall have a lien upon the cattle so driven." The act of 1884 is substantially the same as the act of 1881, so far as the civil liability provided for is concerned. It sets apart a portion of the state as quarantine ground, upon which Texas cattle, or cattle liable to communicate Texas, splenic, or Spanish fever, might be permitted to range under the care of keepers; makes it a misdemeanor for any person to allow Texas cattle to go upon any grounds outside of the quarantine grounds, with penalties similar to those imposed by the act of 1881; and further provides that such person "shall be held liable for all damages that may be done by said cattle either by communicating disease, or in any other manner, and the person or persons so injured shall have a lien on the cattle so doing the damage." In construing the acts upon which the alleged liability is founded, we are not aided by testimony of the nature of the disease, and of the peculiarities of the cattle against which this legislation is directed, as the record contains none of the evidence. We are of opinion, however, that the court took the correct view of the statutes in holding that no recovery could be had against the defendant where he acted in good faith, unless he had knowledge, or such facts existed as made him chargeable with knowledge, that the cattle were diseased, or of a kind liable to communicate the disease to the domestic cattle of the state. The statute does not in terms dispense with the necessity of averring and proving the knowledge of the defendant. The theory of the statute is that the liability arises upon the negligence of the party who drives or causes to be driven the cattle that communicate the fever; and how can negligence be attributed to those who go into a market in the state, and purchase such cattle, when they have no notice, and no facts exist by which they would be chargeable with notice, that the cattle had the fever or were liable to communicate it? The rule of the common law in such cases is that knowledge is indispensably necessary to a recovery. *Wade, Notice*, (2d Ed.) 271; *Chit. Pl.* 69; *Vrooman v. Lawyer*, 13 Johns. 339; *Dearth v. Baker*, 22 Wis. 73; *Lyke v. Van Lewen*, 4 Denio, 127.

In construing statutes, it is well to keep in mind the rules of the common law, and in respect to this it has been well said that "statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is *specified*, and besides what has been plainly pronounced." *Dwar. St.* 185. Doubtless, the legislature has the authority to dispense with the necessity of alleging and proving knowledge; but before a party who is without fault, or without knowledge that his cattle can cause injury, can be held liable, the legislative design to create such liability should be "plainly pronounced."

An example of how slow the courts are to extend this rule is shown by a decision given in Wisconsin. In 1866 the legislature of that state provided that "the owner or keeper of any dog or dogs which shall have wounded, maimed, or killed any cattle, horses, sheep, or lambs, or injured any persons, shall be liable to the owner or legal possessor of such cattle, horses, sheep, or lambs, or to the person injured, in all damages so done by said dog or dogs, without proving notice to the owner or keeper of such dogs, or knowledge by him that his dog was mischievous or disposed to kill or worry sheep." Notwithstanding the general terms used in that statute in stating that for injuries done by dogs to persons or to cattle, horses, sheep, or lambs, the owner should be held liable without notice, the supreme court, in an action brought under the statute for injury done to a person, remarked that it was strongly inclined to the opinion that the necessity of proving a *scienter* was still necessary in all actions except for killing or worrying sheep. *Kertschacke v. Ludwig*, 28 Wis. 430. See, also, *Auchmuty v. Ham*, 1 Denio, 495.

Then again, it seems to us that a subsequent statute on this subject shows that it was never intended by the legislature to dispense with proof of knowledge in these cases. The legislation on this subject is for the protection of domestic cattle of the state, and nearly all of the provisions made are very strongly in the interest of the owners of such cattle. Those who bring in diseased cattle, or cattle liable to communicate the fever, are made both criminally and civilly liable. To render the law easy of enforcement against such persons, it is provided that, in any trial under the act, proof that the cattle are wild and of undomesticated habits is *prima facie* evidence that they are diseased. Then, in 1885, the legislature, to still further relieve the plaintiff from the burdens imposed by the general rules of law, provided that, where the cattle which communicated the disease were brought into the state from south of the thirty-seventh parallel of north latitude, "it shall be taken as *prima facie* evidence that such cattle were capable of communicating and liable to impart Texas, splenic, and Spanish fever, within the meaning of the act, and that the owner or owners or the person in charge of such cattle had full knowledge and notice thereof at the time of the commission of the alleged offense." Laws 1885, c. 191, § 5. By this provision the legislature recognized that proof of knowledge was and is necessary. It modified the general rule, by making the facts stated *prima facie* proof of something which was deemed essential to a recovery. The plaintiff was thereby relieved, to some extent, from a burden which the legislature assumes rests upon him. There was no necessity for making this provision if the proof of knowledge was not required. We conclude that the interpretation placed upon the statute by the plaintiff in error is not sound, and that the true rule upon the question was stated in the district court.

With regard to the question of contributory negligence, we have no doubt that it enters into and may constitute a defense. The action is not for the recovery of a penalty, but to recover compensation for the willful negligence wrought by another. Penalties are prescribed in the criminal features of the statute, and certainly it was not intended that any others should be imposed. There is nothing in the statute indicating that the obligation of the defendant is absolute, or that the plaintiff can recover where the injury is the result of his own wrong-doing. "Where the wrong of both parties contributes to the injury, the law declines to apportion the damages, and so leaves the injured party without any compensation." *Kansas Pac. Ry. Co. v. Pointer*, 14 Kan. 50. If the plaintiff, as was alleged in the answer, willfully and negligently opened the gates of the inclosure, and turned her cattle in with those that were diseased, the injury was the direct result of her own negligence. What the facts were as developed on the trial we cannot know, and all we can or do decide is that the rule of contributory negligence is applicable in these actions, and that the instruction thereon was warranted under the pleadings

in the case. *Railway Co. v. McHenry*, 24 Kan. 501; *Curry v. Railway Co.*, 43 Wis. 665; *Railway Co. v. Methuen*, 21 Ohio St. 586; *Keech v. Railroad Co.*, 17 Md. 32.

We find no error in the record, and the judgment of the district court will be affirmed.

(All the justices concurring.)

CENTRAL BRANCH U. P. R. CO. v. ANDREWS and another.

(*Supreme Court of Kansas. July 9, 1887.*)

1. EMINENT DOMAIN—COMPENSATION—EVIDENCE.

A railroad track was put down in an alley in the city of A., on August 1, 1877. Witnesses were introduced to prove the damages caused by reason thereof to the lots abutting upon the said alley, and upon examination they stated they knew the market value of the said property on or about the first of August, 1877. Upon such a showing they were competent to testify to the value of said property, both before and immediately after the laying down of said track.

2. SAME.

Where a witness is offered to prove the damages caused to adjacent real property by laying down a railroad track through an alley, and he testifies that he did not know the real value of the lots in controversy at the time the track was laid down, but does say that he had an opinion of their market value, and it is in evidence that he has been in the business of buying and selling real estate for nearly 15 years in the city where the lots are situated, he is qualified to give his opinion of the value of the property inquired about.

3. SAME.

In an action against a railroad company for damages caused, by the laying down of its track through an alley, to lots abutting thereon, the statements of the values of said lots, made by the party whose administrator brings the action, may ordinarily be introduced in evidence by the opposite party; but where such statements are either made a long time before or a long time after the laying down of said track, and the values of the property in that locality have been fluctuating, held, not error to reject such testimony.

(*Syllabus by Holt, C.*)

Error from district court, Atchison county.

Everest & Waggener, for plaintiff in error. *Hudson & Tufts*, for defendants in error.

HOLT, C. This action was begun in the court below by R. S. Andrews in his life-time, in 1878. This is the fourth time that it has been in this court. *Railroad Co. v. Andrews*, 26 Kan. 702; *Same v. Same*, 30 Kan. 590, 2 Pac. Rep. 677; *Same v. Same*, 34 Kan. 564, 9 Pac. Rep. 213. This case was last tried in September, 1886, before W. D. W., judge *pro tem.*, to a jury, and a verdict and judgment rendered for the plaintiff for \$3,765.98. Plaintiff in error (defendant below) now seeks a reversal of that judgment. For a statement of facts, see *Railroad Co. v. Andrews*, 26 Kan. 702, and *Same v. Same*, 30 Kan. 590, 2 Pac. Rep. 677.

The defendant makes quite a number of assignments of error, a part only of which we shall consider in the examination of this case. It contends that the allegation in plaintiffs' petition of the appointment of plaintiffs as administrators of the estate of R. S. Andrews, deceased, is not sufficiently explicit. The allegation is as follows: "*First*. That said R. S. Andrews died in Atchison county, Kansas, upon March 9, 1883, and thereafter, and upon March 13, 1883, said L. A. Andrews and B. F. Hudson were by the probate court of Atchison county, Kansas, being duly and legally authorized thereto, duly and legally appointed administrators of the estate of said R. S. Andrews, deceased, and letters of administration duly and legally issued to them as such out of and by said court, and that they thereupon duly and legally qualified as such administrators, and have ever since been and now are the duly and legally authorized, appointed, qualified, and acting administrators of the estate of R.

S. Andrews, deceased." This is sufficient. It is a brief and direct statement of the facts, in ordinary and concise language.

Another error complained of is that witnesses were allowed to testify as experts to the value of the lots abutting upon the alley immediately after the railroad track was laid down through it. They had been asked simply if they knew the market value of the lots in question on or about August 1, 1877. It appears that the track was laid down in a very short time,—in a few hours,—about August 1, 1877. We believe from their answers that they had knowledge of the market values of the lots in question on or about August 1, 1877, and that they were sufficiently qualified to answer in regard to their value, both before the laying down of the track, as well as immediately afterwards. The time of the laying down of the track was so brief, and the question asked limiting it to "on or about" is broad enough, in our opinion, to permit the testimony to be introduced.

Another objection urged is in allowing A. J. North to give his opinion of the value of said property. He was asked if he knew the market value of the lots in question, and he replied that he did not know the real value, but after some hesitation, upon further examination, said that he had an opinion of their market value. It further appears in the testimony that he has been dealing in land in Atchison since 1870, and had bought land in the part of the city where the lots were situated, although not in the same block. The testimony of Mr. North was not so specific and definite as might have been desired, so far as his qualifications are concerned, yet we think that it was competent.

The defendant still further complains that it was not allowed to introduce in evidence by the witness Challis the admissions or statements made by defendant in his life-time as to the value of the lots. The witness was asked if he had a conversation in regard to this property in the life-time of Mr. Andrews, and he answered in the affirmative. He was not able to definitely fix the time, but he said he guessed it was before 1880. On objection made by plaintiff, he was not allowed to testify. The attorney for the defendant then offered to prove that shortly before the laying down of the track in the alley, and about the time of the construction of the brick building, he entered into the agreement with L. A. Andrews in reference to this property, and that Andrews had placed a valuation on the same. He testified, also, in regard to a conversation had shortly after returning from New York in 1878. There is no admission of the value of the lots in question at or near August 1, 1877. In fact, the admission of the value of the lots was either a long time before or a long time after that date. The offer to prove that the statement was made before the filing of this petition, and about the time that the brick house was built was very indefinite, as the brick house was built before the track was laid,—how long does not appear in the evidence,—and the petition was not filed until 1878. While ordinarily all the admissions of the party ought to be introduced in evidence, and while it might not have been error to have admitted the testimony of Challis in this case, it further appears in evidence that the market value of lots and real property in the city of Atchison was fluctuating, and to have ascertained the value at the various times named would not have been a definite basis from which to have established the value of the same August 1, 1877. If the market value of the land had been nearly the same all these years, then the testimony sought to be introduced would have been more in point. But under the other testimony introduced, showing the changing values of property in the city, it seems to us that this rejection of the testimony offered is not material error.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

STATE v. M'CLINTOCK.

(Supreme Court of Kansas. July 9, 1887.)

1. CRIMINAL PRACTICE—APPEAL—RECORD—EXAMINATION ON VOIR DIRE.

In a criminal prosecution the only way to make the testimony or statements of jurors on their *voir dire*, or the testimony of witnesses introduced on the trial, a part of the record, whether the testimony and statements are taken by a stenographic reporter or not, is to embody such testimony or statements in a bill of exceptions allowed and signed by the judge of the trial court.

2. SAME—APPEAL—RECORD—INSTRUCTIONS.

And in such prosecution, instructions asked for by the defendant, and refused by the trial court, cannot become a part of the record unless they are embodied in a bill of exceptions.

(Syllabus by the Court.)

Appeal from district court, Sedgwick county.

S. B. Bradford, Atty. Gen., and *J. M. Balderston*, for the State. *Sankey & Campbell*, for appellant.

VALENTINE, J. This was a criminal prosecution upon information for murder in the first degree. The defendant, Carl McClintock, was charged with the murder of his wife, Julia A. McClintock. The only defense interposed by him was that he was insane. He was found guilty of murder in the second degree, and was sentenced to imprisonment in the penitentiary for the term of 15 years. He now appeals to this court.

Many errors are assigned, but the prosecution urges as a preliminary question that none of the supposed errors are presented by the record brought to this court. The real question is whether the proceedings had in the court below concerning the examination of jurors upon their *voir dire*, the evidence introduced on the trial, the rulings of the court below admitting and excluding evidence, the instructions of the court given to the jury, and the instructions asked for by the defendant and refused by the court, are legally embodied in the record as brought to this court. The prosecution claims that they are not, while the defendant claims that they are.

The only bill of exceptions found in the record as brought to this court reads as follows: "Be it remembered that on the trial of this cause a verdict was rendered November 25, 1886, finding the defendant guilty of murder in the second degree, and that on the twenty-seventh day of November, A. D. 1886, the defendant filed a motion for a new trial, in words and figures as follows: Said motion being hereto attached, marked 'Exhibit A,' and made a part of this bill of exceptions. And on the twenty-ninth day of November, A. D. 1886, certain affidavits were filed in support of said motion for a new trial, which said affidavits are hereto attached, marked 'Exhibit B,' and made a part hereof. And on the first day of December, A. D. 1886, said motion for a new trial came on for hearing, and on the second day of December, A. D. 1886, after hearing argument on said motion, and being fully advised in the premises, the court overruled said motion for a new trial, to which ruling of the court the defendant at the time duly excepted. And thereupon the court sentenced said defendant to hard labor in the penitentiary for a term of 15 years, to which sentence the defendant at the time duly excepted." The exhibits above referred to are as stated, except that Exhibit A contains only an amendment to the motion for a new trial. Attached to the record brought to this court is what purports to be the testimony of jurors on their *voir dire*, and the testimony of witnesses introduced on the trial; but there is nothing in the record or elsewhere making this testimony a part of the record, or authenticating it in any manner, except a certain certificate which reads as fol-

"State of Kansas, Sedgwick County—ss.

"IN THE DISTRICT COURT IN AND FOR THE COUNTY AND STATE AFORESAID.

"The State of Kansas v. Carl McClintock.

"I, Florence Hartley, do hereby certify that I am the legally appointed and authorized official stenographer and reporter of the district court of Sedgwick county, Kansas, and that the hereto attached testimony is a true and correct transcript of all the testimony of all the witnesses who testified on the trial of the above-entitled cause, and also of all the testimony of the jurors Scott, Frank Blackburn, and M. D. Wemple, given on their *voir dire*.

"January 28, 1887.

FLORENCE HARTLEY, Official Stenographer."

The paper to which this certificate is attached, was filed in the office of the clerk of the district court on February 3, 1887.

Assuming that Florence Hartley, at the time of the trial of this case, and also on January 28, 1887, when she certified to the foregoing testimony, was the official stenographer of the district court of Sedgwick county,—but there is nothing in the record tending to show that she was,—then is the aforesaid testimony a part of the record of this case? We think not. There is nothing in the statutes making the stenographic notes of the official stenographer in any case, or any copy thereof, whether written out in full or not, a part of the record of such case; and the only way to make the testimony or statements of jurors on their *voir dire*, or the testimony of witnesses introduced on the trial, a part of the record, whether the testimony and statements are taken by a stenographic reporter or not, is to embody such testimony or statements in a bill of exceptions allowed and signed by the judge of the trial court. The acts relating to official stenographers will be found in Comp. Laws 1879, c. 28, art. 2, and Comp. Laws 1885, c. 28, art. 2. As to how exceptions may be taken and bills of exceptions made, see section 219, Crim. Code, and sections 299-305, Civil Code. See, also, *State v. Wilgus*, 32 Kan. 128, 129, 4 Pac. Rep. 218. At the time the aforesaid stenographer's certificate was made, her notes of evidence had never been filed in the district court; but, if they had, it would make no difference; for they could become a part of the record only by being embodied in a bill of exceptions allowed and signed by the judge of the trial court in accordance with the statutes.

Section 236 of the Criminal Code reads as follows: "Sec. 236. The judge must charge the jury in writing, and the charge shall be filed among the papers of the cause. In charging the jury, he must state to them all matters of law which are necessary for their information in giving their verdict. If he presents the facts of the case, he must inform the jury that they are exclusive judges of all questions of fact." Whether the charge under this statute becomes a part of the record without being embodied in a bill of exceptions has been questioned, but not decided, (*State v. Lewis*, 10 Kan. 157, 160;) and it is not necessary to decide the question now. But it is clear that instructions asked for by the defendant, and refused by the trial court, cannot become a part of the record, unless they are embodied in a bill of exceptions.

Taking the record as it has been brought to this court, and neither the testimony nor statements of the jurors on their *voir dire*, nor the testimony of witness on the trial, nor the instructions asked for by the defendant and refused by the trial court, can be considered as any part of the record; and therefore it would be useless to discuss any of the questions that might be supposed to arise upon such testimony or refusal; and, taking the record as it is, we do not think that it can be said that the trial court committed any material error.

The judgment of the court below will therefore be affirmed.

(All the justices concurring.)

72 Cal. 549

Estate of SULLENBERGER. (No. 11,670.)

(Supreme Court of California. June 17, 1887.)

1. LIMITATION OF ACTIONS—ACKNOWLEDGMENT—EXECUTOR.

Transactions between the maker of a promissory note and the executor of the payee, showing that the dealings were not carried on by the executor as such, but in his personal character, and a simple permission given by the maker to the executor that he might apply any balance of accounts there might be in his favor to the payment of the note belonging to the estate, will not take such a note out of the statute of limitations.

2. SAME—NOVATION.

A loose statement by the maker of a note, after the running of the statute of limitations, to the effect that he would settle the whole indebtedness on his return, and pay the balance, if any was found due, does not amount to such "a substitution of a new obligation between the same parties, with intent to extinguish the old obligation," as is required to constitute a novation.

3. PROBATE PRACTICE—ALTERATION OF CLAIM.

No substantial change in a claim on file in probate court can be made, either by amendment or otherwise, after the expiration of the time for the presentation of claims.

4. SAME—SETTING ASIDE JUDGMENT.

A probate court has power to set aside its own judgments obtained *ex parte*.

5. SAME—NOTICE OF MOTION.

If an order is made out of court, and without notice, allowing a claim against an estate, no notice of motion to set it aside is necessary.

Commissioners' decision. Department I.

Appeal from superior court, Yolo county.

Benj. Bullard, Add. C. Hinkson, and Armstrong & Hinkson, for appellant. Reese Clark, for respondent.

HAYNE, C. This is an appeal from an order setting aside the allowance by the judge of a claim against the estate. The ground of the order was that the claim was barred by the statute of limitations. We think the claim was barred. It was upon a promissory note dated December 2, 1878, and payable eight months after date. Sullenberger died December 5, 1883, at which time the statute had run against the note, unless the case is taken out of its operation by the following circumstances: After the death of L. C. Drummond, (the payee,) Sullenberger (the maker) sold some wheat to M. Drummond, who was the son of the payee and the executor of his will, and delivered some hogs to him to be sold; and M. Drummond advanced some money to Sullenberger, and paid some of his debts, and testifies that on one occasion, when about to go on a short journey, "he said that when he should return, which would be in a short time, he would settle the whole indebtedness; and, if the proceeds of the wheat and hogs were not sufficient to settle the note and money advanced and paid to his creditors, he would pay the balance." M. Drummond sold the hogs, and after applying the proceeds of the hogs and wheat to the various demands against Sullenberger there remained due on the note a balance of \$828, for which sum the claim was presented. Two grounds are urged to show that the foregoing circumstances take the case out of the statute.

1. It is said that the transactions mentioned constitute a mutual open and current account. But if we assume that this is so, the account was not between the parties to the note. There is no evidence that M. Drummond had any authority from the probate court that the estate of which he was executor should advance money to Sullenberger, or pay his debts, or buy his wheat, or act as his broker in selling hogs. And it does not appear that the estate did so. So far as the evidence showed, M. Drummond advanced his own money for the purposes mentioned, and acted individually in his purchase of the wheat and sale of the hogs. His testimony is as follows: "He

was going away from Davisville temporarily, and was owing some to me and Liggett and to other persons. He delivered to me some hogs to sell for him and Liggett, and I had bought from him his wheat. I was to let him have some money then, which I did, and paid some debts for him." There is not a word to show any dealing between Sullenberger and the estate of Drummond. The passage first above quoted amounts to nothing more than a permission from Sullenberger to M. Drummond to apply whatever balance should remain in his hands to the payment of the note due to the estate. We attach no importance to the statement of M. Drummond that the note was "considered a part" of the business transactions which he had with Sullenberger, or that it "was understood to form a part of the indebtedness."

2. It is argued that there was a novation, and that the provision requiring a writing to take a case out of the statute does not apply, because there was a new consideration. Without considering the latter branch of this argument, it is sufficient to say that the loose statements of Sullenberger to the effect that "he would settle the whole indebtedness" on his return, and would "pay the balance" if a balance should remain after application of proceeds of sales, do not amount to "the substitution of a new obligation between the same parties with intent to extinguish the old obligation," and hence there was no novation. Civil Code, § 1531. If, however, we overlook this, and disregard the fact that the new consideration did not move from the estate, then it would follow that the claim should not have been on the note, but upon the "new obligation," which must have existed if there was any novation. The claim, however, which was allowed, and the allowance of which was set aside, was a simple claim upon the note. The "amended claim," which was allowed to be filed "in opposition to the motion" to vacate the allowance of the first claim, is not an element of the question. No substantial change can be made in a claim on file, either by way of amendment or otherwise, after the expiration of the time for the presentation of claims. Furthermore, the permission was merely to file the "amended claim" on the hearing of the motion. When the court came to consider the matter, it rejected the claim.

But it is urged that the allowance of the first claim was a judgment, and that the court could not set aside its action for mere error. But, if it was a judgment in this sense, it was a judgment obtained *ex parte*, and the rule with reference to the power of a court to revise its own action suffers an exception in the case of *ex parte* proceedings. This must necessarily be so; for, if an appeal should be taken directly from the "judgment" allowing the claim, it must be heard upon the case made upon the application to the court below; and the opposing party is not heard upon such application, and consequently has had no opportunity to present his side of the question. The only way he has to make a showing is by moving to set aside the "judgment."

Exception is taken to the notice of motion to set aside. But the order allowing the claim having been made out of court and without notice, no notice of motion to set it aside was necessary. Code Civil Proc. § 937. Moreover, we think the notice was, under the circumstances, sufficient. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

72 Cal. 508

MONROE v. FOHL. (No. 12,048.)

(Supreme Court of California. June 21, 1887.)

1. PAYMENTS—APPLICATION OF—UNEARNED INTEREST.

Payment of a given sum of money on a note four months after date, the interest on the note being payable annually, and the payment exceeding the annual inter-

est on the note, operates, in the absence of special agreement; as a payment of the principal indebtedness so far as the sum paid exceeds the interest then due, and is not a payment of unearned interest.¹

2. MORTGAGE—DEFAULT IN INTEREST PAYMENT—CLAIMING PRINCIPAL DUE—NOTICE.

A note secured by mortgage provided that the mortgagee, upon a failure of the mortgagor to pay the interest annually, might elect to have the whole principal become due. Upon the mortgagor's failure to pay the annual interest, the mortgagee left notices at the residence and place of business of the mortgagor with persons of discretion in charge thereof; the mortgagor being absent, and the mortgagee being unable to find him after diligent search. *Held*, that the notice was sufficient to indicate the mortgagee's election.

3. PLEADING—CONCLUSIONS OF LAW.

The execution and delivery of a note payable to the order of plaintiff being admitted, a denial that plaintiff is the "holder" of it and an allegation that a third party is such "holder," without stating any facts showing such to be the case, *held* to be conclusions merely, and not to raise an issue.

4. MORTGAGE—FORECLOSURE—ATTORNEY'S FEES.

Under the California statute of March 27, 1874, entitled "An act to abolish attorney's fees and other charges in foreclosure," when a mortgage provides a certain amount as attorney's fees, it is error for the court to allow more than is specified.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county.

Aug. Muentzer and W. B. Nutter, for appellant. *Carter, Smith & Keniston*, for respondent.

HAYNE, C. Action to foreclose a mortgage, the plaintiff claiming that he was entitled to elect, and did elect, to have the principal become due for non-payment of interest. The plaintiff had judgment on demurrer to the answer and the defendant appeals. We think the answer presented no defense.

1. The note was dated June 25, 1885, and the interest was payable annually. On October 10, 1885, the defendant paid \$800 on account of the note, without anything being said on either side as to whether the payment was to be applied to the interest or to the principal. Conceding, in favor of the defendant, that the payment was to be applied first to the interest, it will be so only as to interest up to the date of the payment. The balance of the payment must be applied to the principal. The law will not apply it to future or unearned interest. After making the application as above stated, there remained something over eight months' interest to fall due on June 25, 1886. That balance of interest fell due on that day; for the meaning of the contract is that the interest was to be paid annually from its date, and not annually from any date at which a payment might happen to be made; and the fact that the defendant chose to make the payment above mentioned does not affect the interest on the unpaid principal. The non-payment of this eight months' interest entitled the plaintiff to elect to consider the principal as due.

2. The plaintiff did elect to have the principal become due. The complaint alleges that on July 14, 1886, the plaintiff notified the defendant of his election by leaving a notice at the defendant's residence with a person of discretion in charge of such residence, and by leaving a notice at the defendant's place of business with a person of discretion in charge of such place of business; the defendant being then absent from his residence and place of business, and the plaintiff having been unable, after diligent search and inquiry, to ascertain his whereabouts. The only construction we can give to the answer is that the defendant was not *personally* notified or "informed" of the election. We think the notice given was sufficient.

3. The execution and delivery of the note payable to the order of plaintiff being admitted, the denial that plaintiff was the "holder" of the note, and

¹ Respecting the application of payments, see *Gage v. Dudley*, (N. H.) 9 Atl. Rep. 786; *Robie v. Briggs' Estate*, (Vt.) Id. 593; *The Martha*, 29 Fed. Rep. 708; *Magarity v. Shipman*, (Va.) 1 S. E. Rep. 109, and note; *Murphy v. Reedy*, (Miss.) 2 South Rep. 167.

the assertion that the bank was the holder, without averring any facts showing such to be the case, were of conclusions merely, and raised no issue. *Poorman v. Mills*, 35 Cal. 119; *Wedderspoon v. Rogers*, 32 Cal. 571; *Hook v. White*, 36 Cal. 302.

4. But we think the court erred in allowing a greater sum as counsel fee than the one stipulated in the mortgage. In the absence of a provision in the mortgage, the plaintiff is not entitled to a counsel fee (*Sichel v. Carrillo*, 42 Cal. 493; *Mascarel v. Raffour*, 51 Cal. 242,) unless there is a statute which allows one. The statute of March 27, 1874, provides that, "in all cases of foreclosure of mortgage, the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." Read literally, this language might mean that "in all cases of foreclosure" a counsel fee shall be fixed by the court, whether the mortgage provides for one or not. But we do not think that such is its meaning. The title of the act is "An act to *abolish* attorney's fees and other charges in foreclosure." And there is no provision in terms that any fee shall be allowed. The thing to be "fixed" is "*the attorney's fee*." We think this means "the attorney's fee provided for by the mortgage," and that it has no application where none is so provided. But even if this is not the true construction, and the court can allow a counsel fee where the mortgage is silent upon the subject, if, as here, a counsel fee is agreed upon between the parties, it must be held to be an exclusion of any greater fee.

The court therefore erred in allowing a greater fee than the one provided in the mortgage. But this does not make the ruling on the demurrer to the answer erroneous. The counsel fee stipulated to be paid was not an element of the cause of action, but was, like the costs, a mere incident to it, and was to be fixed by the judge in his discretion, not exceeding the stipulated amount. *Carriere v. Minturn*, 5 Cal. 435.

The other points do not require special mention.

We think the cause should be remanded, with directions to the court below to modify its judgment in accordance with the views above expressed, the appellant to recover his costs of appeal.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the cause is remanded to the court below, with direction to modify its judgment in accordance with the views expressed in said opinion, the appellant to recover his costs of appeal.

73 Cal. 540

LINDSAY v. STEWART. (No. 11,962.)

(Supreme Court of California. 1887.)

1. ACTION—ENTIRE DEMAND—SEPARATE ACTIONS—COUNTER-CLAIM.

An action was brought to recover the sum of \$1,146.91. Defendant answered and pleaded a counter-claim arising from "a mutual open and current account" for \$1,660.13. Previous to the commencement of this action, defendant had commenced an action in justice's court against plaintiff for items amounting to \$118.18, which items were included in the counter-claim above stated. The action in justice's court was still pending when the answer and counter-claim were filed. *Held*, that while defendant could not bring another action (after the action in justice court) to recover the balance due on the account above the \$118.18 claimed, and while he could not on his counter-claim obtain an affirmative judgment, yet he could avail himself of the claim as a defense to plaintiff's action.

2. SAME—ELECTION.

Defendant was not bound to dismiss the action in the justice's court in order to avail himself of his counter-claim, nor was he bound to elect between that action and his defense, judgment not having been entered in the justice's court.

Appeal from superior court, Ventura county.

S. A. Sheppard, J. Marion Brooks, and Frederick Hall, for appellant. Blackstock & Shepherd, for respondent.

PATERSON, J. This action was commenced in February, 1886, to recover from the defendant—*First*, the sum of \$750 with interest, alleged to be due on a promissory note executed and delivered by defendant to M. H. Lindsay, who assigned to plaintiff; *second*, the sum of \$396.91, for work, money advanced, and merchandise furnished by plaintiff at request of defendant between February 11, 1884, and February 10, 1886. The defendant answered denying generally and specifically every allegation of the complaint, and setting up a further defense and counter-claim, alleging that plaintiff was indebted to him in the sum of \$1,660.18 for the balance due on a mutual open and current account for goods sold and delivered by defendant to plaintiff, also for work done, money lent and paid out, lands sold, rent of land, board and lodging, and for pasturage,—all between January 1, 1884, and December 14, 1885.

The court found—*First*, that the note for \$750 was executed and delivered and thereafter duly assigned as alleged in the complaint, that only part thereof was paid, and there was still due and unpaid \$292.50. *Second*, that of the items claimed by plaintiff in his "second cause of action" the sum of \$188.25 was still unpaid. *Third*, that defendant, on February 8, 1886, commenced an action in the justice's court against plaintiff for the sum of \$118.18, for money lent, labor performed, and merchandise furnished, all of which items were included in and were a part of the counter-claim set forth in the answer of defendant herein; that the defendant therein (plaintiff herein) appeared and answered, denying each and every allegation of the complaint; and that said cause in justice's court was at the commencement of this suit and is "still pending and undecided, and has not been dismissed nor discontinued." *Fourth*, as conclusions of law the court finds that plaintiff is entitled to judgment; that plaintiff's plea in abatement be sustained, and defendant's counter-claim be abated and dismissed, and that plaintiff is entitled to judgment against defendant for \$480.75, and costs. The judgment was that "plaintiff do have and recover of and from T. H. Stewart, defendant, \$480.75, and costs, amounting to \$128.15."

There was no plea in abatement to the counter-claim of defendant, and there could be no such plea under the circumstances. To sustain the defense of a former action pending, it must appear that in that action the plaintiff is the same as in the action in which the plea is offered, and the cause of action in both must be founded upon one entire contract, or upon one single or continuous tortious act. The law abhors a multiplicity of actions, and will not permit a party to prosecute two actions for the same cause, because it annoys and harasses the defendant without cause; but there can be no reason for the application of this rule in cases where the defendant in the former action is the aggressor, and the other party relies upon the matters contained in that action for his defense. *Ayres v. Bensley*, 32 Cal. 630; *Herriter v. Porter*, 23 Cal. 385.

In *Naylor v. Schenck*, 3 E. D. Smith, 135, the court, speaking upon this subject, said: "There is in this holding a misapprehension of the defendants' position. They are not prosecuting two actions, one of which abates the other. In an endeavor to recover their damages they find themselves prosecuted by their adversary. They may defend by setting up any matter which the law recognizes as a defense, whether it be a cause of action, or whether it be a judgment actually recovered thereon; the only difference being that after judgment it must be used as a judgment and by way of set-off."

The defendant herein was not bound to dismiss his action in the justice's court, nor was he required to elect between that action and his defense in

this suit, the former not having gone to judgment. *Fuller v. Read*, 15 How. Pr. 238; *Wiltzie v. Northam*, 3 Bosw. 168.

We think, however, that defendant can make use of the matters contained in his counter-claim only in defense of the plaintiff's claim, and as an offset thereto, and will not be entitled to judgment in his favor for any balance due on the account. In his counter-claim, defendant alleges "that the plaintiff is indebted to the defendant in the sum of \$1,660.13, the balance due defendant on the ninth day of February, 1886, upon a mutual open and current account in which there were reciprocal demands between the plaintiff and defendant," and that the items were "charged in account between the first day of January, 1884, and the fourteenth day of December, 1885, the date of the last item of said account, all of which will more fully appear from the copy of account hereto annexed and made a part of this amended answer and counter-claim, marked 'A'; that the aggregate amount of said above alleged items of account and demands is the sum of \$1,797.80, no part of which has been paid, except the sum of \$137.75, leaving a balance of \$1,660.13 of said demand unpaid; that the plaintiff refused to pay the same."

As before stated, this account contained all of the items sued for in the justice's court, and all were due at the time that suit was commenced. The defendant could not have maintained another action against plaintiff for the balance of the account.

The allegations of the counter-claim clearly show that the balance of the mutual open and current account in favor of the defendant constitutes an entire demand, against which it was intended the statute should not begin to run earlier than the date of the last item, to-wit, December 14, 1885. Such an account cannot be severed, and different suits be brought upon it piecemeal, (*Corey v. Miller*, 12 R. I. 338; *Borngegger v. Harrison*, 12 Wis. 544;) and, if action be brought in such case for a part only of the items, he cannot afterwards sue for the rest. For the purpose of defending against the claim of his adversary, however, he may set out any and all items of the account, whether included in the former action pending or not.

Judgment and order reversed, and cause remanded for a new trial.

We concur: TEMPLE, J.; MCKINSTY, J.

3 Cal. 137

GLASCOCK v. CENTRAL PAC. R. CO. (No. 11,581.)

(*Supreme Court of California*. July 13, 1887.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—RAILROAD CROSSING—SIGNALS.

In an action against a railroad company for the negligent killing of plaintiff's husband at a railroad crossing, it appeared that the railroad track at the place of the occurrence was unobstructed and in plain view of the highway along which deceased was approaching the crossing; that deceased was a man in the full possession of all his faculties, active, sober, cautious, and fully acquainted with the usual time that trains passed over the road; that the train that killed him was going south, was a special train, and unexpected at the station just north of the crossing. No evidence showed that the train made any signal of warning before passing the crossing. It made a loud noise in its course, and the track along which it passed was near and in sight of the highway along which deceased was driving for some distance before they crossed. There was no evidence whatever of the manner of the collision, nor of the circumstances before or connected with it. The wind was from the north; there was no smoke, dust, or other obstruction to a fair view of the track. The engineers had been in the habit of passing this crossing without the usual signals, and defendant was aware of the habit. *Held*, that deceased, by failing to use the faculties and opportunities of observation which the plaintiff's own case showed that he had, was guilty of contributory negligence, and the plaintiff was properly nonsuited.¹

¹Respecting contributory negligence in crossing a railroad track, see *Kelly v. Pennsylvania R. Co.*, (Pa.) 8 Atl. Rep. 856; *Purinton v. Maine Cent. R. Co.*, (Me.) 7 Atl. Rep. 707, and note; *Chase v. Maine Cent. R. Co.*, (Me.) 5 Atl. Rep. 771, and note; *Sherry v.*

In bank. Appeal from superior court, Yolo county.
F. E. Baker, J. C. Ball, and Jackson Hatch, for appellant. *P. C. Denson*,
for respondent.

PATERSON, J. Plaintiff is the widow of George Glascock, who was killed by defendant's cars at a railroad crossing near Black's Station on the morning of November 1, 1884. The cause came on for trial before a jury, and after the plaintiff had rested her case a motion for a nonsuit was made and granted. Counsel for appellant in the following epitome give a very fair statement of the facts:

"Black's Station is a village about ten miles north-west from Woodland, in Yolo county. A public road about sixty feet wide leads from Black's in a southerly direction for about a quarter of a mile; thence easterly about one mile, crossing defendant's railroad track about a quarter of a mile east from the point where the road turns east. After leading east for about a mile, as above stated, the road turns south, and goes due south, and past the residence of deceased. The crossing where the collision occurred was on this road about fifteen hundred feet north of the house. A person passing down the highway in question to the crossing would have a clear view of the railroad track to his right nearly all the time. There are no obstructions that would prevent him seeing the track or an approaching train. There are two whistling posts north of the crossing on the railroad track; one 1,370 feet distant, and beyond a crossing on another road, the other 588 feet distant. A wind was blowing at the time from the north.

"The train that collided with the wagon of deceased that day was a special freight train from the north, going south; no notice of its coming having been received by the company's agent at Black's. It passed the station about 10 o'clock A. M. Just before the collision it was running at the rate of probably ten miles an hour. The regular freight train going north on that day was due at Black's about 11:30 o'clock A. M., and the regular passenger train going north that day was due at Black's at 1:03 P. M. In fact a train did pass the crossing going north about one-half hour after the collision. It is fair to conclude that the collision actually occurred between 10 and 11 A. M. that day.

"Deceased was a thrifty, prudent, cautious, strictly temperate, and unusually active man; a man of strong individuality, self-reliant, and had lived on a farm owned by him, through which defendant's railroad track passed, since 1853, and was familiar with the crossing where the collision occurred. He was a good horseman also. He had been especially cautious in approaching and passing over this crossing. Before the colliding train reached the crossing, no signal of its approach was given by the sounding of a whistle, or the ringing of a bell. No witness saw deceased after he had started homeward from Black's, nor was he seen by any one at the time of the collision. There is no evidence whatever of the manner in which the collision occurred; nor of the manner in which the deceased approached the railroad track; nor of any of the circumstances immediately preceding, or concurrent, in point of time, with the collision. It is shown by the pleadings that deceased, at the time of the collision or immediately prior thereto, was driving two horses harnessed to a wagon along and upon the public highway referred to, and was in the act of crossing defendant's railroad track at the crossing."

None of the witnesses could say whether the train began to "slow down" before it reached the crossing. Several of the witnesses testified that they were on the road in view of the crossing, but further from the crossing than the deceased, and that they heard the whistle when the train was at Black's,

New York Cent. & H. R. R. Co., (N. Y.) 10 N. E. Rep. 128; *Cooper v. Lake Shore & M. S. R. Co.*, (Mich.) 33 N. W. Rep. 306; *Slater v. Burlington, C. R. & N. R. Co.*, (Iowa,) 32 N. W. Rep. 264; *Mynning v. Detroit, L. & N. R. Co.*, (Mich.) 31 N. W. Rep. 162, and note; *Union Pac. R. Co. v. Henry*, (Kan.) 14 Pac. Rep. 1.

and again at a crossing south of Black's; that the country was level, and the track graded slightly above the general surface of the ground; that the train made a great noise, which was carried southward by the wind. The angle made by the railroad and the highway is one of about 35 deg. The evidence showed that the engineers had been in the habit of passing the crossing where the accident occurred without giving the signals required by the statute, and that the deceased was aware of the fact.

We think there can be but one reasonable conclusion drawn from the facts. Mr. Glascock either saw the train before he reached the track, or he did not look towards the track as he approached it. According to the testimony of his son he was in full possession of his mental and physical powers; "and when at the crossing, and a little ways from it," as his brother testified, "could see up and down the track at least a couple of hundred yards from the crossing; it was always an open, plain view." Having good eyes, it was his duty to use them, at least to some extent, for his own protection; and his failure to do so would be contributory negligence, and prevent a recovery, notwithstanding the negligence of the defendant in failing to ring the locomotive bell or blow the whistle. It is an irresistible inference from the facts developed from the testimony of the plaintiff that, if Mr. Glascock had at any time looked up the track after the train reached the point where the engineer ought to have rung the bell, he could and would have seen the train coming in time to stop and let it pass. There was no dust,—nothing to obstruct the view. The case is not one, therefore, where we are called upon to say how much investigation, listening, or looking by the deceased would overcome the charge of contributory negligence, as where a curve in the road, tunnel, embankment, trees, buildings, or dust obscures the view; but it is a case where the deceased could have seen and heard if he had exercised his faculties therefor to any extent whatever. If he looked, he saw; and, having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances. His failure to so act was negligence which, notwithstanding the negligence of the defendant, the law regards as such a contributory cause on his part as will make the injury his own misfortune, and relieve the other party from liability therefor. *Flemming v. Western Pacific R. Co.*, 49 Cal. 257; *McQuilken v. Central Pac. R. Co.*, 64 Cal. 466, 2 Pac. Rep. 46; *Clark v. Missouri R. R. Co.*, 11 Pac. Rep. 138; *Union Pac. R. Co. v. Adams*, 6 Pac. Rep. 529; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125.

While the question of negligence is nearly always a matter for the jury, and the burden of proving contributory negligence rests upon the defendant, yet, when it appears from the undisputed facts—shown by the plaintiff's own evidence—that the deceased has not exercised such care as men of prudence usually exercise in positions of like exposure and danger, the question is one of law for the court. *Fernandes v. Sacramento R. Co.*, 52 Cal. 50; *Flemming v. Western Pac. R. Co.*, *supra*. In the case at bar we think the facts shown by the plaintiff would not support a verdict in her favor, and that the court below properly granted the motion for nonsuit.

There was no error in sustaining the objections to the questions propounded to the witness Glascock. The questions called for the conclusion or opinion of the witness. If admissible at all, the inquiry should have been confined to matters of fact,—to a relation of the circumstances. In passing upon the motion for nonsuit, the court below was bound to presume that the defendant was ordinarily a cautious and prudent man. But neither this presumption, nor the fact, if shown, that he had on every other occasion been careful in crossing the railroad, could avail the plaintiff in view of the other facts in the case. *Sanderson v. Frazier*, 5 Pac. Rep. 632.

Judgment and order affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; McFARLAND, J.

STATE v. MARPLE.

(Supreme Court of Oregon. May 27, 1887.)

1. CRIMINAL PRACTICE—DEATH SENTENCE—WARRANT—TIME OF EXECUTION.

Crim. Code Or. § 218, provides that the death-warrant shall fix the day of execution at a date not less than 30 nor more than 60 days from the time of judgment. *Held*, where the accused was sentenced April 9, 1887, to be hanged June 29, 1887, and the death-warrant appointed June 2, 1887, as the day of execution, that there was no ground for a new trial, but that the warrant should be set aside, and the cause remanded, so as to make the record conform to the statute and be consistent with itself.

2. MURDER—INDICTMENT—NAMING DEGREE.

An indictment is sufficient which charges the crime as murder without naming the degree, and, under such a charge, the accused may be convicted of murder in the first degree.

3. SAME—VERDICT—"GUILTY AS CHARGED."

When the indictment charges murder in the first degree, a verdict of "guilty as charged in the indictment" finds the accused guilty of murder in the first degree.

Appeal from circuit court, Yamhill county.

The appellant, Richard E. Marple, was tried and convicted of murder in the first degree under the following indictment:

"IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF YAMHILL.

"The State of Oregon vs. Richard E. Marple.

"INDICTMENT.

"Richard E. Marple is accused by the grand jury of the county of Yamhill, state of Oregon, by this indictment, of the crime of murder, committed as follows: The said Richard E. Marple, on the first day of November, A. D. 1886, in the county of Yamhill and state of Oregon then and there being, did then and there feloniously, willfully, purposely, and of deliberate and premeditated malice, kill D. I. Corker, by then and there striking, thrusting, cutting, and penetrating the head, face, and skull of him, the said D. I. Corker, with a certain axe which he, the said Richard E. Marple, in his hands then and there held and grasped, with the intent and purpose, and of his deliberate and premeditated malice, him, the said D. I. Corker, then and there to kill and murder, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Oregon.

"Dated at Lafayette, in the county aforesaid, this first day of April, A. D. 1887.

GEO. W. BELT, District Attorney."

The verdict was rendered April 9, 1887, and was in the following form: "We, the jury in the above-entitled cause, find the defendant guilty as charged in the indictment, and recommend the mercy of the court."

The accused was thereupon sentenced to be hanged June 29, 1887. The death-warrant, as issued, was directed to the sheriff, or his deputy, and, after reciting the judgment, proceeded as follows: "You, and each of you, are hereby commanded that on the second day of June, 1887, you take the said Richard E. Marple," etc., and that you cause him to be hanged by the neck until he is dead." The accused thereupon took this appeal.

Crim. Code Or. p. 368, § 218, provides as follows: "When judgment of death is pronounced, a warrant, signed by the judge of the court, and attested by the clerk, with the seal of the court affixed, must be drawn and delivered to the sheriff of the county. The warrant shall state the conviction and judgment, and appoint a day on which the judgment is to be executed, which must not be less than thirty nor more than sixty days from the time of judgment."

H. Y. Thompson, for appellant. *George W. Belt*, Dist. Atty., and *McKay & Hurley*, for the State.

BY THE COURT. The appellant was indicted, tried, and convicted in the above court of the crime of murder in the first degree, and the following judgment and sentence were given against him:

"APRIL 9, 1887.

"State of Oregon vs. Richard E. Marple.

"INDICTMENT FOR MURDER.

"Now at this day this cause comes on for hearing on the motion of the said defendant to set aside the verdict of the jury heretofore rendered in this cause, and for a new trial,—the state appearing by Geo. W. Belt, prosecuting attorney, and by H. Hurley, and the defendant in his own proper person, and H. Y. Thompson, his attorney; and, after argument by counsel, and fully considering the said motion, it is ordered that the same be overruled; whereupon, on motion of Geo. W. Belt, prosecuting attorney, the court proceeds to pronounce and render judgment and sentence against the said Richard E. Marple, and the court asked the defendant, in the presence of his said attorney, what he had to say why the court should not now pronounce and render sentence and judgment against him in accordance with the verdict of the jury heretofore rendered against him in this cause, whereupon the said defendant made a statement to the court; and immediately thereafter, it appearing to the court that the said Richard E. Marple had been duly indicted and convicted of the crime of murder in the first degree, for feloniously, willfully, purposely, and of deliberate and premeditated malice killing one D. I. Corker, it is therefore ordered and adjudged by the court that the said Richard E. Marple is guilty of said crime of murder in the first degree, and that it is further ordered and adjudged by the court that the said Richard E. Marple be taken from this place to the jail of this county of Yamhill, and that he be there kept in close confinement until the twenty-ninth day of June, 1887, and that on said twenty-ninth day of June, between the hours of ten o'clock A. M. and 2 o'clock P. M. of said day, he be taken from said jail to the place to be prepared for the execution of this judgment of this court, and that he be then and there hanged by the neck until he is dead.

"R. P. BOISE, Judge."

—That thereupon the judge of said circuit court issued and delivered to the sheriff of said Yamhill county a warrant under his hand and the seal of the said circuit court, and duly attested by the clerk of said county, which said warrant stated the said conviction and judgment, and appointed the second day of June, A. D. 1887, as the day upon which said judgment is to be executed.

The defendant appeals from the judgment pronounced against him, as above stated, and gives notice that he will rely upon the following errors of law appearing of record upon the trial of said cause: *First*, the indictment does not charge the defendant with any crime; *second*, there was no verdict of the jury upon which to base the said judgment and sentence; *third*, said judgment and sentence was pronounced by the court without legal power or authority; *fourth*, that the death-warrant does not conform to the laws relating thereto, or to the judgment of the court in said action against the defendant."

We have examined the alleged errors, and are of the opinion that the three first ones are not well taken. The fourth one is true as a statement of fact, as the part of the record above set forth shows, though we do not think it presents such an error as will authorize the court to grant a new trial. We are of the opinion, however, that the record should be corrected, before any attempt is made to enforce the judgment, so as to make it conform to law, and be consistent with itself. The judgment appealed from will therefore be modified so as to adjudge, in effect, that the said Richard E. Marple be detained and imprisoned until such day as shall be designated and named in

the warrant of execution of the judgment, signed, attested, and delivered as provided by law, and the case be remanded to the said circuit court, with directions to enter such judgment and sentence as here indicated, and such warrant of execution be thereupon issued; that the warrant of execution of the said judgment now in the hands of the sheriff of said Yamhill county be set aside, and held for naught.

BINGHAM and another v. SALENE and another,

(Supreme Court of Oregon. June 13, 1887.)

1. PROFIT A PRENDRE—GRANT OF—SHOOTING PRIVILEGE—LICENSE.

A grant of "the sole and exclusive right, privilege, and easement to shoot, take, and kill" wild fowl, on the "lakes and sloughs and waters" of the grantor, executed to the grantees, "their heirs and assigns, forever," with a privilege of "ingress and egress to and from said lakes, waters, and sloughs, for the purpose of shooting and taking wild fowl as aforesaid," is the grant of a *profit a prendre*, and not a mere license revocable at the pleasure of the grantor.

2. SAME—CONSTRUCTION OF GRANT—PERMITS.

The privilege conferred by such grant, however, is limited strictly to the places designated, viz., the waters situate upon the grantors' lands, and does not include the right to hunt upon his lands, and the grant does not authorize the indiscriminate giving by the grantees of permits to various persons to exercise the privilege granted.

3. FRAUD—CONFIDENTIAL RELATION—SETTING ASIDE DEED.

Defendants, who had executed to plaintiffs, "their heirs and assigns, forever," an exclusive right to hunt on the lakes and waters on their lands, sought to have the grant set aside on the ground of want of understanding of its terms and effect at the time they executed the grant, and on the further ground that the plaintiffs were their attorneys at the time the grant was made, and took advantage of the confidential relation thus existing in order to obtain the grant. The defendants could not read or write English, but could speak it and understand it. The deed was read over to them, and its contents explained to them before they signed it, and it was made pursuant to an agreement made by them with plaintiffs before the relation of attorney and client began, and was founded on a valuable consideration. *Held* that, in view of the facts proved, a refusal to set aside the grant was proper.¹

4. INJUNCTION—WHEN GRANTED—FAULT ON PLAINTIFFS' PART.

In a suit for an injunction to restrain defendants from interfering with the exercise of a hunting right upon defendants' premises, granted by defendants to plaintiffs, it appearing that plaintiffs had, in excess of the rights granted, issued permits to third persons to hunt upon the premises, who hunted in places not included in the grant, and committed various depredations, *held* that an injunction would not be granted, although defendants were guilty of acts which interfered with the legitimate exercise of the right.

A. R. Coleman, for plaintiffs. H. H. Northrup, for defendants.

LORD, C. J. This is a suit in equity to enjoin the defendants from interfering in any manner with the alleged exclusive right and privileges of the plaintiffs to go upon and over certain lands of the defendants, described herein, for the purpose of shooting, killing, or taking wild fowl in the lakes, sloughs, and waters therein and thereon, and to restrain the defendants from inviting or allowing any other person or persons so to do. Briefly the grievances complained of are that the plaintiffs, by virtue of a deed executed to them, whereby the defendants conveyed to them, "their heirs and assigns, forever, the sole and exclusive right, privilege, and easement to shoot, take, and kill any and all wild ducks and other wild fowl upon and in any and all lakes and sloughs and waters situate, lying, or upon our lands, lying in Columbia county, state of Oregon, the said lands being more particularly described as follows: * * *; and also, for the consideration above mentioned, the right of ingress and egress to and from said lakes, waters, and sloughs, for the purpose of shooting and taking wild fowl as aforesaid,—to have and to hold the said easement

¹See note at end of case.

and privilege, to them, the said H. T. Bingham and E. W. Bingham, and their heirs and assigns, forever,"—which said right and privilege depended for its value on its exclusiveness; and that, in order to protect the same, the plaintiffs posted notices upon the lands of the defendants forbidding all persons from going upon the lands of the defendants for the purpose of shooting wild fowl upon the lakes and waters thereon, and that the defendants, knowing the plaintiffs' rights in the premises, tore down and destroyed said notices, and made threats of assault and personal injury to plaintiffs should they go upon said land to exercise their right and privilege, etc. And, further, that the defendants have invited and permitted professional hunters to take and kill wild fowl upon said lakes and waters, to the injury of the plaintiffs, and threaten and will continue to do so unless restrained. After denying the matters alleged, the defendants affirmatively set up that the English language is not their native tongue; that they cannot read or write it, and understand it but indifferently; that they are ignorant of all forms of law; and that plaintiffs are practising attorneys, and were, at the time of making the deed aforesaid, employed by the defendants as their attorneys in certain matters of business, and that plaintiffs asked them for the privilege of going upon the lands to hunt wild fowl, and that the defendants expressed themselves as willing to give them, and no one else but them, the privilege of going upon the lands to hunt wild fowl, and that thereupon the plaintiffs prepared the above grant, but at the time of signing the same the defendants declared that they did not understand its import, and particularly the defendant Christiana, to whom then and now belong said lands, and that the plaintiffs informed her that it was nothing but the privilege to go down upon said lands and hunt, etc., and that the defendants understood that the conveyance, by its terms, granted no more than a permission to hunt upon said premises; that plaintiffs have given other persons permission to hunt upon the premises; and that, during the hunting season, they have come upon the lands, trampled and injured the grass and crops, and by shooting in the vicinity have frightened the stock of defendants, etc.; and asks that the deed be declared null and void. The reply put in issue all the affirmative matter alleged. The suit was referred and reported by the master, which report was set aside, and new findings made by the court, on which a decree was entered, and from which both parties appeal.

By their brief and at the argument, the first inquiry of the counsel was directed to the nature and import of the exclusive privilege granted by the deed; the counsel for the defendants claiming that nothing but a license was created by it, while the counsel for the plaintiffs insisted that it was a grant of a *profit a prendre*. The distinction between a grant and a license is to be taken as understood, as the contention here is that the right and privilege granted by the terms of the deed do not constitute a grant of a license of a *profit a prendre*. Rights exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof,—as rights of pasture or digging sand,—are termed *profits a prendre*. They are said to differ from easements, in that the former are rights of profit, and the latter are mere rights of convenience without profit. "A right to take something out of the soil of another is a *profit a prendre*, as the right of common; and also some minor rights, as a right to take drifted sand, or a liberty to fish, fowl, hunt, and hawk." Crabb, Real Prop. 125, c. 1; Phear, Water, 57. In *Ewart v. Graham*, 7 H. L. Cas. 334, Lord Chancellor CAMPBELL said: "The property in animals *feræ nature*, while they are on the soil, belong to the owner of the soil, and he may grant a right to others to come and take them, by a grant of hunting, shooting, fowling, and so forth. That right may be granted by the owner of the fee-simple, and such a grant is a license of a *profit a prendre*." It is seen, then, that rights which are said to be *prendre* are distinguished again into rights coupled with profits, which are called *profits a prendre*, or rights without any profits, which are called easements. But "the distinction

between an interest in the soil, or a right to profit in it, and an easement, is not always palpable. The line of separation is sometimes obscure, in some points unsettled, with no established principles to determine it." DAVIS, J., in *Hill v. Lord*, 48 Me. 99. "For a *profit a prendre* in the land of another, when not granted in favor of some dominant tenement, cannot be said to be an easement, but an interest or estate in the land itself." WALWORTH, Ch., in *Post v. Pearsall*, 22 Wend. 425. And Mr. Washburne says: "This right of a *profit a prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same." Washb. Easem. 7. But it has been expressly held that the right to enter upon lands of another to cut grass, for pasturage, for the purpose of hunting, or for fishing in an unnavigable stream, is an interest in the land, or a right to take a profit in the soil. *Fennell v. Williams*, 1 Croke, 180; *Fowler v. Dale*, Id. 363; *Pickering v. Noyes*, 4 Barn. & C. 639; *Wickham v. Hawker*, 7 Mees. & W. 63; *Waters v. Lilley*, 4 Pick. 145. A grant of a right to kill and take game on the lands of the grantor is a grant of an interest in the land itself, and within the statute of frauds. *Webber v. Lee*, 9 Q. B. Div. 315. In *Wickham v. Hawker*, *supra*, it was held that a grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come in and upon lands, and there to hawk, hunt, fish, and fowl," is a grant of a license of profit, and not of a mere personal license of pleasure, and therefore it authorized the grantee, his heirs and assigns, to hunt, fish, and fowl by his servants, in his absence, and that such a liberty is a *profit a prendre*. See, also, Washb. Easem. 8-11; Washb. Real Prop. 313; Gould, Waters, §§ 24, 25, 184, 185.

Now, let us turn to the deed, and determine what the parties intended, and what interest passed. By it the defendants, for a consideration expressed, granted in words *de presenti*, to the plaintiffs, their heirs and assigns, forever, the sole and exclusive right and privilege to shoot, take, and kill any and all wild fowl upon and in any lakes, sloughs, or waters situate upon their lands, and the right of ingress and egress to and from said lakes, sloughs, and waters for such purpose. As the owners of the lands which included such lakes, sloughs, and waters thereon, the property of animals *feræ naturæ*, while on the lands or such waters, belonged to the defendants by virtue of such ownership. The defendants had the exclusive right to take and kill such wild fowl upon the lakes or other waters upon their lands, and they had the right to grant to the plaintiffs the sole and exclusive right to take and kill such wild fowl at the places designated in their deed. But the sole and exclusive right granted to the plaintiffs to take and kill any and all wild fowl on such lakes, sloughs, and waters is inconsistent with the right of any other persons to take or kill them, or to use and exercise such privilege at such places. It is a right exclusive of all others at such particular or specified places. *Holford v. Bailey*, 66 E. C. L. 425-447, 55 E. C. L. 1000-1007. If this the plaintiffs granted,—this sole and exclusive privilege to take and kill such game at such places on their land,—it divested them of all right and authority to permit or grant other persons to take and kill such wild fowl upon any lake, slough, or waters lying upon their lands. Here there is a grant of a sole and exclusive right and privilege to the plaintiffs, their heirs and assigns, forever, to shoot, take, and kill such game on the lakes and waters upon the lands of the grantors, and which right in *Webber v. Lee*, *supra*, was held to be a grant of an interest in land, and within the statute of frauds. This right, then, to take something out of the soil, or from the land of another, which includes shooting, hunting, and fishing, is a *profit a prendre*; and, Mr. Washburne says, "is so far of the character of an estate or interest in the land itself that, if granted to one in gross, it is treated as an estate, and may

therefore be for life or for inheritance." Washb. Easem. 9. It is manifest, therefore, that the contention that the deed only created a license, revocable at the pleasure of the defendants, cannot be sustained.

We do, however, concur in the construction of the deed insisted upon by counsel for the defendants, that the use and enjoyment of the privilege is limited and confined strictly to the places designated. There is no authority or privilege granted to shoot, take, and kill wild duck or other wild fowls on the lands of the defendants. It is confined to the waters lying upon the lands of the defendants. The deed is specific upon this point. The right and privilege to be exercised, used, and enjoyed, is "upon and in any and all lakes, sloughs, and waters situate, lying, or upon our lands," etc. The plaintiffs have the right to shoot, take, and kill any and all wild fowl in or upon the lakes and waters situate and lying upon the lands of the defendants, but the right and privilege is limited and confined to such designated places, and cannot be exercised elsewhere by force of the grant.

We concur, also, in the construction maintained by counsel for the defendants, that the deed does not authorize the indiscriminate giving of passes or permits to various and numerous persons to use and enjoy the sole and exclusive privilege granted to them, their heirs and assigns, forever. For the purpose of enjoying the privilege granted, the plaintiffs may shoot and take and kill the wild fowl upon the lakes and waters on the lands of the defendants, or they may sell and assign their right and privilege, but there is no authority to give such passes or permits, by whatever name designated, to others. In *Wickham v. Hawker*, *supra*, PARKE, B., said: "But this is a grant by deed to persons, 'their heirs or assigns.' It is clearly intended that not merely the particular individual named, but any one to whom they or their heirs choose to assign it, should exercise the right, which seems to us to show that it is an interest or a *profit a prendre* which is intended to be granted." And it may be said, *en passant*, that much of the trouble which has caused the present suit, as indicated by the evidence, is undoubtedly due to the misconduct and abuse of the privilege by persons to whom such permits were given. Some of these persons were not only insulting to the defendants at places upon their lands where such persons had no lawful right to be without the consent of the defendants, but they asserted defiantly the right to use, and did use, the privilege for purposes and in a manner and at places unauthorized by the terms of the grant. While "the supposed odiousness of this right," as Lord CAMPBELL said, "cannot influence our decision," the fact, at least, admonishes us that no intendments or presumption are to be indulged in the construction of the grant not warranted by the plain import of its terms and provisions. A grant of this description is construed strictly. The court is therefore of the opinion that such permits were unauthorized, and not within the purview of the privilege granted.

It is also contended by counsel for the defendants that the right of ingress and egress is limited to the lakes and waters. The provision on this subject is: "The right of ingress and egress to and from said lakes, waters, and sloughs, for the purpose of shooting and taking wild fowl, as aforesaid." The evident object of this provision was to give the plaintiffs ingress and egress to and from the lakes and sloughs,—the places where the privilege of killing and taking of wild fowl was to be exercised and used; and if ingress to and egress from, or from lake to slough, was over the land, the right to pass over the land for that purpose was granted. Of course, this right can and must be used and enjoyed without detriment or injury to the crops and grass and stock of the defendants.

Thus far we have been considering solely the terms of the grant as indicated upon the face of the instrument. We come now to consider the defenses of the defendants. Substantially, they are divisible into two parts; and, briefly, are (1) that the defendants, being unable to read and write, signed the deed re-

lying upon the representation of the plaintiffs that its provisions only created a personal license to come down to the farm of the defendants to shoot and hunt wild fowl; and (2) that, at the time the deed was executed, the plaintiffs were acting as the attorneys of the defendants, and availed themselves of the confidence arising from that relation to procure their consent to grant them such privilege on the representations stated. It is sufficient to say, without going much into detail, that we do not think that either of these defenses are sustained by the evidence. It is true that the defendants cannot read or write, but both speak the English language reasonably well, and the evidence discloses that they are persons of ordinary understanding, and not negligent of their interests. At the time the deed was executed, the defendants sought the law office of the plaintiffs for the purpose of shifting the title from the defendant husband to the defendant wife to avoid a liability to which it might be exposed to remain in his hands. The object of that arrangement, and the effect sought by the transfer, they evidently understood; and, after the explanation made to them of the nature of the right and privilege contained in the deed executed to the plaintiffs, we cannot doubt that they understood it,—not, it may be admitted, in the technical sense, but in the sense that it was the grant of an exclusive right in perpetuity, and not a mere personal license revocable at their pleasure. They might not have known it was a *profit à prendre*; but, to accord to them ordinary sense after the explanation given, they must have understood that they were granting to the plaintiffs, their heirs and assigns, forever, the exclusive right to shoot and take and kill wild fowl upon the lakes and waters on their lands. There is no difficulty in understanding the nature and duration of the privilege granted, although disagreements might arise, under the terms of the grant, as to how and where the privilege is to be used and enjoyed. This often happens with men of superior understanding and attainments in respect to writings, but it is no ground for declaring such writing invalid. We recognize it to be the duty of a party when dealing with unlettered persons who can neither read nor write, and taking from them a deed, to show, when seeking to establish or enforce some right under it, that it was read and fully explained to them before it was executed. All this was done, and the evidence to this point is explicit and conclusive. Judge Rice, who took the acknowledgment, testifies: "After the instrument was completed, which was in a few minutes, it was read over to the parties. I may have read it myself to them; but I remember distinctly that it was read by some one while I was present, and that there was a very considerable conversation between the parties and both the plaintiffs concerning the instrument and its contents. This made a very distinct impression on my mind, from the fact that there was a great deal more than I considered usual care to have the grantors fully understand the contents of the instrument." Nor do we think any declarations were made by the plaintiffs at the time, designed to deceive or mislead the defendants, or as relevant to this matter, for any other purpose than to explain the true purport of the privilege granted. All things taken together, it is certainly clear that the plaintiffs understood what they were doing, and that the privilege granted was not a mere license as alleged.

As to the correctness of the principle so ably maintained by the counsel for the defendants in respect to the duties and obligations of attorneys to their clients, the measure of faith and diligence required of them, and the great jealousy with which the courts watch all transactions between them, and the affirmative duty of the attorney to show that the transaction was fair and honest and above all suspicion,—in a word, that the confidence reposed has not been betrayed,—we heartily approve and indorse. The principle of a public policy which affects with a presumption all transactions between persons standing towards each other in a confidential relation that an undue influence has been exercised, and which devolves upon him who occupies the post of active confidence to show that presumption adequately rebutted, is founded

in the soundest judicial wisdom. But the fact is, so far as relates to this case, it had been previously agreed, when no such relationship existed, that the grant of this privilege should be made. It is true, it had not been put into any obligatory form, and yet the evidence indicates that when done it was done in the pursuance of that agreement, and as necessary to be done before the title was transferred through a third party from the husband to the wife for the purposes already stated. Besides, we think that the transaction was fair and honest, and that the consideration given was the equivalent of the value of the privilege when granted, and that the plaintiffs were not guilty of any violation of the trust or confidence reposed in them. For these reasons, we do not think that the defense which seeks to set aside and declare invalid the grant is made out.

We now come to the grounds of the complaint, and the issue joined upon it, in connection with the evidence elicited, for the purpose of ascertaining whether the plaintiffs, in view of all the facts, have made such a case as will authorize the injunction prayed for. The facts alleged, and their denial, have already been stated. Without detail, it is sufficient to say there is evidence tending to prove the grievances complained of; and, if there was not also evidence tending to show that the plaintiffs, in the same connection, have not been free from fault, we should be disposed to grant the relief prayed for; notwithstanding our doubts that the remedy is at law, and not in equity. It was said in *Weiss v. Jackson Co.*, 9 Or. 471, that the granting of an injunction is an equitable proceeding, and that the party seeking this peculiar equitable relief should show that he has a right, under all the circumstances, to this extraordinary writ. It is admitted that the plaintiffs have issued permits to very many persons to use and enjoy the sole and exclusive privilege granted to them, their heirs and assigns. In this they transcended their rights under the terms of the grant. They claimed the right also to use the privilege to kill and take wild fowl at places not authorized by the grant. Some of the persons to whom the plaintiffs gave these permits not only claimed the right to hunt and shoot and roam where they pleased on the lands of the defendants, but in some instances behaved in a most impudent and insolent manner to those old people, upon whose land they had no right to be without their permission for any purpose whatever. In substance, the evidence is that they left the gates open, shot their guns off in the vicinity of the house and barn, sometimes hitting the cattle and frightening the stock; twice hitting and wounding a valuable shepherd dog, which finally had to be killed in consequence of the wounds thereof; roaming over the lands at their will; and in one instance, when ordered to leave the place, one of these persons threatening to have one of the defendants arrested; another telling her: "You have nothing to say about this place; it is none of your business; I have got a permit in my pocket;" and much more of like character. Under this state of facts, is it surprising that the defendants were exasperated and resisted, and may we not suppose that, if the privilege granted had been used in conformity with its terms, the present misunderstanding might have been avoided? It may be admitted that the defendants have not been without fault; but have the plaintiffs been free from blame? We do not care to pursue the subject further.

Our opinion is a case has not been made which would authorize the issuance of this extraordinary writ as prayed for, and that the decree must be reversed, and the bill dismissed; each party paying their own costs and disbursements.

NOTE.

CONFIDENTIAL RELATIONS—ATTORNEY AND CLIENT. In dealings between an attorney and his client, the burden is on the former to show that the transaction was fair, honest, and untainted by undue influence. *Dunn v. Dunn*, (N. J.) 7 Atl. Rep. 842; *Cleine v. Englebrecht*, (N. J.) 5 Atl. Rep. 718, and note; *Whipple v. Barton*, (N. H.) 3 Atl. Rep. 922; *Tancre v. Pullman*, (Minn.) 29 N. W. Rep. 171. Respecting undue influence generally, as exercised by those occupying a confidential relation towards the other party,

see *Morton's Adm'r v. Morton*, (N. J.) 8 Atl. Rep. 807; *Kerrigan v. Leonard*, Id. 503; *Conover v. Conover*, Id. 500; June v. Willis, 30 Fed. Rep. 11, and note; *Carter v. Tice*, (Ill.) 11 N. E. Rep. 529, and note; *Conner v. Stanley*, (Cal.) 14 Pac. Rep. 306; *McHarry v. Irvin's Ex'rs*, (Ky.) 4 S. W. Rep. 800, and 3 S. W. Rep. 374; *Clutter v. Clutter*, (Ky.) 4 S. W. Rep. 182, and note.

FERRARIS, Adm'r, etc., v. KYLE. (No. 1,257.)

(*Supreme Court of Nevada*. June 27, 1887.)

1. EVIDENCE—COMPETENCY—STATEMENT ON MOTION FOR NEW TRIAL.

A "statement of a case" used upon motion for new trial held not admissible upon the second trial to prove a variance between the testimony of plaintiff on the first trial and his testimony on the second trial.

2. SAME—RELATING TO POSSESSION.

It being conceded that the delivery of inclosed land carries with it the possession of the personal property thereon, an offer to show, in justification of a levy of execution made upon a ranch, and the personal property thereon, after its sale and delivery of possession to plaintiff, that the execution purchaser, after his purchase, built a new fence around the land, no offer being made to show the condition of the old fence, held properly refused.

3. SAME.

Evidence of the condition of a brush fence at a given date just before the trial is incompetent for the purpose of showing its condition 29 months previous.

Appeal from a judgment of the district court in and for Eureka county, entered in favor of the plaintiff.

Action for conversion by the purchaser of a certain ranch, and the personal property thereon, from a judgment debtor, against a sheriff who levied upon the personal property to satisfy the judgment. The evidence showed that plaintiff purchased and entered upon the premises, and occupied the house; that the property levied upon was a quantity of wood and coal a short distance from the house on the ranch; that the ranch was inclosed by a fence.

For a former appeal in this case, see 5 Pac. Rep. 666.

H. K. Mitchell, for appellant. *Baker & Wines*, for respondent.

BELKNAP, J. Upon the former appeal the judgment of the district court was reversed on the ground of failure of the plaintiff to establish such a possession of the personal property against attaching creditors as would satisfy the requirements of the statute of frauds. In reaching this conclusion, the evidence adduced at the trial was fully set forth in the opinion of the court. *Comaita v. Kyle*, 5 Pac. Rep. 666. At the second trial the testimony introduced by the plaintiff tended to establish the facts proven at the first trial, and, in addition thereto, the fact that the land surrendered to the possession of plaintiff's intestate was inclosed by a fence.

The assignments of error specify that the evidence is insufficient to justify the verdict, for the reason that no change of possession from vendor to vendee was shown. This objection is answered by the fact that the delivery of the possession of the inclosed land carried with it the possession of the personal property thereon. This appears to be conceded by counsel, and we shall assume that the point has been abandoned as untenable.

The other exceptions arise upon the rulings of the court at the trial.

1. It was claimed that the evidence of the plaintiff differed from that given at the former trial; and, for the purpose of establishing the variance, defendant offered in evidence the statement upon motion for new trial and appeal used at the former hearing of the cause. The court excluded it. A statement upon motion for new trial and appeal is made for the purpose of explaining the errors upon which the moving party and appellant will rely. If it contains the evidence introduced at the trial, it is for this purpose. Counsel frequently agree to the correctness of a statement, or that it contains all of the evidence given at the trial, and these agreements are accepted as true for

the purpose for which they are made. But, in fact, notwithstanding stipulations of this nature, statements rarely embody more of the evidence or rulings than counsel consider necessary to illustrate the errors assigned; and matter upon which no question is made, although a part of the history of the case, is set aside as unnecessary. A document prepared in this way, it is scarcely necessary to say, should not be received without preliminary proof that its report of the evidence is correct.

2. The next specification of error is to the refusal of the court to allow the witness Tognini to testify that, after his purchase of the ranch under an execution issued upon his judgment against the vendor of plaintiff's intestate, he built a new fence around the ranch. The specification includes also an offer to prove the condition of the old fence at the time of the construction of the new one, but an examination of the record will show that this latter offer was not made, and it will not, therefore, be considered. The offer relating to the building of the fence was not coupled with any offer of evidence tending to prove a necessity for its construction, or that the inclosure was insufficient. The evidence of itself was immaterial, and was properly excluded.

3. Appellant again sought to prove the condition of the fence at the time of the sale in the month of November, 1882, by three witnesses who had examined it during the month of June, 1885, a few days before the trial. The purpose of the testimony was to prove the insufficiency of the inclosure. The district court correctly considered that a knowledge of the condition of a brush fence at the time of trial was not a fact from which the jury could infer its condition 29 months before.

4. The remaining exception arose upon the refusal of the court to give an instruction identified in the transcript as defendant's instruction No. 5. The instruction is self-contradictory and misleading, and should have been refused.

The judgment and order of the district court are affirmed.

STONE v. FRENCH and others.

(*Supreme Court of Kansas. July 9, 1887.*)

1. DEED—DELIVERY.

Where a voluntary warranty deed, containing, among other things, the following words, to-wit, "Signed, sealed, and delivered in the presence of S. M.," is signed and acknowledged by the maker, and the deed is not delivered to any person during his life-time, he intending at the time that it should be delivered and pass title *after his death, and not before*; but after his death the intended grantee, in accordance with the maker's intention, gets the possession of the deed, has it recorded, and takes possession of the land under it: *held*, that such deed has never been in law delivered, that no title has passed under it, and that it is void.¹

2. SAME.

And in such a case, where the person named in the deed as grantee sells and conveys the land by warranty deed to another person who is in fact a *bona fide* purchaser, and who afterwards takes the possession of the land, *held*, that no title has passed to such purchaser as against the heirs of the deceased owner.

(*Syllabus by the Court.*)

Error from district court, Neosho county.

Buck & Feighan and Cox & Stratton, for plaintiff in error. *C. F. Hutchings and J. L. Denison*, for defendants in error.

VALENTINE, J. This was an action for the partition of 200 acres of land in Neosho county, Kansas, brought in the district court of that county on October 16, 1884, by Luther C. French against John Stone and others. The

¹As to the necessity of delivery to give effect to a deed, see *Duraind's Appeal*, (Pa.) 8 Atl. Rep. 922; *Quick v. Milligan*, (Ind.) 9 N. E. Rep. 392; *Sturtevant v. Sturtevant*, (Ill.) 6 N. E. Rep. 428; *Vaughan v. Godman*, (Ind.) 3 N. E. Rep. 257, and note; *In re Guyer*, (Iowa,) 29 N. W. Rep. 826, and note; *Fain v. Smith*, (Or.) 12 Pac. Rep. 365.

case was tried before the court and a jury, and judgment was rendered for the partition of the property, giving to the plaintiff, Luther C. French, one-seventh thereof, and to the defendant John Stone one-seventh thereof, and to the other defendants the remainder thereof; and to reverse this judgment the defendant John Stone, as plaintiff in error, brings the case to this court, making the plaintiff, Luther C. French, and all the defendants, except himself, defendants in error.

It appears that on March 1, 1878, and prior thereto, the property in controversy belonged to Francis B. French, although he had not yet entirely paid for the same. At that time he formed the intention of giving this land at his death to his brother, Dudley S. French, unless he should sell the same during his life-time. On March 1, 1878, he wrote a letter to his brother, Dudley S. French, in which he stated, among other things, the following: "In case I should drop off, you can take possession of the land, and do with it as you please. When I have paid the land out, if not sold, I will make a deed to it to you, inclose it in envelope, direct it to you, to be mailed in event of death, which would make it sure to you without expense or trouble." Nearly one year afterwards, and on February 18, 1879, Francis B. French signed a warranty deed for the property to Dudley S. French, and on October 4, 1879, acknowledged the deed before S. MICHAELS, a justice of the peace in said county. The deed also contained the words: "Signed, sealed, and delivered in the presence of S. MICHAELS." The deed, however, never was in fact delivered. On August 2, 1879, Francis B. French died, in the possession of and owning the land in controversy. During all this time he was a single man, and did not leave at his death any wife or child, or father or mother, but left several brothers, including the plaintiff, Luther C. French, and Dudley S. French. It does not appear that any person except Michaels and Francis B. French ever saw the aforesaid deed, or had the slightest knowledge thereof until about half an hour before French died, when it was found by William Welch inclosed in an envelope, with a letter, in a cigar box, in the drawer of a table in the house occupied as a residence by French. The following words were indorsed upon this envelope: "This deed to be placed in the recorder's office at Erie, Kansas, for record, and the accompanying letter to be mailed as per direction thereon." At the time this deed was found, French was speechless and unconscious, and remained in that condition until he died, about half an hour afterwards. Welch immediately telegraphed to Dudley S. French, who resided at Clinton, Illinois, and French came to Kansas, arriving at the place where Francis B. French died on August 4, 1879. Shortly afterwards, Welch delivered to French the aforesaid deed. This is the first time that French ever saw the deed, and he never heard of it until after the death of Francis B. French. On August 6, 1879, Dudley S. French filed the deed for record in the office of the register of deeds of Neosho county, Kansas. Dudley S. French then took possession of the land, and remained in the possession thereof until he sold the same to John Stone, the plaintiff in error. Dudley S. French was a brother-in-law to Stone, and for a time lived at his house. He was weak in body and in mind, and a part of the time could scarcely dress himself. On June 10, 1882, he sold and conveyed this land by warranty deed to Stone for the expressed consideration of \$2,000, but for the real consideration of only \$800. He was a single man at the time. The land was worth about \$3,000. Stone at the time did not know that there was any infirmity in the title of Dudley S. French, and for the purposes of this case he must be considered as *in fact a bona fide purchaser*, whatever the law may be. The deed from Dudley S. French to Stone was recorded on June 16, 1882. At some time during the summer of 1882, Stone took possession of the land, and has remained in the possession thereof ever since. This action was commenced on October 16, 1884. All the heirs at law of Francis B. French, including the plaintiff below, Luther C. French, and Dudley S. French, were

made parties to the action, so, also, were the defendant, John Stone, and S. Michaels and others. Dudley S. French died on January 7, 1885, after this action was commenced, but before the trial was had.

It is conceded by all parties that John Stone is entitled to one-seventh of the land in controversy, that amount being admitted to be the share inherited by Dudley S. French from Francis B. French; but Stone claims that he is entitled to all the land, and whether he is entitled to only one-seventh thereof or to all the land is the only substantial question involved in this case. The principal questions presented by counsel to this court are as follows: (1) Was the deed from Francis B. French to Dudley S. French ever delivered so as to make it a valid deed? (2) If not, then, is John Stone, for any reason, entitled to more than one-seventh of the land in controversy?

There is no room for even a pretense that the deed was ever in fact delivered to Dudley S. French, or to any one else, and there is scarcely any room for even a pretense that it was ever in law delivered. The only grounds upon which it is claimed that it was ever delivered is the letter of Francis B. French to Dudley S. French, dated March 1, 1878; the indorsement on the envelope found in the cigar box on August 2, 1879; and the words contained in the deed, to-wit: "Signed, sealed, and delivered in the presence of S. MICHAELS." Now, it may be conceded that these things constitute some evidence of a delivery; but, when it is shown conclusively by the other evidence that there was no delivery, these things can have no force. Besides, the letter itself shows that there was no present intention on the part of Francis B. French of conveying the land, or delivering a deed to Dudley S. French; and it also shows that Francis B. French contemplated that he might before his death sell the land to some other person. Francis B. French never had any intention of conveying the land immediately, but it was always his intention, unless he sold the land, to retain the title thereto in himself as long as he lived, and to let the property go to Dudley S. French only after his death. This does not constitute a delivery of a deed or a conveyance of the land. Of course, there are cases where it is not necessary that there should be any actual manual delivery of the deed. A recording of the deed is sometimes considered as a delivery. So, also, is a delivery to a third person sometimes considered as a delivery to the grantee. And where a deed is executed by a father to an infant child, with the intention that the title shall immediately pass and vest in the child, and the father retains the custody of the deed as the natural guardian of the child, the title may pass. But none of these cases is the present case; nor is the present case anything like them. Dudley S. French was not an infant, and, although he was a man of weak mind, yet he was not *non compos mentis*. The deed was not delivered or recorded by Francis B. French, nor during his life-time, and he never had any intention that the title should pass until after his death. The deed never was a deed in law, and Dudley S. French never had any right to it; nor had he any right to have it recorded; nor did it convey any title, interest, or estate to him. It was not merely voidable, but it was absolutely void.

The court of appeals of New York uses the following language: "A rule of law by which a voluntary deed executed by the grantor, afterwards retained by him during his life in his own exclusive possession and control, never during that time made known to the grantee, and never delivered to any one for him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court either of law or equity." *Fisher v. Hall*, 41 N. Y. 421, 422. See, also, *Burton v. Boyd*, 7 Kan. 17, 31, *et seq.*; *Huey v. Huey*, 65 Mo. 689.

Taking this view of the case, John Stone obtained no title from Dudley S. French; for Dudley S. French had none whatever to convey.

This is unlike a case where a deed is only voidable, and a *bona fide* purchaser obtains title from the holder of the same without any notice of its infirmity. In such a case he may obtain a good title; but, where the deed is absolutely void, he cannot. It seems to be admitted that if the deed were forged, that no person could obtain any title under it, however innocent he might be, but a forged deed is no more void than this deed. Both, in this respect, are precisely alike. Both are equally void. And neither the record of a forged deed, nor the record of an absolutely void deed, can be invoked to support or bolster up a disputed title; for the record is worth no more than the original deed itself. It is only instruments that have some validity, and that may in some manner affect real estate, that can be recorded legally. There is no statute authorizing the recording of a void instrument, and it is an error to suppose that the statutes can have the effect of making valid an absolutely void instrument by permitting the void instrument to be recorded. The instrument is still void, although recorded. The record can give it no validity. As tending to support the view that a purchaser of real estate from a person holding under a void recorded deed, although in fact a *bona fide* purchaser, cannot obtain a good or valid title, or, indeed, any title, we would refer to the following authorities: *Everts v. Agnes*, 6 Wis. 453; *Tisher v. Beckwith*, 30 Wis. 55; *Chipman v. Tucker*, 38 Wis. 43, 20 Amer. Rep. 1; *Van Amringe v. Morton*, 4 Whart. 382; *Smith v. South Royalton Bank*, 32 Vt. 341; *Harkreader v. Clayton*, 56 Miss. 383; *Berry v. Anderson*, 22 Ind. 37, 40. The case of *Lewis v. Kirk*, 28 Kan. 497, 505, has no reference to void deeds, or to the record of void deeds.

A deed not delivered at all is a very different thing from a deed actually delivered, even though the delivery of the same may have been procured through fraud; and a deed not delivered, but wrongfully in the hands of the apparent grantee, without fault or negligence on the part of the owner of the land, is unlike a deed not delivered, but through the fault or negligence of the owner has been permitted to get into the hands of the apparent grantee. In the present case the deed was never delivered, and was not permitted to get into the hands of Dudley S. French, the apparent grantee, while Francis B. French was the owner of the land; but after Francis B. French died, and after the title to the land had passed from him to his heirs, the deed did get into the hands of Dudley S. French, the apparent grantee, but not through any fault or negligence on the part of the heirs, who were then the owners of the land.

Other points are raised in this case, but they are technical and unsubstantial, and require no comment. To reverse the judgment of the court below for any of them would be a violation of the spirit of the Civil Code, and especially of sections 140 and 304. We think no substantial error has been committed in this case, and it is unnecessary to prolong this opinion.

The judgment of the court below will be affirmed.

(All the Justices concurring.)

CLARK and others v. WEIR.

(Supreme Court of Kansas. July 9, 1887.)

1. ASSAULT AND BATTERY—CIVIL ACTION—PLEADING.

In a civil action for an assault and battery, where two sufficient defenses are set forth in the defendant's answer, and the court, upon motion and demurrer, erroneously holds that one of them is insufficient, and afterwards the defendant goes to trial upon the other defense, and rightfully and without objection introduces all the evidence under it which he could have introduced under the defense that was excluded, *held* no material error was committed.

2. SAME—INSTRUCTIONS.

Also held, that no material error was committed in giving or refusing instructions.

3. SAME—DAMAGES.

In such action, where the court instructs the jury that they may render a verdict for both actual damages and exemplary damages, and where the jury, at the request of the defendant, is not only required to return a general verdict, but also to answer special questions of fact, among which is the following question: "What amount of actual damages did the plaintiff sustain, if any?" And the jury afterwards return their general verdict in favor of the plaintiff, and against the defendant, and assess the plaintiff's damages at \$300, and state orally that they cannot agree with reference to this special question, and the court then directs the jury to answer it by saying, "Jury do not agree;" and they so answer this question, and do not answer it in any other manner, and there is nothing in the case showing how much the jury allowed as actual damages, or how much they allowed as exemplary damages: *held* material error.

(*Syllabus by the Court.*)

Error from district court, Shawnee county.

H. H. Harris and J. J. Hitt, for plaintiffs in error. *Welch, Lawrence & Welch*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Shawnee county by William Weir against Jonas D. Clark, Fleming Gear, and James Duncan, to recover damages for an alleged assault and battery. The case was afterwards transferred to the superior court of Shawnee county, where it was tried before the court and a jury, and judgment rendered in favor of the plaintiff, and against the defendants, for \$300 and costs. To reverse this judgment the defendants, as plaintiffs in error, bring the case to this court.

The first alleged error is the striking out of certain portions of the second defense of the defendants' answer, and then sustaining a demurrer to such defense. The ground for the demurrer was that the facts set forth did not constitute any defense. The facts were set forth in great detail; but, briefly stated, they are in substance as follows: The defendants were the school board of school-district No. 39, in Shawnee county, Kansas, and the plaintiff was a school-teacher in such district. The board went to the school-house where the plaintiff was teaching to visit the school, to examine the school-register, and to perform such other duties as are prescribed by law. They requested the plaintiff to permit them to see the register, but he refused, and became greatly enraged, attempted to grab an iron poker, but was prevented, and then he made an assault upon the defendant Gear. When such assault was made, the defendants put him out of the house, but "at no time used more force or violence than was absolutely necessary to protect themselves from the violence and attacks of the plaintiff;" "and that plaintiff himself was all the time the aggressor, used all the violence, and, through his own malicious and wicked motives, created all the disturbance, and made the only assault that was made."

Section 27 of the act relating to school boards reads as follows: "Sec. 27. The district board shall furnish each teacher with a suitable daily register, and shall visit together, or by one or two of their number, all the schools of their district at least once a term, and at such other periods during the term as in their opinion the exigencies of each school may require, at which visits they shall examine the register of the teacher, and see that it is properly kept, and inquire into other matters touching the school-house, facilities for ventilation, furniture, apparatus, library, studies, discipline, modes of teaching and improvement of the school; shall confer with the teacher in regard to condition and management, and make such suggestions as in their view would promote the interest and efficiency of the school, and the progress and good order of the pupils. The date and results of each visit shall be entered by the clerk of the board on their minutes."

We shall decide this case upon the theory that the court below erred in disposing of this second defense as it did. We shall assume that the facts stated therein constitute a good defense to the plaintiff's action. But under the

other facts of the case, is the error material? If the defendants had stood upon the sufficiency of this defense, and not have participated in the trial that followed, the error would certainly have been material, and they could at once have brought the case to the supreme court, and have had the error corrected. *Gilchrist v. Schmidling*, 12 Kan. 268. But they did not stand upon the sufficiency of their second defense. They went to trial upon their first defense, upon which they had a right to prove, and they did in fact and without objection offer evidence to prove, all that was alleged in their second defense, and all that they could have proved under such defense. This, we think, rendered the errors of the trial court with regard to the second defense immaterial. *Cannon v. Kresipe*, 14 Kan. 324.

It is claimed that the court below erred in giving and in refusing instructions. It may be that the instructions given were too verbose and contained too much extraneous matter; and, indeed, it may be that such of the instructions given as were favorable to the plaintiff's side of the case were unnecessarily profuse, while those given on the other side were correspondingly scanty; but still we cannot say that the court below committed any material error in either giving or refusing instructions. We are inclined to think that the instructions given state the law, and cover the entire case.

It is also claimed that the court below erred in directing the jury how to answer the special questions numbered 2 and 3. The record upon this subject shows and reads as follows:

"At the request of the defendants, the court then submitted to the jury the following questions to be answered by them and returned as a part of their verdict in this cause, to-wit: '(1) Did Gear and Clark, or either of them, have anything to do with spitting in plaintiff's face? (2) What amount of actual damages did the plaintiff sustain, if any? (3) What items, and what is the amount of each item, that plaintiff sustained in actual damages, if he sustained any?'

"The jury then retired with their bailiff, and after consultation returned into court with the following verdict, to-wit:

"We, the jury impaneled and sworn to try this cause, find generally in favor of the plaintiff, and against all the defendants, and we assess the plaintiff's damages at the sum of \$300. H. D. CARR, Foreman.

"And, in addition to our general verdict herein, we, the jury, make answer to particular questions of fact as follows: (1) Did Gear and Clark, or either of them, have anything to do with spitting in plaintiff's face? *Answer*. No. (2) What amount of actual damage did the plaintiff sustain, if any? *A. ———*. (3) What items, and what is the amount of each item, that plaintiff sustained in actual damage, if he sustained any? *A. ———*.'

"The attention of the court was then called to the fact that the second and third interrogatories had not been answered by the jury. The court then asked the foreman of the jury why the questions had not all been answered, and the foreman replied that the jury could not agree upon answers to said second and third questions. The court then instructed the foreman of the jury to write as answers to the second and third questions the following: 'Jury do not agree.' The foreman then, and without retiring to their jury-room, wrote at the end of the questions the words, 'Jury do not agree,' and signed his name, 'H. D. CARR, Foreman;' so that, as returned to the court, the second and third questions, and their answers as returned, are as follows, to-wit:

"(2) What amount of actual damages did the plaintiff sustain, if any? *Answer*. Jury do not agree. (3) What items, and what is the amount of each item, that plaintiff sustained in actual damage, if he sustained any? *A. Jury do not agree.* H. D. CARR, Foreman.'

"And thereupon the said questions numbered two and three, with said answers thereto, were read to the jury, and the jury were asked if said answers

were their answers, and the answer of all the jurors to said questions, and the jury responded in the affirmative. To all of which action of the court the defendants then and there objected, and, their objection being overruled, they at the time excepted. Defendants then moved the court that the jury be returned to the jury-room to make answer to questions 2 and 3, which motion was by the court overruled, to which action of the court the defendants then and there excepted. Defendants then moved the court for a judgment upon the verdict of the jury, which said motion was by the court overruled, and to which action of the court defendants excepted. Defendants then filed their motion for a new trial, which said motion is in words and figures as follows, to-wit: [Here is set out the motion in full, which sets forth as grounds for the new trial not only the rulings of the court with regard to these special questions, but also 11 other grounds for a new trial.]”

This motion was overruled by the court, and the defendants excepted, and judgment was then rendered in favor of the plaintiff and against the defendants, as aforesaid.

We think the court below erred in directing the jury to answer the special questions numbered 2 and 3 by simply saying, “Jury do not agree.” The court ought to have required the jury to find proper answers to these questions, or at least to the one numbered 2. *Kansas Pac. Ry. Co. v. Peavey*, 34 Kan. 474, 8 Pac. Rep. 780; *Union Pac. Ry. Co. v. Fray*, 35 Kan. 700, 12 Pac. Rep. 98; *Wichita & W. R. Co. v. Fehheimer*, 36 Kan. —, 12 Pac. Rep. 362. This question numbered 2 is a material one, and the defendants had a right to have it answered properly. The court instructed the jury that they might award to the plaintiff both *actual* damages and *exemplary* damages; and this question was submitted to the jury for the purpose of ascertaining what amount of *actual* damages, if any, the plaintiff sustained; and then, by deducting the actual damages awarded from the whole amount of the damages awarded, the amount of the exemplary damages would be shown. But from the answer to the question, as given by the jury, no one can tell what amount of actual damages was awarded, or what amount of exemplary damages was awarded. Indeed, the jury as a body never agreed upon any amount of actual damages, or any amount of exemplary damages. Their verdict was simply a compromise verdict for \$300 damages in the aggregate. Some of the jurors may have been in favor of awarding the whole amount as exemplary damages, while other jurors may have been in favor of awarding the whole amount as actual damages, and still other members of the jury may have been in favor of awarding a portion of this amount as exemplary damages and a portion as actual damages; and no two of the jurors may have agreed with regard to the damages. Certainly, the jury, *as a jury*, never agreed upon any verdict as to actual damages or as to exemplary damages. They should have been required to agree, or have been discharged because they could not agree.

For the error of the court below in permitting and requiring this question to be answered in the manner in which it was answered, its judgment must be reversed, and cause remanded for a new trial.

(All the justices concurring.)

MCABOY v. TALBOT.

(*Supreme Court of Kansas. July 9, 1887.*)

1. JUSTICE'S COURTS—PLEADINGS—FORMALITY.

In Kansas, pleadings in actions commenced before a justice of the peace are not required to be so formal as pleadings in actions commenced in the district court.

2. APPEAL—QUESTIONS OF FACT.

Where the evidence tends to sustain every material fact, and the verdict rendered has received the approval of the trial court, the supreme court will not interfere, although the testimony may seem to preponderate against the verdict.

Error from district court, Cherokee county.

W. H. Hornor & Son, for plaintiff in error. *Anderson & Tracewell*, for defendant in error.

PER CURIAM. Talbot commenced his action before a justice of the peace of Cherokee county, against McAboy, to recover \$63.67, alleged to be due for pasturage of certain stock. McAboy filed an answer containing a general denial, and also alleging that Talbot took and accepted 28 head of stock from him to pasture, thereby becoming a bailee for hire, and that, through his negligence, three of the cattle were lost, and therefore that he was entitled to recover the value of the same, being \$75, for damages. Upon the trial before the justice of the peace, McAboy recovered judgment for \$12.10, with his costs. Talbot appealed to the district court, and the case was tried at the April term for 1885. The jury returned a verdict for Talbot for the sum of \$39.40, and judgment was rendered thereon, with costs taxed at \$49.85. McAboy excepted, and brings the case here.

It is contended that the bill of particulars setting forth the account or claim is insufficient, and that no evidence ought to have been received against the objections presented. We think otherwise. Pleadings in actions commenced before a justice of the peace are generally not required to be as formal as pleadings in actions commenced in the district court. *Galbraith v. McCormick*, 23 Kan. 706.

It is further contended that the evidence does not support the verdict. This case comes within the rule so often declared by this court that where the testimony sustains every essential fact, and the verdict has received the approval of the trial court, this court will not interfere, although the testimony seems to preponderate the other way. This court is not a trier of questions of fact. *Railway Co. v. Kunkel*, 17 Kan. 145.

The judgment of the district court will be affirmed.

JOHNSON v. WILLIAMS.

(*Supreme Court of Kansas. July 9, 1887.*)

VENDOR AND VENDEE—BONA FIDE PURCHASER.

A person who holds real estate by virtue only of a quitclaim deed from his immediate grantor, whether he is purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries.¹

(*Syllabus by the Court.*)

Error from district court, Elk county.

A. M. Bowen and Kirkpatrick & Vestal, for plaintiff in error. *Scott & Frith*, for defendant in error.

VALENTINE, J. This was an action in the nature of ejectment, brought in the district court of Elk county by D. H. Williams against Samuel M. Johnson for the recovery of certain real estate in said county. The record clearly shows that Williams is the legal owner of the land in controversy, unless his title thereto has been divested by a certain tax deed, and other proceedings founded thereon, which will be hereafter mentioned. On September 17, 1881, the aforesaid tax deed was executed by the county clerk of Elk county to Anna Eby, and was recorded on September 20, 1881. On September 20, 1881, Anna Eby executed a quitclaim deed for the land to Lark Vinson, which deed was recorded on December 10, 1881. On September 26, 1881, Vinson commenced an action in the district court of Elk county against the said defendant D. H.

¹See note at end of case.

Williams and others to quiet his title to the property in controversy, and obtained service of summons only by publication. On December 8, 1881, a judgment was rendered in that action, quieting Vinson's title as against all the defendants in that action. On December 10, 1881, Vinson executed a quitclaim deed for the property to Richard M. Roe, which deed was recorded on December 19, 1881. On July 22, 1882, said Roe, by his quitclaim deed, remised, released, and quitclaimed unto Samuel M. Johnson, the plaintiff in error, defendant below, all his right, title, and interest in and to the land, which deed was duly recorded on July 25, 1882. On October 12, 1882, Williams filed his motion in the district court of Elk county to open up said judgment under section 77 of the Civil Code; and such proceedings were had that on November 8, 1883, the motion was sustained, and Williams permitted to defend in the action. On March 7, 1884, a trial was had in the action, and judgment was rendered in favor of Williams and against Vinson, decreeing Williams to be the owner in fee-simple of the land, and quieting his title as against Vinson and all persons claiming under him. This present action of ejectment was commenced on August 8, 1884, and was tried before the court without a jury, and judgment was rendered in favor of Williams and against Johnson for the recovery of the land and for costs; and Johnson, as plaintiff in error, brings the case to this court for review.

It is admitted that Johnson, in purchasing the property, paid value therefor, and at the time had no knowledge of the claim of Williams; or, in other words, it is admitted that Johnson was "a purchaser in good faith" of the property, provided a purchaser taking a quitclaim deed for the property can be "a purchaser in good faith." In this state a quitclaim deed to land will convey to the grantee all the rights, interests, title, and estate of the grantor in and to the land, unless otherwise specified by the deed itself. Conveyance Act, § 2; *Utley v. Fee*, 33 Kan. 683, 691, 7 Pac. Rep. 555. Such deed will convey such of the covenants of former grantors as run with the land, (*Scoffins v. Grandstaff*, 12 Kan. 467;) and the grantee in the quitclaim deed will be entitled to such further title or estate as may inure at any time to the grantees of such former grantors by virtue of such covenants as run with the land. See case last cited. But a quitclaim deed will not estop the maker thereof from afterwards purchasing or acquiring an adverse title or interest, and holding it as against his grantee, (*Simpson v. Greeley*, 8 Kan. 586, 597, 598; *Bruce v. Luke*, 9 Kan. 201, 207, *et seq.*; *Scoffins v. Grandstaff*, 12 Kan. 469, 470; *Young v. Clippinger*, 14 Kan. 148, 150; *Ott v. Sprague*, 27 Kan. 624;) and a person who holds only by virtue of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a *bona fide* purchaser, (*Bayer v. Cockerill*, 3 Kan. 283, 294; *Oliver v. Piatt*, 3 How. 333, 410; *May v. Le Claire*, 11 Wall. 217, 232; *Villa v. Rodriguez*, 12 Wall. 323; *Dickerson v. Colgrove*, 100 U. S. 578, 584; *Baker v. Humphrey*, 101 U. S. 494, 499; *Runyon v. Smith*, 18 Fed. Rep. 579; *U. S. v. Sliney*, 21 Fed. Rep. 895; *Watson v. Phelps*, 40 Iowa, 482; *Smith v. Dunton*, 42 Iowa, 48; *Besore v. Dosh*, 43 Iowa, 211, 212; *Springer v. Bartle*, 46 Iowa, 688; *Pastel v. Pulmer*, 32 N. W. Rep. 257; *Bragg v. Paulk*, 42 Me. 517; *Coe v. Persons Unknown*, 43 Me. 432; *Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 147; *Mann v. Best*, Id. 491; *Rodgers v. Burchard*, 34 Tex. 441, 452; *Harrison v. Boring*, 44 Tex. 255; *Thorn v. Newsum*, 64 Tex. 161; *Richardson v. Levi*, 3 S. W. Rep. 444; *Smith's Heirs v. Branch Bank at Mobile*, 21 Ala. 125, 134; *Derrick v. Brown*, 66 Ala. 162; *Everest v. Ferris*, 16 Minn. 26, (Gil. 14); *Marshall v. Roberts*, 18 Minn. 405, (Gil. 365); *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 146; *Smith v. Winston*, 2 How. (Miss.) 601; *Kerr v. Freeman*, 33 Miss. 292, 296; *Learned v. Corley*, 43 Miss. 688; *Leland v. Isenbeck*, 1 Idaho, 469; *Baker v. Woodward*, 12 Or. 3, 10, 6 Pac. Rep. 174, 178; *Richards v. Snyder*, 11 Or. 511, 6 Pac. Rep. 186; *Snowden v. Tyler*, 31 N. W. Rep. 661, 668; *McAdow v. Black*, 13 Pac. Rep. 377, 380, 381.

It may be that, with reference to some equities or interests in real estate, the purchaser who holds only under a quitclaim deed may be deemed to be a *bona fide* purchaser; for equities and interests in real estate may sometimes be latent, hidden, secret, and concealed, and not only unknown to the purchaser, but undiscoverable by the exercise of any ordinary or reasonable degree of diligence. It is possible, also, that a purchaser taking a quitclaim deed may, under the registry laws, be considered a *bona fide* purchaser with reference to a prior unrecorded deed with respect to which he has no notice, nor any reasonable means of obtaining notice. *Bradbury v. Davis*, 5 Colo. 265; *Butterfield v. Smith*, 11 Ill. 485; *Brown v. Banner Coal & Coal Oil Co.*, 97 Ill. 214; *Fox v. Hall*, 74 Mo. 315; *Graff v. Middleton*, 43 Cal. 341; *Pettingill v. Devin*, 35 Iowa, 344. But, *contra*, see *Thorn v. Newsom*, 64 Tex. 161, 53 Amer. Rep. 747, and note; *Pastel v. Palmer*, 32 N. W. Rep. 257.

We would think that in all cases, however, where a purchaser takes a quitclaim deed, he must be presumed to take it with notice of all outstanding equities and interests of which he could by the exercise of any reasonable diligence obtain notice from an examination of all the records affecting the title to the property, and from all inquiries which he might make of persons in the possession of the property, or of persons paying taxes thereon, or of any person who might, from any record, or from any knowledge which the purchaser might have, seemingly have some interest in the property. In nearly all cases between individuals where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received. Hence, when a party takes a quitclaim deed, he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title. Also, as a quitclaim deed can never of itself subject the maker thereof to any liability, such deeds may be executed recklessly, and by persons who have no real claim and scarcely a shadow of a claim to the lands for which the deeds are given; and the deeds may be executed for a merely nominal consideration, and merely to enable speculators in doubtful titles to harass and annoy the real owners of the land; and speculators in doubtful titles are always ready to pay some trifling or nominal consideration to obtain a quitclaim deed. This kind of thing should not be encouraged. Speculators in doubtful titles are not so pre-eminently unselfish, altruistic, or philanthropic in their dealings with others as to be entitled to any very high degree of encouragement from any source. There are cases which are claimed to be adverse to the opinions herein expressed. They will be found cited in *Martindale on Conveyancing*, §§ 59, 285, and notes, and 12 Cent. Law J. 127.

Not wishing to decide anything further in this case than is necessary to be decided, our decision will be as follows: A person who holds real estate by virtue only of a quitclaim deed from his immediate grantor, whether he is a purchaser or not, is not a *bona fide* purchaser with respect to outstanding and adverse equities and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries.

The judgment of the court below will be affirmed.
(All the justices concurring.)

NOTE.

BONA FIDE PURCHASER—QUITCLAIM DEED. A deed which is but a naked release of the grantor's interest in property, though recorded, is of no effect as against a prior deed of such interest from the same grantor, though unrecorded. *Peaks v. Blethen*, (Me.) 1 Atl. Rep. 451. A quitclaim deed passes no title as against the grantor's prior, though unrecorded, conveyance. *Pastel v. Palmer*, (Iowa,) 32 N. W. Rep. 257. A purchaser by such a deed is not to be regarded as a *bona fide* purchaser without notice. *Dodge v. Briggs*, 27 Fed. Rep. 160; *U. S. v. Sliney*, 21 Fed. Rep. 894; *Runyon v. Smith*, 18 Fed. Rep. 679;

Martin v. Morris, (Wis.) 22 N. W. Rep. 525; Raymond v. Morrison, (Iowa,) 13 N. W. Rep. 332; Wightman v. Spofford, (Iowa,) 8 N. W. Rep. 680; McAdow v. Black, (Mont.) 13 Pac. Rep. 377; Richards v. Snyder, (Or.) 6 Pac. Rep. 186; Richardson v. Levi, (Tex.) 3 S. W. Rep. 444; Laurens v. Anderson, (Tex.) 1 S. W. Rep. 379.

Where a quitclaim deed is tendered by the apparent owner to one contemplating the purchase of land, it is a fact sufficient to awaken the suspicion of the latter as to the validity of the title, and to put him on inquiry, and he is chargeable with notice of such defect of title as he might readily have ascertained on inquiry. Dodge v. Briggs, 27 Fed. Rep. 160. Especially is this so where the conveyance is only of the "right, title, and interest" of the grantor. Runyon v. Smith, 18 Fed. Rep. 579. Such conveyance indicates by its very form that the grantor has doubts of his title, and the grantee takes with notice that he is getting a dubious title, and is put upon inquiry as to the claim which casts doubts upon it. Richardson v. Levi, (Tex.) 3 S. W. Rep. 444. A party who claims title under a quitclaim deed from a grantor who had previously conveyed all his right, title, and interest in the real estate to another, and the effect of the second deed, if sustained, will be to deprive the first grantee of his title, must make a clear case of *bona fides* on his part before his deed will be sustained. Hoyt v. Schuyler, (Neb.) 28 N. W. Rep. 306. A quitclaim deed of real estate, while affording cause of suspicion, may, where it appears in a chain of title on the proper records of the county, be sufficient to justify a *bona fide* purchaser for valuable consideration in relying upon it as a valid conveyance. It is a *bona fide* purchaser for valuable consideration, and not a donee who is protected. Snowden v. Tyler, (Neb.) 31 N. W. Rep. 661.

But it has also been held that a quitclaim deed is as effectual to transfer title as a grant or bargain and sale. Packard v. Johnson, (Cal.) 4 Pac. Rep. 632, (SHELDON, J., dissents;) Stokes v. Riley, (Ill.) 9 N. E. Rep. 69.

TRUSTEES OF THE AFRICAN METHODIST EPISCOPAL CHURCH, etc., v. HEWITT.

(Supreme Court of Kansas. July 9, 1887.)

1. TAXATION—LIEN—QUITCLAIM DEED.

Where one was in possession and claimed to own real estate under a void tax deed, but later procured a quitclaim deed from the rightful owner of said real estate, the interest he had in the land by virtue of such tax deed was merged in the stronger and superior title he obtained by such quitclaim deed. He then holds such real estate subject to all tax liens that would have been valid if the rightful owner had never parted with his title.

2. DEED—QUITCLAIM—RECORDING.

Where A., an owner of real estate, executes a quitclaim deed therefor, and a grantee of A.'s grantee takes the possession of the property, and while in the possession thereof A. executes another quitclaim deed for the property to another person, who has no knowledge of the existence of the first quitclaim deed, and the last quitclaim deed is recorded first, *held*, that the grantee under the last quitclaim deed obtains no valid claim or title to the real estate.¹

(Syllabus by Holt, C.)

Error from district court, Bourbon county.

J. D. McCleverty, for plaintiffs in error. W. J. Baroden and W. W. Martin, for defendant in error

HOLT, C. This is an action of ejectment to recover lot 1, block 131, in the city of Fort Scott, Kansas. The petition contains the usual averments, and the answer is a general denial. The case was tried by the court without a jury, and judgment entered for defendant below, awarding him the lot, subject to lien for taxes paid by plaintiff in the amount of \$226.31. Defendant below brings the case here.

The only error complained of was making the sum of \$226.31 a lien on the lot. The court found that plaintiff below, defendant in error, claimed ownership under two deeds,—a tax deed dated and recorded October 27, 1884, exe-

¹ Respecting the effect of conveyances by means of quitclaim deeds, see Johnson v Williams, ante, 537, and note.

cuted upon a sale made of the lot September 16, 1875, for the taxes due for 1874; at that sale the county purchased the lot, and assigned the certificate to plaintiff in April, 1884; that the treasurer charged 25 cents per lot for advertising the tax sale of 1874, while the actual cost was only $12\frac{1}{2}$ cents per lot; that the plaintiff also had a quitclaim deed from R. C. Anderson, the original owner, dated March 18, 1884, and filed for record on the twenty-fourth of the same month, at 2 o'clock P. M.; that plaintiff was entitled to \$226.31 redemption money, and that it was a lien on the lot. The defendants below, plaintiffs in error, claim under a warranty deed from James Hart, September 13, 1880. Hart claimed under two deeds,—a tax deed dated September 10, 1877, for the taxes for the year 1876; also under a quitclaim deed from R. C. Anderson, the original owner, dated May 11, 1883, and filed for record March 24, 1884, at 3 o'clock P. M. At the time of the tax sale of 1877, the lot had been sold to Bourbon county for the taxes of 1874. Both tax deeds are good upon their face, and Hart and his grantees had been in actual possession of the lot, and paid the taxes thereon, since the recording of his tax deed, September 13, 1880; that the title to the property down to Anderson was good.

The question urgently presented in the briefs, as to the effect of the priority of registration of the quitclaim deeds, may be answered by simply stating that the defendants and their grantor took their quitclaim deeds from Anderson, who was also the grantor of plaintiff. The deed to Hart was under date of May 11, 1883, to Hewitt, of March 18, 1885. The deed from Anderson to Hewitt of March 18, 1885, conveyed nothing more than what he actually owned at that time. *Ulley v. Fee*, 33 Kan. 683, 7 Pac. Rep. 555. He had before that conveyed his entire interest to Hart. Therefore the plaintiff took nothing, as against him, by his quitclaim deed.

The tax deed under which the plaintiff claimed was executed in 1884, based upon the sale to Bourbon county, in 1875, for the taxes of 1874. For that sale the treasurer charged 25 cents per lot for advertising the delinquent tax sale, while the actual cost was only half the amount. Such a deed was void. *Board of Regents, etc., v. Linscott*, 30 Kan. 241, 1 Pac. Rep. 81.

The defendants claim a title under tax deed from tax sale of 1877 for the taxes of 1876. In 1875 the land had been bought in by Bourbon county at tax sale for the taxes of 1874; and when it was offered for sale, in 1877, for the taxes of 1876, the land had neither been redeemed nor sold, nor the tax-sale certificate assigned; therefore that tax sale was void. Section 122, c. 107, Comp. Laws 1879; *Belz v. Bird*, 31 Kan. 139, 1 Pac. Rep. 246. A tax deed was issued to Mr. Hart, the grantor of defendant, September, 1880, and he immediately took possession under his tax deed.

It is contended in this action, because Hart had been in possession, and had had his tax deed recorded more than two years before the commencement of this action, that he held the lot divested of all tax liens for taxes levied before the date of the tax sale of 1877. Now, while the tax deed of Hart, after the two years had expired, would probably have been valid against everybody except Anderson, it would have been voidable as to him. Hart secured from Anderson, in 1883, his interest in the lot. Now, this quitclaim deed was a better and a stronger title than the tax deed held by Hart, and, under the well-known rule of law, the weaker and inferior title was merged in the stronger and superior title, and he took the lot under such quitclaim deed, subject to all liens that would have been upon it while owned by Anderson. If Anderson had not parted with his title to any person until this action had been brought, the taxes under Hewitt's tax deed would have been a lien upon the lot, and the defendants claiming under Hart, the grantee of Anderson, have the same rights, and are under the same liabilities, so far as this tax lien on the lot is concerned, as Anderson himself would have been had he not given a deed for the lot. The taxes for 1874 would have been then a lien upon the lot, under section 142, c. 107, Comp. Laws 1879. For that purpose it

would be immaterial whether the tax deed was based upon a valid or void tax sale.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

BELL v. KEEPERS.

(*Supreme Court of Kansas. July 9, 1887.*)

1. MALICIOUS PROSECUTION—DEFENSE—DEFECTIVE WARRANT.

In an action for malicious prosecution it is no defense that the complaint upon which the warrant of arrest was issued did not state a criminal offense.¹

2. SAME—PROBABLE CAUSE.

In an action for malicious prosecution, probable cause is a question of law for the court, and it is the duty of the court to instruct the jury what facts would constitute probable cause.²

3. EVIDENCE—DOCUMENTARY.

When a written instrument is admitted in evidence, it then becomes the duty of the court to construe and determine its legal effect, and the relation of the parties thereto, and to include such determination in the instructions to the jury.

(*Syllabus by Clogston, C.*)

Error from district court, Wyandotte county.

This is an action for malicious prosecution commenced in the district court of Wyandotte county. The transaction out of which the prosecution was commenced was substantially as follows: Bell sold Keepers a tract of land and a barn, which Keepers was to move on the land, and occupy and maintain as a canning factory, and was to pay, as the purchase price therefor, \$40 per month until the premises were paid for. Keepers made default in the payments, and desired to remove from the property. The contract provided that upon a failure to make payments the contract might be terminated, Keepers to forfeit all payments made as liquidated damages. The contract was terminated, and Keepers moved from the premises all the machinery and fixtures placed thereon by him, and also partitions and sheds attached to and made a part of the barn. While this removal was going on, Bell filed a complaint, and procured his arrest, and afterwards failed to appear and prosecute the action. Keepers was discharged, and costs taxed to Bell. The present action was tried on the twenty-eighth day of August, 1885, by a jury. Verdict in favor of Keepers for \$500, and costs. Bell brings the action here for review.

Nathan Cree, for plaintiff in error. *J. O. Fife* and *Hale & Miller*, for defendant in error.

CLOGSTON, C. The prosecution of which the defendant in error complained was commenced by plaintiff in error, S. B. Bell, upon the following complaint:

"*State of Kansas, County of Wyandotte—ss.*: Simeon B. Bell, of lawful age, being first duly sworn, says that at the county of Wyandotte and state of Kansas, and on or about the twenty-fourth day of March, 1885, one Keepers did unlawfully and willfully enter into and destroy personal property, and trespass upon the premises of the affiant, contrary to statute in such case made and provided.

S. B. BELL."

Upon this complaint a warrant was issued substantially following the complaint, and it is now claimed that this complaint does not state a criminal offense, and for this reason plaintiff insists that no action for malicious prosecution can be maintained for the arrest made thereunder. This is no longer an unsettled question in this state. This court has repeatedly held that it could not protect a complainant after procuring a warrant to issue on his

¹See note at end of case, part 1.

²See note at end of case, part 2.

complaint to say, in answer to a charge of malicious prosecution, that the complaint charges no crime. A void process procured through malice, and without probable cause, is even more reprehensible, if possible, than if it charged a criminal offense. The wrong is not in the charge alone, but more in the object and purposes to be gained, and the intention and motive in procuring the complaint and arrest. The contents of the complaint, when maliciously made, without good cause, is of but little consequence and can give no protection. *Parli v. Reed*, 30 Kan. 534, 2 Pac. Rep. 635; *Shaul v. Brown*, 28 Iowa, 37; *Bauer v. Clay*, 8 Kan. 580.

The record presents a more serious question than that urged against the complaint. At the trial the written contract of the sale of the property in dispute was introduced in evidence. To this contract we must look to determine the rights of the respective parties, and from their interests and rights thereto, as they were then placed, must be gathered something of the intention, objects, and inducements that led to the procuring of the complaint and arrest. It is not the act alone that we are to judge, but the intentions and motives that prompt the act, and this contract was admitted in evidence for this purpose; and as this contract fixed their interests in and relation to the property in dispute, then, what those interests and relations were was a question of law to be determined by the court, and not a fact to be determined and found by a jury.

The court, upon this contract, gave the following instructions to the jury: "No. 20. The written contract offered in evidence tends to show and does show the existing relations as respects the barn and attachment between plaintiff and defendant at the time the affidavit was filed and warrant issued for the arrest of the plaintiff by Justice STINE. This contract, with all the other evidence in the case, will be considered by the jury. The point to which this evidence has application is as to whether this written and the other evidence was, at the time of the arrest, sufficient to create a reasonable suspicion that the acts and conduct of the plaintiff in removing parts of the barn and other fixtures were a crime, as alleged in the affidavit of the defendant, upon which the warrant of arrest issued. Were all these facts of such a character and sufficiency as to create a reasonable suspicion in the mind of a reasonable man that John Keepers was at the time guilty of the offense as alleged by the defendant in said affidavit? And if the jury should so believe, on consideration of the terms of said contract and of other circumstances in the case, it will be their duty to find for the defendant." We think this instruction was erroneous. The court ought to have defined the rights and interests of the parties in this property, and so instructed the jury, and not left them to draw their own conclusions from this contract.

The court also instructed the jury as follows:

"No. 11. To constitute probable cause for a prosecution, there must be such reasonable grounds for suspicion, supported by circumstances sufficiently strong to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged."

"No. 14. To authorize a recovery in this class of cases it must not only appear that the defendant was actuated by malice, but the jury must further believe from the testimony that the defendant had no probable cause or no reasonable grounds to believe the plaintiff was guilty of the offense charged against him; and the court further instructs the jury that probable cause means a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a reasonably cautious man to believe that the person accused is guilty of the offense charged."

By these instructions the court gave to the jury the question of probable cause, and left them to determine what facts would constitute probable cause. This was error. Probable cause, or the want thereof, is a question of law to be determined by the court, and not a question of fact to be found by the jury.

True, if the facts upon which probable cause is to be founded are in dispute, the court may submit to the jury the questions of fact; but, even in that case, the instructions must state what facts, when found by the jury, will be sufficient to establish probable cause. The relations of the parties, their rights and interest in the property in dispute, being fixed by the written contract, no question, then, of probable cause was in dispute, and the court ought to have instructed the jury as to whether or not plaintiff had established the want of probable cause.

Justice BREWER held in *Parli v. Reed*: "The court passes upon the law. It is its province to say what constitutes probable cause, for that is a matter of law." 30 Kan. 534, 2 Pac. Rep. 635. Also *Thaule v. Krekeler*, 81 N. Y. 428.

There are other questions complained of by the plaintiff in error; but, as the errors already discussed will require a reversal of the case, we will not examine them.

It is therefore recommended that the judgment of the court below be reversed.

BY THE COURT. It is so ordered; all the justices concurring.

NOTE.

1. **MALICIOUS PROSECUTION—INVALIDITY OF PROSECUTION.** It is no defense to an action for malicious prosecution that the complaint was technically defective. *Parli v. Reed*, (Kan.) 2 Pac. Rep. 635. Where the subject-matter of an offense charged on the accused is wholly beyond the jurisdiction of the committing magistrate, only an action for false imprisonment, and not an action for malicious prosecution, will lie. *Castro v. De Uriarte*, 12 Fed. Rep. 250. If an imprisonment is under legal process, but the action has been commenced and carried on maliciously, and without probable cause, it is malicious prosecution. If it has been extrajudicial, without legal process, it is false imprisonment. *Murphy v. Martin*, (Wis.) 16 N. W. Rep. 603. A warrant absolutely void on its face in an action of false imprisonment can afford no protection to one participating in making an arrest under it. *Gelzenleuchter v. Niemeyer*, (Wis.) 25 N. W. Rep. 442.

2. **PROBABLE CAUSE—PROVINCE OF JURY.** The existence of a probable cause is a mixed question of law and fact. It is for the jury to determine what facts are proved, and for the court to say whether or not they amount to probable cause. *Moore v. Northern Pac. R. Co.*, (Minn.) 33 N. W. Rep. 334; *Burton v. St. Paul, M. & M. R. Co.*, (Minn.) 22 N. W. Rep. 300; *Johnson v. Miller*, (Iowa,) 29 N. W. Rep. 747, and 17 N. W. Rep. 34, and 19 N. W. Rep. 310; *Ross v. Langworthy*, (Neb.) 14 N. W. Rep. 515; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Gee v. Culver*, (Or.) 6 Pac. Rep. 775; *Sartwell v. Parker*, (Mass.) 5 N. E. Rep. 807; *McNulty v. Walker*, (Miss.) 1 South. Rep. 55; but, when the facts are undisputed, the court should instruct the jury that there was or was not probable cause. *Brewer v. Jacobs*, 22 Fed. Rep. 217; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Fulton v. Onesti*, (Cal.) 6 Pac. Rep. 491; *Sartwell v. Parker*, (Mass.) 5 N. E. Rep. 807; *McNulty v. Walker*, (Miss.) 1 South. Rep. 55.

BUCK v. KELLEY and others.

(*Supreme Court of Kansas*. July 9, 1887.)

APPEAL—NECESSITY OF MOTION FOR NEW TRIAL.

In order to enable the supreme court to review an order sustaining a demurrer to the evidence, and directing a verdict for the defendant, it is necessary that a motion for a new trial be made and filed within the time prescribed by law.

Error from district court, Shawnee county.

J. H. Collier, for plaintiff in error. *A. Bergen*, for defendants in error.

PER CURIAM. This action was tried in the superior court of Shawnee county before the judge and jury. The court sustained a demurrer to the evidence of the defendant below. (plaintiff in error,) and directed the jury to find a verdict for the plaintiffs, (defendants in error.) The defendant below, (plaintiff in error,) filed no motion for a new trial. Therefore the judgment must be affirmed. *Pratt v. Kelley*, 24 Kan. 111; *Gruble v. Ryus*, 23 Kan. 105, and cases therein cited.

THOMAS v. SWEET and another.

(Supreme Court of Kansas. July 9, 1887.)

1. CORPORATIONS—OFFICERS—OBLIGATIONS.

When the offices of vice-president and treasurer of a corporation are vested in one person, and at the same time he is the managing and controlling officer of the company, his relations to the creditors and stockholders is of that character that the utmost good faith towards their interest, and the most scrupulous attention to the affairs of the corporation, are imperatively demanded of him.¹

2. SAME—LIABILITY.

The law does not permit such a person to so manage the affairs of the corporation as to result to his own pecuniary advantage; and if he speculates with the funds of the company, or buys claims against it at discount, he must account to its creditors or stockholders for any profit that results from such dealings.²

(Syllabus by Simpson, C.)

Error from district court, Shawnee county.

G. C. Clemens, for plaintiff in error. W. P. Douthitt and Rossington, Smith & Dallas, for defendant in error.

SIMPSON, C. The questions in this case arise on the demurrer to the petition. The court below sustained the demurrer, and the plaintiff in error, who was plaintiff below, brings the case here, assigning this ruling of the court as error.

The material statements in the petition are as follows:

First. The plaintiff's demands: (1) That he is an unsatisfied *bona fide* creditor of the Topeka Rolling-Mill Company, who sues for himself, and all other *bona fide* unsatisfied creditors of said company. (2) That on the twelfth day of May, 1874, the said company made its promissory note to the plaintiff for the sum of \$5,000, with interest at 12 per cent. per annum from date,—said note maturing in eight months, in consideration of so much money advanced by him for the company; that, on the twenty-fourth day of September following, the company executed a mortgage to secure this note on the real estate and mills of said company. (3) That on the eleventh day of December, 1874, he recovered against said company judgment before a justice of the peace aggregating \$884.35, and \$31.50 costs. (4) On the thirtieth day of December, 1874, judgments were recovered against the company in his favor amounting to \$171.10; that proper abstracts of these judgments were duly filed in the office of the clerk of the district court of Shawnee county. (5) That on the twenty-second day of August, A. D. 1874, for the accommodation of said company and its surety, the defendant Timothy B. Sweet, he indorsed the promissory note of said company of that date for \$1,000, due 30 days after date, with interest at 12 per cent. per annum; that said note was discounted at the bank of Black & Sons, in the city of Topeka. And, said company having failed to pay the same, when it became due and payable, he was compelled to pay it, and did pay it; that, to indemnify him as indorser on said note, the company delivered to him one of its first mortgage bonds for \$1,000, dated January 1, 1874, payable five years after date, with semi-annual interest, according to coupons attached, which said bond was taken by plaintiff in good faith, and without knowledge or notice of any of the transactions connected with said bonds, as hereinafter set forth. (6) That the plaintiff has at all times remained and is now the owner and holder of all of said indebtedness, and has never been paid any part thereof, nor of the interest thereon.

Second. The rolling-mill company: (1) That said Topeka Rolling-Mill Company is a corporation duly incorporated, under the laws of the state of Kansas, on the thirty-first day of December, 1873, for the purpose of rolling and manufacturing railroad and merchants' iron, and carrying on the general

¹See note at end of case.

business of manufacturing iron castings, etc., at Topeka, Kansas. (2) That, at its original organization, Timothy B. Sweet, Reuben D. Coldren, and E. L. Derby became, and have ever since continued to be, the board of directors of said company; that Timothy B. Sweet became, and has continued to be, vice-president and treasurer thereof, Reuben D. Coldren its president, and E. L. Derby its secretary,—no election for directors or officers ever having been called or held since its original organization, and the said Timothy B. Sweet has during all this time been its chief and controlling officer. (3) That, immediately upon the organization of said company, it purchased from the Topeka Iron & Steel Company a tract of real estate in the city of Topeka, upon which rolling-mills had been partially erected, and they at once completed said mills, and on the fifteenth day of April, 1874, they were fully provided with machinery, tools, implements, and fixtures, and were ready for operation. (4) That said mills were operated by said company until the thirty-first day of December, 1874, at which time they were placed in charge and under the control of a receiver of the Shawnee county district court, as hereinafter stated, and large profits were derived from the operation of said mills, which were retained and converted to his own use and benefit by the said Timothy B. Sweet, and applied by him to the payment of certain pretended indebtedness of said company to him.

Third. The first mortgage bonds: (1) That, immediately after the organization of the Topeka Rolling-Mill Company, it issued and sold the Shawnee County Bank its first mortgage bonds, to the amount of \$60,000 in bonds of \$1,000 each, dated the first day of January, 1874, payable five years after date, with semi-annual interest coupons attached, secured by a first mortgage on the real estate and mills of the company. (2) Said bank was to pay \$58,000 therefor, in payments as follows: \$10,000 cash at date; \$10,000 February 1, 1874; \$10,000 March 1st; and \$8,000 April 1, 1874, in cash; the remaining \$20,000 to be paid in paid-up stock of the Topeka Iron & Steel Company, from which the Topeka Rolling-Mill Company had purchased its real estate and a partially completed mill. (3) Said bonds were to be placed in escrow in the hands of George F. Parmalee, who was the cashier of the Shawnee County Bank, and were to be delivered by him to said bank as fast as they were paid for. (4) The bonds were issued and delivered in escrow, and said mortgage made and recorded. The bank paid the first \$10,000 payment, and about \$600 additional, and then refused to further perform its contract of purchase, and thereupon 11 of said bonds were delivered to said bank in full satisfaction of the \$10,000 they had paid. (5) Twenty-nine of said bonds were surrendered to Sweet, Coldren, and Derby for said company. (6) Arthur C. Huidekoper was the president of the Shawnee County Bank during this time, and he wrongfully obtained possession of the remaining 20 of said bonds, and with them, and the 11 bonds delivered to the bank, left the state of Kansas, and has never returned. (7) All these things occurred with the knowledge of Timothy B. Sweet, who made no effort to prevent them. (8) That, of the 29 bonds returned to said company, one was delivered to the plaintiff, as heretofore stated. (9) By an agreement made by and between Sweet, Coldren, and Derby with intent to cheat, wrong, and defraud the *bona fide* creditors of said company, 13 of said bonds were delivered to Coldren to be held by him as security for certain obligations and indebtedness of said company to him. (10) The remaining 15 of said bonds were taken possession of by E. L. Derby, who fled from the state with them, and has never returned. (11) All these things were done with the knowledge of Sweet, who made no effort to prevent them.

Fourth. The second mortgage: (1) That on the twenty-fifth day of September, A. D. 1874, the Topeka Rolling-Mill Company executed to Timothy B. Sweet a second mortgage on all of its real estate and mills to secure payment to Sweet of a large sum of money claimed to be due Sweet from the company,

and to secure him as surety and endorser for the company. This mortgage was recorded the same day it was executed. (2) That on the nineteenth day of October, 1874, Sweet and Coldren entered into a written agreement, by the terms of which the 13 mortgage bonds were to be turned over to Sweet, and Sweet assigned to Coldren an interest in said mortgage, and the proceeds of the mills were first to be applied to the reduction of the indebtedness of the company to Sweet until the amount should be reduced to a sum equal to that of the indebtedness of the company to Coldren, and then Coldren and Sweet should hold the mortgage equally.

Fifth. The Huidekopersuit: (1) That on the twenty-first day of December, 1876, Arthur C. Huidekoper, claiming to be rightful owner and holder of said 31 bonds, commenced his action in the Shawnee county district court against the company, Sweet, and others, alleging the insolvency of the company; that Sweet, Coldren, and Derby had fraudulently obtained possession of said 29 bonds; praying a judgment for the amount of his bonds with interest; asking the appointment of a receiver, and an injunction against Sweet, Coldren, and Derby to prevent them from disposing of the 29 bonds, or withdrawing them from the jurisdiction of the court, and for a foreclosure of a first mortgage given to secure said first mortgage bonds. (2) Sweet well knowing that but 11 of these bonds had ever been rightfully issued, and there being then in his hands rightfully belonging to said company, and derived from the profits of its business, sufficient funds to pay off all then due on said bonds, and well knowing that the coupons on the said 11 bonds were overdue, because he had misappropriated the funds of said company which should have been applied to their payment, colluded with said Coldren and the said Huidekoper for the purpose of procuring a fraudulent judicial sale and disposition of said real estate and mills. (3) On the thirty-first day of December, 1874, without any showing therefor required of said Huidekoper, and said showing being impossible if required, Sweet consented in open court, on behalf of said company, to the appointment of a receiver for said real estate and mills, as prayed for by said Huidekoper, and said receiver was thereupon appointed by the court, and on that day took possession of said real estate and mills, and all the assets of said company. (4) Sweet answered to said action as a defendant therein, without controverting the right of Huidekoper to recover in any manner whatever, but set up a large indebtedness of said company to him; and liability incurred for said company aggregating the sum of \$27,483.77, all of which was covered and secured by said mortgage executed to him on the twenty-third day of September, A. D. 1874, which was also set up in said answer, and said Sweet prayed judgment for said sum, and foreclosure of said mortgage, and a sale of the real estate and mills to satisfy his judgment. (5) At the same time that the said Sweet caused answer to be filed in said action by A. H. Hentig, A. W. Strong, and the Citizens' Bank, each setting up a portion of the first 13 mortgage bonds, so as aforesaid wrongfully taken by said Coldren, and obtained from him by said Sweet, to-wit, bonds Nos. 32, 33, 34, 35, 36, were set up in the pretended answer of the said A. H. Hentig as owner and holder; bonds Nos. 37, 38, 39, 40, 41 and 42, set up in the pretended answer of the Citizens' Bank; bonds Nos. 43 and 44 in the pretended answer of A. W. Strong,—the said bonds and coupons being then and there all the time in the possession and under the control of the said Sweet, under his arrangement with the said Coldren, and neither Hentig, Strong, nor the Citizens' Bank having ever had any interest in the same; but said answers were prepared and filed without the knowledge, consent, or authority of either said Strong, Hentig, or Citizens' Bank, but by the sole procurement and direction of said Sweet, for the purpose of having it appear to the court, and the adverse parties in said action, that said bonds had been negotiated and held by innocent holders, to the end that he might easier obtain judgment thereon against said company, and share in the proceeds of

the sale of the said real estate and mills to a greater extent. (6) That all but a small portion of the pretended indebtedness set up by said Sweet in his answers as due him from said company was wholly fictitious and without consideration, and all the pretended promissory notes alleged in said answer to have been given by said company were made and delivered without authority therefor, were not the obligations of said company, and most of them did not purport to be the obligations of said company. (7) That all of said pretended indebtedness was made and incurred during the time the said Sweet, Coldren, and Derby were operating said mills for their own exclusive use and profit, and were in exclusive receipt of all revenues and income of said company, and were appropriating it to their own exclusive use and benefit as hereinbefore alleged, and any money actually advanced by said Sweet procured on said indorsement was so advanced and procured to pay the current running expenses of said mills while so operated, including large salaries to the said Sweet, Coldren, and Derby, and for the private use of Sweet, Coldren, and Derby while operating said mills, for their own benefit, and none of said money was received by or went to the benefit of said company, and the profits secured by Sweet exceeded all said pretended indebtedness by many thousands of dollars. (8) That at the time said answer was filed by said Sweet, the said company did not owe him a single dollar, but that he was indebted to said company in a large sum for the receipt and use of the income and revenue of said mills, all of which the said Sweet well knew. (9) That, before the filing of said answers, the Birmingham Iron Foundry, a defendant in said action, had filed its answer setting forth the frauds of the said Huldekoper, Sweet, Coldren, and Derby in obtaining among them 49 of said first mortgage bonds, as heretofore stated, praying the cancellation of said illegal bonds, and setting up on its own account a mechanic's lien on said real estate and mills, to the amount of \$32,317.47, with interest, and \$2,000 attorney's fees for foreclosing said lien, which said lien so set up was constituted solely by two certain writings, attached and marked as "Exhibits C, D." (10) Said pretended lien was wholly invalid upon its face, as the said Sweet well knew, and the said Birmingham Iron Foundry had no claim whatever in law or equity against said company or its property. (11) That said Sweet caused an answer to be filed by said rolling-mill company, which was filed on the same day as the answers of Sweet, Hentig, Strong, and Citizens' Bank, and they were all prepared by the same attorney, and all by the direction and retainers of said Sweet, and from dates and information supplied by him for the purpose, and he well knew the contents of said answer, as well as the answers of the said Birmingham Iron Foundry; and, regardless of his duty in the premises to the *bona fide* creditors of the company, he caused the answer of the rolling-mill company to omit all notice of said Coldren bonds, said indebtedness set up by the said Sweet, and the pretended demand and lien of the said Birmingham Iron Foundry; and utterly and purposely neglected to make any defense whatever for or by said rolling-mill company against said claims or either of them, although he took sole management and charge, as vice-president, of the litigation for said company,—the president of said company having left the state of Kansas, and being then in the state of California. (12) The said claim of the Birmingham Iron Foundry was solely on the mechanic's lien as aforesaid; the indebtedness by said foundry alleged, if any there was, being the personal indebtedness of Derby & Coldren, a partnership consisting of Rueben D. Coldren and E. L. Derby, and not the indebtedness of said company; and Coldren & Derby had long before been paid by said company for the identical items set up by said foundry, and the whole of said demand, and the said Coldren & Derby, and the said Rueben D. Coldren and E. L. Derby, were each of them indebted then to the said rolling-mill company for large amounts, in excess of said demand as contractors, and all other demands held or claimed by them, or either of them, against said company; all of which the said Timothy

B. Sweet, when said answer was filed by said iron foundry, well knew, and had long known, and knew that equitably and justly said company should not pay any portion of said alleged indebtedness.

Sixth. A secret agreement: (1) That while said action was pending, to-wit, in the month of July, 1875, the said Huidekoper and said Sweet met together, and mutually agreed not to controvert each other's claims set up in said action, but to act together for their mutual benefit secretly, while pretending to controvert each others' claims, and keep up the semblance in said action of adversary proceedings between them, and mutually labor to defeat all other claims set up or to be set up in said action. (2) Thereupon the said Sweet bought up divers judgments against said company at sums greatly less than the amounts due thereon, and in his answer set them up at their full value against the company, instead of giving said company the benefit of the discounts thereon obtained by him; he, the said Sweet, having then in his hands, as treasurer as aforesaid, funds enough of said company to have fully paid off each and every of said judgments.

Seventh. A second secret agreement: (1) That on the thirtieth day of August, A. D. 1876, the said Huidekoper, Royal M. Bassett for the Birmingham Iron Foundry, and said Sweet, entered into an agreement in writing by which they agree with each other not to contest each other's claims, but to have judgment obtained upon them as soon as possible, and that each one of them should share equally in whatever decree might be rendered in favor of either of them in said action; and, if they should succeed in buying in said mills and real estate at the sale under such decree, each therein should own in their own right one-third interest therein. A copy of the agreement is attached and made a part of the petition. (2) That, in pursuance of said agreement, each of said parties instructed his attorneys to act secretly, in concert with the attorneys of each of the other parties, while remaining apparently adverse, so that such agreement might not be known to or suspected by the plaintiff, or any other of the *bona fide* creditors who were defendants in said action; and, in pursuance thereof, said action was thereafter, on the twenty-first day of September, 1876, brought to trial, and was tried by the attorneys of said parties as if the said Sweet, Huidekoper, and the Birmingham Iron Foundry were hostile to each other, by which means said plaintiff was deceived, as were also all the other *bona fide* creditors who were defendants in said action, and believed that an honest trial and contest was being carried on by the parties apparently the most interested therein. (3) That said agreement was by said Sweet and the other parties thereto fully understood to include the agreement on the part of Sweet that no defense should be made by or for the said rolling-mill company against the said claims of Sweet, Huidekoper, or the Birmingham Iron Foundry, and that no obstacle should by or for said company be thrown in the way of the consummation of said agreement.

Eighth. The plaintiff in error a party defendant: (1) That the plaintiff was made party defendant to said claims, and files his answer therein, setting up his claims hereinbefore set forth; but said plaintiff knew nothing whatever, nor had he any notice or suspicion at that time, nor until long afterwards, of the existence of any of the doings of fraudulent acts and schemes hereinbefore alleged on the part of or by the said Sweet, or by him and Coldren and Derby, or either of them, or by said Sweet, Huidekoper, and the Birmingham Iron Foundry; nor had he any means at that time, or until recently, of ascertaining anything concerning said doings, schemes, acts, and agreements, but filed his answer in said action in the utmost good faith on his part, supposing and believing said action to be an honest adversary proceeding on the part of the said Huidekoper, Birmingham Iron Foundry, said Sweet, and the rolling-mill company, and supposing and believing that due and proper defense to all claims set up would be made by and on behalf of said rolling-mill company. (2) But in fact said action was not an adversary ac-

tion, so far as said Sweet, Huidekoper, and the Birmingham Iron Foundry were concerned, but was simply carried on by them as a scheme whereby, under the forms of legal proceedings, they might, by obtaining a decree for a large aggregate debt which should be made to appear prior in time to all other claims against said rolling-mill company, be able to buy in said mills and real estate, without other payment than of their said decree in whole or in part, and shut off and bar the claims of all the *bona fide* creditors of said rolling-mill company, and thus cheat and defraud the *bona fide* creditors out of their demands. (3) That a large number of *bona fide* creditors answered in said action, most of whom set up mechanics' liens on said premises and mills; none of the *bona fide* creditors being aware of said attempted and contemplated frauds upon their rights, through the abuse of the process of this court.

Ninth. The decree in the Huidekoper suit: (1) That said trial resulted in a decree by the court, which decreed that the Birmingham Iron Foundry recover \$37,596, and that its demand was the first lien on the premises. (2) That the said Huidekoper recover on his 31 bonds of said company, and that his demand, together with the said Coldren bonds, so far as aforesaid set up by said Hentig, Citizens' Bank, and Strong, and the said bond held by the plaintiff, constitute the second lien on said premises and mills. (3) That the said Sweet recover \$36,599.40 on the claims and mortgage set up by him as aforesaid, and that his demand was the third lien on said premises and mills. (4) All the other claims set up by said plaintiff, and the other *bona fide* creditors of said company in said action, were declared to be subordinate to these in various degrees. (5) Under that decree the sum of \$37,596 to said Birmingham Iron Foundry, and the sum of \$72,313.80 in said first mortgage bonds, and the sum of \$36,599.40 on said Sweet's demand, were to be first paid, before any of the *bona fide* creditors should share in the proceeds of any sale that might be made, as will more fully appear from said decree on record of this court. (6) The said decree ordered the sale of said premises and mills, as an entirety, upon the application of said colluding parties.

Tenth. The sale of the rolling-mills: (1) Said premises and mills were appraised at the sum of \$90,000, and were sold by the sheriff of Shawnee county, under said decree so procured, for the sum of \$60,000, to said Sweet, Bassett, and Huidekoper, and said sale was confirmed, and said premises deeded to them by said sheriff without other payment thereof than mere credit on the amount of said decree.

Eleventh. Money in the hands of the receiver: (1) That, at the termination of said proceedings, a large amount of money, to-wit, the sum of \$10,000 or more, was in the hands of said receiver, to be paid over by him as the court should direct, and the said Sweet, Huidekoper, and Bassett, for the Birmingham Iron Foundry, under the said secret agreement, by consent obtained an order of the court for said fund to be paid over to said Birmingham Iron Foundry, to reimburse it for pretended costs and expenses paid out by it, and said fund was paid over by said receiver, and equally divided between said Sweet, Huidekoper, and Bassett, in pursuance of said secret agreement.

Twelfth. Assets of the mill company: (1) That said premises and mills were the sole and entire assets and property of said rolling-mill company, and said company has not since had any property or assets whatever. (2) That said premises and mills were of the actual value of \$200,000, and the goodwill of the business of said company was well worth \$25,000. (3) That the said mills and premises were afterwards sold and conveyed by said parties to the Union Pacific Railroad Company, who purchased in good faith, as the plaintiff is informed and believes.

Thirteenth. Discovery by plaintiff in error: (1) That none of said doings or fraudulent acts or schemes or agreements hereinbefore set forth or alleged were discovered by said plaintiff until within less than two years next before the filing of this petition. (2) Neither the plaintiff, nor any of the *bona fide*

creditors who were parties to said action, received any sum whatever but their several demands remain still unpaid, both principal and interest.

Fourteenth. Receipts of Sweet: (1) Sweet in fact received one-third of the amount due the Birmingham Iron Foundry, one-third found due said Huidekoper, the whole of the amount found due A. H. Hentig, A. W. Strong, and the Citizens' Bank on said Coldren's bonds, and one-third of the amount received by the Birmingham Iron Foundry from said receiver, which amounts, even had said amount due him been just and valid, and said proceedings *bona fide*, as they purported to be, should have been credited on the amount found due the said Sweet, and the benefit thus given to the said rolling-mill company and its creditors, but the said Sweet claims and pretends that the whole amount so found due him is still due, and has issued execution thereon from time to time. (2) That in a certain action now pending in this court by the said plaintiff against said Sweet to enforce payment upon plaintiff's demands of the individual liability of said Sweet as a stockholder in said rolling-mill company, being action No. 4,952 in this court, said Sweet has pleaded the said amount found due him by said decree, without credit of said sum received by him, as a defense, set-off, and counter-claims against said plaintiff's just demands. (3) That said rolling-mill company is, and ever since said frauds were perpetrated, and since the organization of said company, has been, under the control of said Sweet and said Rueben D. Coldren, and no effort has ever been made by said company, for that reason, to discover said bonds, or compel said Sweet, Derby, and Coldren to restore to said company the sum of which it had been by them so as aforesaid defrauded.

Fifteenth. Judgment for plaintiff in error: (1) There was adjudged to be due to said plaintiff on his six several judgments the sum of \$1,184.80, and his note the sum of \$6,400, and as matured interest on the said bond held by him the sum of \$256.80. (2) That execution on plaintiff's judgment was duly issued on the nineteenth day of May, 1881, and duly returned by the sheriff of said Shawnee county, wholly unsatisfied for want of any property, real or personal, of said rolling-mill company whereon to levy, all of which fully appears by the records of said court therein still remaining. (3) That the whole of said plaintiff's demands, with interest, remains unpaid and unsatisfied.

Sixteenth. Sweet's receipts: (1) After said sale, Sweet, under execution, caused all the machinery and fixtures to be sold, and a portion thereof was sold to third parties for the sum of about \$1,000, which the said Sweet received and still retains, and the remainder thereof was bought in by said Sweet, and has since been resold by him at a large profit. (2) That there is now in the hands of said Sweet as treasurer of said company, and as trustee for the creditors of said company, including the plaintiff, derived from the income and proceeds of said mills, and for which he ought to account with said company and its creditors, including the plaintiff, a large sum of money, to-wit, the sum of \$100,000, which he unjustly and fraudulently refuses to apply to the payment of said creditors.

Seventeenth. The prayer for relief: The plaintiff prays that the said Timothy B. Sweet may be required to account: (1) For the actual value of said mills and real estate, and all other property and assets of said company. (2) For all sums received by him for the operation of said mills, or in anywise belonging to or derived from said company. (3) For all amounts that came into the hands of the receiver while in possession of said mills; and that he be required to make good and restore, by money compensation, all things as they would have been had he procured the cancellation of said 49 first mortgage bonds, the defeat of the pretended lien of the Birmingham Iron Foundry, and refrained from setting up his said answer; and that an account may be taken of the assets of said company thus derived and restored, and all of the *bona fide* debts and demands due from said company, and that all such debts may

be decreed to be paid of equal right out of said assets. (4) That said Timothy B. Sweet may be ordered to bring and pay into this court in the mean time the funds of said company which have not been paid upon *bona fide* demands due from said company, without regard to any demand due him or by him as surety or indorser for said company, the sum received by him of the amount paid over by said receiver to said iron foundry, and the sum received by him on the resale of said mills and real estate, or anything pertaining thereto, and for such other and further relief as may be meet and in accordance with the law and equity.

These statements, extracted from the body of a long petition, present all the material facts alleged in chronological order, and also the prayer for relief that the plaintiff in error thinks he is entitled to. The record also contains many exhibits, and among them Exhibit A, contract between the Shawnee County Bank and the Topeka Rolling-Mill Company, for the purchase and sale of the first mortgage bonds of the company; Exhibit B, contract between Collier and Sweet as to money advanced, and liabilities incurred by them, on behalf of the rolling-mill company, and as to the interest of each in securities given them by the company in the shape of a second mortgage; Exhibits C and D, copies of a mechanic's lien filed by the Birmingham Iron Foundry against the Topeka Rolling-Mill Company for the material furnished in its construction. Exhibit E is a copy of the agreement made on the thirtieth day of August, 1876, by the Birmingham Iron Foundry, Arthur C. Huidekoper, of Meadville, Pennsylvania, and Timothy B. Sweet, about their respective claims, then being litigated, against the Topeka Rolling-Mill Company, in which they agreed not to resist each other's claims, to press the action of Huidekoper against the company to a speedy trial, and to each have one-third interest in the proceeds of the result of that litigation. In the view (we shall hereafter state) that we take of this petition, all of these exhibits are not important, and we shall not incur the opinion with copies of them.

The defendant in error T. B. Sweet assigned the following causes for demurrer: (1) The plaintiff has no legal capacity to sue; (2) there is a defect of parties plaintiff; (3) there is a defect of parties defendant; (4) several causes of action are improperly joined; (5) the petition does not state facts sufficient to constitute a cause of action.

On the argument of the cause in this court, most of the assigned causes have been abandoned, or at least not referred to in the brief of counsel for the defendant in error, but their contention is—*First*, that the action should not be maintained because the plaintiff in error has been guilty of such negligence and laches as to deprive him of the interposition of the court in this behalf,—in other words, his action is barred by the statutes of limitations; *secondly*, that all matters and things asserted in the petition against Sweet have been adjudicated against the plaintiff in error, as appears by the petition, in a suit to which he was a party. The contention of the defendant in error amounts to the assertion that the petition shows on its face that the supposed cause of action is not only barred, but also recites a former adjudication against the claim of the plaintiff in error, and therefore the petition does not state a cause of action against Sweet. The inquiry that we shall make, then, is, does the petition state any cause of action against the defendant in error, Sweet?

It may be that under the elastic provisions of the Code of Civil Procedure of this state, and the generic form of action in all cases prescribed by it, that any number of pre-existing forms of action may be blended in the civil action of its creation; but in an attempted classification of this action, made either from the general tenor or specific allegations of the petition, uncertainty results as to whether it was intended in the nature of a judgment creditor's bill, or is one of that class of cases in which a court of equity is asked to set aside a judgment on the ground that it was obtained by fraud. The petition contains elements of both so blended and interwoven that, in the considera-

tion of questions arising under it, constant recurrence must be had to the rules governing each in order to determine this. This form of pleading will not be permitted, and in this case, the pleading being attacked by demurrer, the rule is that its language is to be construed against the pleader; and the operation of this rule leads to the conclusion that we shall treat this action as one in the nature of a creditors' bill, seeking to charge Sweet, as a trustee for the creditors of the rolling-mill company, with the proceeds of the sale of the property, under the decree of the district court rendered in the action brought by Huidekoper. We do this because we believe the allegations of the petition amply justify such a conclusion, and for the additional reason that if any cause of action is stated in this petition, that, under all the facts recited therein, this is probably the only one that is now available to the plaintiff in error. If it is possible to do so, we will now endeavor to extract from the body of this petition the exact specific charges made against Sweet, upon which the plaintiff in error, as a creditor of the rolling-mill company, relies as statements of causes of action against him.

The petition charges very many transactions of Sweet, as the agent of the company, with its business affairs, as fraudulent, and among them are: (1) The disposition of a part of the first mortgage bonds of the company; (2) the procurement of a second mortgage on all the property of the company to secure a pretended indebtedness to him; (3) the retention and use of the daily receipts of the corporation, being a sum vastly in excess of all *bona fide* indebtedness by the company to him; (4) the assignment of Sweet to Coldren of an interest in the second mortgage, and the delivery by Coldren, the president of the company, to Sweet, of 13 of the first mortgage bonds; (5) the procurement by Sweet from the other officers of the company of an agreement whereby the total receipts of the company were to be turned over and retained by him, and to his exclusive benefit, under the pretense that this was done to reimburse him for money advanced for the use of the company; (6) that Sweet, being the controlling officer of the corporation, and the management of all the litigation of the company being intrusted to him, fraudulently conspired with Huidekoper to place the property of the corporation in the hands of a receiver the better to carry out his plans to wreck it; (7) that the action brought by Huidekoper against the company, Sweet, and others, was, so far as Huidekoper, the Birmingham Iron Foundry, and Sweet were concerned, a collusive suit, the main object of which was to sell and get control of all the property of the company, and to prevent all other creditors from securing payment of their just demands; (8) that he caused divers persons to file answers in that action setting up claims and demands against the Topeka Rolling-Mill Company in their own names, when in truth and in fact these demands and claims were the property of Sweet, bought by the funds of the company, used by Sweet for the purpose; (9) that many of the claims and demands set up by Sweet in his answer in that action against the company were false and fictitious, and made with the intent to so largely increase the amount of the first liens on the property of the company as that the balance of the creditors of the company would not be able to successfully bid at the sale thereof; (10) that the claims of the Birmingham Iron Foundry had in fact been paid, but was used by Huidekoper and Sweet for the purpose of largely increasing the amount of the first lien, and to enable them to more successfully control the sale of the property; (11) that the agreement made by Huidekoper, the Birmingham Iron Foundry, and Sweet, on the thirtieth day of August, 1876, to press the trial of the Huidekoper suit, and to share in its results, was made to more effectually carry out the understanding between the parties at the time of the commencement of that action; (12) that by reason of this agreement, and protected by it, Sweet was enabled to buy up many claims against the mill company at a large discount, by reason of the fact that those to whom the company were indebted had become tired of the long litigation, and hopeless of any satisfactory results

therefrom, and these claims were set up in an answer by Sweet in the action, and a decree rendered in his favor for them at their face value. There are many other allegations, but these are among the principal ones. It is true that many of them are stated in the most general terms, and some of them partake more of the nature of legal conclusions than of specific allegations of facts. There is no reason why we should discuss at length all these allegations; for it practically makes no difference how many causes of action may be stated, or how many attempts there had been to state causes of action. The question is, does the petition state one cause of action against the defendant in error, the said Timothy B. Sweet? If it does, we have then reached the end of our inquiry.

Having determined this suit to be in the nature of a creditors' bill seeking to make the defendant in error Timothy B. Sweet, as an officer and a director of the mill company, and hence by operation of law, a trustee for the creditors and stockholders of said mill company, responsible for his management of the business of said company, and that all acts of his as such officer about the business management and litigation resulted to the benefit of the creditors, and not to his individual benefit, and that he must account for all the property, moneys, and revenues that came into his hands by virtue of his employment as vice-president, treasurer, and active manager of the concerns of the said mill company, we will examine the allegations of the petition, to find if it does state a cause of action in this behalf.

But, before proceeding to this, it will be well to state that there are very many things set up in this petition that are alleged to have occurred prior to the filing of the petition in the case of Huidekoper against the rolling-mill company, T. B. Sweet, this plaintiff in error, and others, that we must regard as finally disposed of by the decree in that case. It must be recollected that the plaintiff in error was a party to that action. That he had large sum of money involved in its determination. That many of the acts now charged against Sweet as fraudulent had occurred long before the commencement of that suit, and at a time when the plaintiff in error must have had a somewhat active business relation with the company,—advancing it money, indorsed its notes,—under such circumstances as would imply an understanding as to what was going on around him; or at least put a prudent man on inquiry, and cause him to follow an ordinary dictate of business prudence,—to investigate the condition of affairs. He alleges that the knowledge of many, if not all, of these acts of Sweet that are now charged as fraudulent, did not come to him until after the rendition of the decree in that action; but he ought to have shown some sufficient reason why he did not sooner discover them, or that, with the exercise of reasonable care and diligence, he could not have sooner discovered them; because it has been held in a great many cases that reasonable opportunities for discovering frauds practiced under such circumstances is equivalent to knowledge in a certain class of cases, and to notice in another class of cases. That over seven years had elapsed since the rendition of the decree in that case before this action was commenced. That some of the acts of Sweet now complained of as being fraudulent as against the plaintiff in error occurred almost two years before the decree in the *Huidekoper Case*. And with the opportunities of the plaintiff in error to acquire knowledge of these transactions, and with a large pecuniary interest to prompt an investigation, they have been so long waived, if not acquiesced in, that presumption is against the pleader, and to sustain their fraudulent character there must be not only vigorous pleading sustained by strong proof, but there should be a good and sufficient reason given why the discovery was not sooner made. So that we must assert that, so far as the acts of Sweet are concerned prior to the commencement of the action of Huidekoper, the laches of the plaintiff in error have been such that we shall regard the decree in that action as a final disposition of all the allegations in

the petition respecting them; that, so far as the record develops, no attempt had been made in the district court to set aside the decree in the case of *Huidekoper v. Sweet and others* for the reason that it was fraudulent, or that it was obtained by fraud. We cannot vacate such a judgment, or disregard it in a collateral proceeding. Proceedings to vacate must originate in the district court. If facts come to the knowledge of the plaintiff in error after the time elapses prescribed by the statute for the commencement of such proceedings, it might be that some equitable remedies could be resorted to. But, be that as it may, we see no way that we can give the plaintiff in error the benefit of his allegations respecting the numerous transactions of Sweet with the revenues of the company, before the rendition of the decree, so as to aid the attempt in the case to charge him as a trustee of the creditors of the company, except as hereinafter stated.

There is another thing that might as well be said now. We can take no notice of the allegations affecting Huidekoper, Coldren, and Derby, as they are not parties to this action, and their rights were adjudicated and declared in the previous litigation.

Reducing the material facts bearing bearing upon the we are making to the most compact forms, so as to be easily understood, they are as follows: The Topeka Rolling-Mill Company began business about the fifteenth day of April, 1874. The defendant in error, Timothy B. Sweet, was its vice-president and treasurer,—its chief and controlling officer. The mills were operated until the thirty-first of December, 1874, by the company, under the active management of Sweet, when they were placed in charge and under the control of a receiver appointed by the Shawnee county district court. On the twelfth day May, 1874, the rolling-mill company made a promissory note to the plaintiff in error for the sum of \$5,000, with interest at 12 per cent. per annum from date, payable in eight months, in consideration of so much money advanced by him for the company, and on the twenty-fourth of September, 1874, executed a mortgage to secure the payment of this note on the real estate and mills of said company. On the twenty-second day of August, 1874, the plaintiff in error, for the accommodation of said company and its surety, T. B. Sweet, indorsed the promissory note of the company, for \$1,000, due in 90 days, with interest at 12 per cent., that he was compelled to and did pay. On the eleventh day of December, 1874, he recovered against said company judgment before a justice of the peace, aggregating \$884.35 and costs. On the thirtieth day of December, 1874, judgment was recovered against the company in his favor for \$171.10. At the time the rolling-mill company went into the hands of a receiver, it owed the plaintiff in error over \$7,000. It delivered to him one of its first mortgage bonds dated January 1st, payable in five years, with interest according to coupons attached. On the first day of December, 1874, A. C. Huidekoper commenced an action in the district court of Shawnee county against Sweet and others; alleging the insolvency of the company, the fraudulent possession and use of some of its first mortgage bonds by Sweet and other of its officers; praying for the appointment of a receiver and for other relief. On the thirty-first of December a receiver was appointed and took possession of the property of every kind and description of the company. The plaintiff in error was made a party in this action, and filed an answer setting up his claims against the company as above set forth.

It is alleged that while this suit was pending, and prior to the trial, the defendant in error Sweet, the plaintiff Huidekoper, and the Birmingham Iron Foundry, a defendant in the action, entered into an agreement in writing wherein it was stipulated that they would not contest each others' claims, but have a judgment rendered as speedily as possible, and that each of them should share equally in the benefit of any decree of the court that might be rendered in their favor; and, if the mills and property were sold under a decree, that they should buy them in, and each should have one-third interest therein.

On the twenty-first day of December, 1876, a decree was rendered by the district court of Shawnee county, declaring the amount due the Birmingham Iron Foundry a first lien on the property of the mill company; that the first mortgage bonds held by Huidekoper, the plaintiff in error, and others, was the second lien, and the amount found due the defendant in error Sweet the third lien. The property was sold by the sheriff of Shawnee county to Sweet, Huidekoper, and the Birmingham Iron Foundry for \$60,000, and the proceeds of the sale were credited according to the liens as fixed by the decree, and the mills and property were afterwards sold by these parties to the Union Pacific Railroad Company.

It is alleged that the contract made between Huidekoper, the Birmingham Iron Foundry, and Sweet, was made with the intent, as far as Sweet was concerned, to cheat, wrong, and defraud the stockholders and creditors of the mill company; that, at the time said contract was made, Sweet, as treasurer, had in his hands a large sum of money belonging to the company; that he used this money to buy up claims against the company at a large discount, and then set them up in his answer against the company at their full face value, instead of giving the company the benefit of the large discount obtained by him; that Sweet had a sum of money, as treasurer of said company, at that time sufficient to pay off all the demands against the rolling-mill company, except those of Huidekoper and the Birmingham Iron Foundry, and, instead of using it for that purpose, he used the funds of the company to buy up claims in his own name, and for his own individual benefit. It will be recollected that the agreement between the Birmingham Iron Foundry, Huidekoper, and Sweet was made on the thirtieth day of August, 1876, and the decree in the Huidekoper action was rendered on the twenty-first day of December, 1876.

The action, at the time of the agreement, had been pending for about two years. The agreement was necessarily a secret one, and it is not strange that the plaintiff in error, or the other creditors of the rolling-mill company, should not be possessed of any knowledge of it. The nature of this agreement is such that great caution would be observed by the contracting parties to keep it from the knowledge of the other creditors, and it is not surrounded by a chain of circumstances, like other acts of Sweet, that lead to almost the inevitable conclusion that the plaintiff in error knew, or was in such a condition and had such a relation to these parties as to have such opportunities of knowledge, as to be charged with notice of existence of such a contract before the determination of the Huidekoper action; while, to all those acts and transactions of Sweet alleged to have taken place before the commencement of the action by Huidekoper, he had such opportunities of knowledge. This agreement was made a comparatively short time before the rendition of the decree, long after the issues were made up, the claims of the creditors presented, and all the active investigation and work of the lawsuit had been done. We have not the record of the Huidekoper suit before us; but it is alleged in this petition that the claims purchased by Sweet at a large discount with the funds of the company, after he had made the agreement with Huidekoper and the Birmingham Iron Foundry, were set up in his answer against the company, and that in the rendition of the decree in that case he had the benefit of the full face value, with interest on said claims.

We are not prepared to say that such a contract as that entered into by Sweet, Huidekoper, and the Birmingham Iron Foundry is inherently vicious, nor is it necessary for the purpose of this opinion to vigorously denounce it; for even were it free from all shadow of suspicion, or the taint of fraud, if Sweet, in a secret manner, took advantage of it to buy claims against the company at a large discount, with the funds of the company then in his hands as its treasurer, and recovered a judgment against the company for the full face value of the claims so purchased, with interest, he violated his trust, and every rule of justice and every dictate of common honesty. There is a distinct al-

legation in the petition that the knowledge of the agreement, and the subsequent action of Sweet by virtue of it, did not come to the plaintiff in error until long after the rendition of the decree in the Huidekoper action, and within two years before the commencement of this action. It may be that this allegation of itself is sufficient for the purpose of the pleading; but when it is strengthened by the nature of the facts alleged, and the very great probabilities of the situation, it seems but right to give a party who claims to have been greatly injured by reason of gross violations of ordinary trust and confidence an opportunity to prove the facts as charged. We think, with the exception of this comparatively recent and remarkable transaction, the contention of the defendant in error that the plaintiff in error in this action has been guilty of laches, is sufficiently sustained so as to banish from the consideration of the case all the other statements of causes of action against Sweet. But with respect to this one it has been so often declared by the courts—the rule is such a familiar one—that the law will not permit the officers of a corporation to so manage its affairs as to result to their private and personal advantage, that it is within the common knowledge of the great body of the people of this country. They must use every honorable means to enhance the general interest of the corporation for the special advantage of the stockholders and creditors. They are universally held to the highest measure of duty, and the most scrupulous good faith in their transactions with the business of the corporation. So rigid is the rule that no one acting in the capacity of a trustee can derive any benefit from the care, control, management, or investment of trust funds, that it is applied by all courts without exception, and without any relaxation whatever. There is not to be found in any of the books any better or stronger statement of the law on this question than is contained in the opinion of Chief Justice HORTON in the case of *Ryan v. Leavenworth, A. & N. W. R. Co.*, 21 Kan. 365.

The questions arising in this case as to the liability of Sweet as an officer of the mill company to its stockholders and creditors for the resulting profit of his use of the company funds are determined by the court in that case. The petition states sufficient in this behalf to constitute a cause of action against Sweet; so that, if, on the trial that is to follow, these averments are supported by evidence, he should be compelled to account to the creditors of the mill company for such part of the proceeds of his receipts from the sale of the property, and the money he received from the receiver, as the facts will justify. We hold that in this case the petition states a cause of action against Sweet, as above suggested, and this is sufficient for the purpose in view. The defendant in error took the risk of the admission of certain recited facts that result from the filing of the demurrer. We have treated these admissions as the averments of the petition justify. What the real facts are will be apparent when the case is tried on full proof.

We express no opinion further than to say that the petition does state a cause of action, and it is therefore recommended that the ruling of the district court of Shawnee county be reversed, and the cause remanded, with instructions to overrule the demurrer.

BY THE COURT. It is so ordered; HORTON, C. J., and VALENTINE, J., concurring. JOHNSTON, J., having been of counsel, did not sit.

NOTE.

CORPORATIONS—OFFICERS. A contract between a corporation and individuals, some of whom are directors of the corporation, is voidable, at the option of the corporation. *Thomas v. Brownville, Ft. K. & P. R. Co.*, 3 Sup. Ct. Rep. 315, reversing S. C. 2 Fed. Rep. 877; *Meeker v. Winthrop Iron Co.*, 17 Fed. Rep. 48; *Munson v. Syracuse, G. & C. Ry. Co.*, (N. Y.) 8 N. E. Rep. 355. A director of a corporation is not absolutely prohibited from entering into a contract with it through his fellow directors; but the validity of such contract depends upon its nature and terms, and the circumstances

under which it is made. *Hubbard v. New York, N. E. & W. I. Co.*, 14 Fed. Rep. 675. Such contract will be enforced when shown to have been made for the benefit of the corporation, and to be just. *Combination Trust Co. v. Weed*, 2 Fed. Rep. 24. A director of a corporation may become its creditor, and take security for his debt, but his conduct in enforcing such claim will be more closely scrutinized than that of an ordinary creditor, and the proceedings set aside if it appears that he has not acted in good faith as director. *Hallam v. Indianola Hotel Co.*, (Iowa,) 9 N. W. Rep. 111. See, also, *Garrett v. Burlington Plow Co.*, (Iowa,) 29 N. W. Rep. 305. On a sale of corporate property to one of the directors taking part in the transaction as buyer and seller, it devolves upon the directors to establish the good faith of the transaction, and that the sale produced the full value of the property. *Wilkinson v. Bauerle*, (N. J.) 7 Atl. Rep. 514. The sale by the president of a national bank, to himself and cashier, of the stock of the bank, owned by the bank, may be ratified by the bank or its legal representative; but a sale by himself to the bank, of its own stock, where he acts in the double capacity of seller and buyer, cannot be ratified when the purchase of the stock by the bank is not necessary to prevent loss upon a debt previously contracted. *Bundy v. Jackson*, 24 Fed. Rep. 628.

BIERER and another *v.* FRETZ.

(*Supreme Court of Kansas. July 9, 1887.*)

JUDGMENT—RES ADJUDICATA.

Where certain facts are pleaded as a defense in an action, and a final judgment rendered therein, necessarily deciding the merits of such defense, the same facts cannot again be the basis of an action between the same parties arising out of the same transaction, though in the former action the facts were pleaded as a defense only, and no claim made thereon for affirmative relief.

(*Syllabus by Holt, C.*)

Error from district court, Brown county.

Everard Bierer, for plaintiffs in error. *Jas. Falloon*, for defendant in error.

HOLT, O. This action was brought by Bierer and Downer, plaintiffs, against Fretz, defendant. In the Brown county district court, at the September term, 1885, a trial was had, and judgment rendered for the defendant. Plaintiffs bring the case here for review.

The defendant, Fretz, in his answer, sets forth as a defense to plaintiffs' cause of action that the same matter had once before been adjudicated and decided in an action wherein Fretz was plaintiff and Bierer and Downer were defendants; all the evidence introduced in this case was on that issue, and the only question we are called upon to consider is whether the subject-matter of this action has once before been passed upon. In the action referred to in defendant's answer, Fretz, the defendant now, the plaintiff then, obtained a judgment against the plaintiffs in this action. Bierer and Downer carried the same to the supreme court. *Bierer v. Fretz*, 32 Kan. 329, 4 Pac. Rep. 284. The facts detailed in that opinion will more fully explain the circumstances under which this action was brought.

In the first action Bierer and Downer set forth in their answer about all the facts set forth in their petition in this action, although not with the same fullness and amplitude. During the progress of the former trial they obtained leave of the court to withdraw their counter-claim. Whatever is meant by "counter-claim" in this connection we can judge best by the record, from which it appears that he withdrew his prayer for affirmative relief, but that the statement of facts was left in his answer as a defense to the claim set forth in the plaintiffs' petition, exactly the same as it was when he asked for a judgment thereon in his favor for \$1,000.

The plaintiffs offer as evidence all the testimony introduced in the former case. They complain also of some of the rulings in that action; or, as the plaintiffs state in their brief, in substance, that notwithstanding there were allegations of fraud and misrepresentations used and practiced on the part of Fretz in the answer of these plaintiffs, then defendants in the former action, which were similar to the allegations of fraud and misrepresentations set up

by the plaintiffs in the petition in the present case, yet the real issues raised by the petitions in this case and the first count of the answer, a general denial, were not then tried. Then, in their brief, they say: "When the counter-claim of defendants in the original case was withdrawn by consent of the court, it was intended by defendants' counsel, and was so asked of the court, that all the matter and allegations in said answer charging fraud and misrepresentations upon Fretz should be eliminated and withdrawn from said answer. But while the court permitted the bare counter-claims of \$1,000 to be withdrawn, it refused to let defendants withdraw and eliminate from their answer the statements and charges of fraud and misrepresentations upon which their counter-claim was based; and then afterwards, upon trial, the court did the defendants the great injustice of refusing to permit them to introduce in their defense any evidence of the fraud and misrepresentations charged, excepting some small fractions of such testimony, which were incidentally brought out in relation to the other issues in the case." And further they state: "* * * It certainly comes with an ill grace for the same court in the present action to refuse plaintiffs a hearing, and 'their day in court,' because forsooth the charges of fraud, artifice, and misrepresentation in their petition in the present case are substantially the same as those contained in their answer in former action."

We presume it will be conceded that when a fact has once been determined in the course of judicial proceedings, and a final judgment has been rendered in accordance therewith, that from motives of public policy it ought not and cannot be litigated again between the same parties. "It is a rule of law that a man shall not be twice vexed for one and the same cause." This rule had been so long established, and is so salutary in its results, and the reasons therefor so generally and thoroughly understood, that it needs no comments or explanations here.

Was the cause the same in the former action, between these parties, as the one we are now considering? Let us examine the matter from the statements of plaintiff's brief, which states the matter as strongly in their favor as the record justified them in doing. The plaintiffs in this action, defendants in the former one, at their own request, withdrew their prayer for affirmative relief in the nature of a counter-claim, and asked to amend their answer, and make the allegation of fraud more specific and certain. The court refused to allow them to make the amendments asked. The defendants then stood upon their defense as set forth in their answer, but the court refused to allow testimony to be introduced on the allegation of fraud, except as it was relevant to the other issues in the case. The statement of facts remained in the answer in the former case substantially the same as the statement in the petition in the action we are now considering, and all the questions in the issues in this case were necessarily within the issues in the former case, whether formally litigated or not, and the determination of which were of necessity included in that judgment. In that action, if the answer had been true, there could have been no recovery on the part of Fretz, and the defendants would have recovered a judgment for their costs, at least. We do not see how the same facts can be held to be worthless as a defense, and good as a counter-claim, in a cause of action between the same parties, arising out of the same transaction. A party cannot split up his defenses, and present them by piecemeal in successive suits arising out of the same transaction, nor can he relitigate matters which he might have interposed, but failed to do, in a prior action between the same parties about the same subject-matter; and this rule holds true whether the matter that might have been litigated in the former trial would have been therein a ground of action or a defense to the action then pending. A judgment for Fretz in the former action disposed of not only the defenses supported by evidence, but all others that were tried or ought to have been tried, and swept them all away; and that, too, for the purposes

of all subsequent actions that might have been founded upon the same transaction.

The plaintiffs in error seem to rely upon what the court said in the action of *Bierer v. Fretz*, 32 Kan. 334, 4 Pac. Rep. 286. Mr. Justice VALENTINE, speaking for the court, says: "The plaintiffs in error, defendants below, make the further points that this instrument is void for various uncertainties and obscurities in its terms; that it does not contain the entire contract between the parties; that other and additional matters were agreed to between the parties; and that its execution was procured by fraud of Fretz and others." Then, after citing some evidence that might be held to sustain the points claimed, he says further: "We do not think that these matters will render the written contract between Fretz and Bierer and Downer void. They are no part of the written contract. They do not show such fraud in its inception as to render it void; and, if they form a separate and independent contract, or if in any manner they may be considered as constituting the basis or foundation for a cause of action, Bierer and Downer may set them forth in some other action."

The petition filed in this action, though lengthy and elaborate, does not set forth a contract separate and distinct from the one pleaded in the former action. But, on the other hand, it does set forth the same transaction; the same written contract; the other and additional matters agreed to between the parties; and the same allegations of fraud.

The plaintiffs complain of the ruling of the court in the former action in excluding evidence tending to establish fraud. It is not our province to examine this objection. The judgment in the former trial has been complained of heretofore in this court, and on review it was held to be correct, necessarily including the rulings upon the exclusion of testimony. We presume, however, that plaintiffs urge such ruling upon the attention of this court for the purpose of showing that the question of fraud was not tried in the former case. If it were not for the answer of defendants in that action, it is possible that the claim of plaintiffs might have some force, though the record would not, of itself, necessarily establish it; but under the petition of the plaintiffs in this action, and their answer in the former one, they have no ground to complain of the judgment of the trial court. They show conclusively that the same cause of action, arising out of the same transaction, between the same parties, was attempted to be relitigated. The court held the former judgment a bar. That was correct.

It is recommended that the judgment of the court below be affirmed.

BY THE COURT. It is so ordered; all the justices concurring.

HOGUE v. FANNING. (No. 12,038.)

(*Supreme Court of California.* July 1, 1887.)

1. TROVER—VERDICT—JUDGMENT—EXECUTION—MANDAMUS.

In an action of trover before a justice of the peace, where the value of the property claimed is set out in the complaint, but the jury render a verdict as follows: "We, the jury in the case of —, find for the plaintiff, less damages claimed," without stating the value of the property, — a judgment rendered by the justice upon such verdict adjudging that the plaintiff recover the possession of the property, or the value thereof as given in the complaint, though erroneous, as being founded upon a defective verdict, is not void, and execution will issue thereon, and, if refused by the justice, a *mandamus* will be granted to compel the issuance of an execution upon it.

2. SAME—DESCRIPTION OF PROPERTY.

A judgment which adjudges that the plaintiff do recover the possession of "the property in the complaint herein described and filed," where the complaint sufficiently describes the property sought to be recovered, is not void for want of certainty.

Commissioners' decision. Department 1.

Appeal from superior court, Fresno county.

W. D. Grady, for appellant. Wharton & Shaw, for respondent.

NOTE, C. According to the stipulation of the parties, the following appear to be the facts in this case: "(1) That heretofore, to-wit, on the first day of March, 1886, one J. N. Fanning commenced an action in the justice's court of the Fourth township, county of Fresno, state of California, against one Andrew Farley, for the recovery of the possession of a certain mare and colt, or for the sum of \$275, the value thereof, in case a delivery could not be had; and for \$50 damages for the detention thereof, with cost of suit. Said action was in the usual form of actions for claim and delivery of personal property. That on the sixteenth day of September, 1886, said cause was duly tried before the defendant, S. L. Hogue, a justice of the peace, with a jury; and after the evidence was introduced in said cause, the said jury returned the following verdict:

'SELMA, September 16, 1886.

"We, the jury in the case of *Fanning v. Farley*, find for plaintiff, less damages claimed.

C. S. STANTON, Foreman.'

"That thereupon the said justice made and entered the following judgment in said cause:

"In accordance with the foregoing verdict, and the premises having been by the court considered, it is ordered and adjudged that the plaintiff, J. N. Fanning, do have and recover from the defendant, Andrew Farley, the possession of the personal property in the complaint herein described and filed, or for the sum of \$275, in case a delivery cannot be had, together with said plaintiff's costs of suit herein paid out and expended.

"Done in open court this sixteenth day of September, 1886.

"S. L. HOGUE, Justice of the Peace."

"That thereafter, on the tenth day of November, 1886, it having been stipulated that defendant's counsel have time to file the same, defendant's counsel filed a motion to set aside the verdict, and vacate the judgment filed; and on the twenty-sixth day of said month the said court denied said motion; and on the tenth day of January, 1887, plaintiff's counsel asked for an execution in said case to issue, whereupon the said justice of the peace refused to issue said execution in the said case, unless ordered to do so by the honorable superior judge of Fresno county, for the following reasons, among others:

"That before the entering of the judgment in his docket, one J. R. Webb, attorney for plaintiff, wrote said justice that the verdict was not good, and that said justice had concluded and consented that said judgment was void. He refused to act unless so ordered by the superior court. That thereafter the plaintiff, J. N. Fanning, on the eleventh day of January, 1887, applied to the superior court of Fresno county for an order directing the said S. L. Hogue to show cause on the twenty-second day of January, 1887, why a writ of *mandamus* should not issue, compelling the said justice to issue an execution in said case. That on the twenty-second day of January, 1887, the said justice having made his return, from which it appears that he refused to issue said execution for the reasons hereinbefore set out, the said superior court, after hearing argument in said matter, and being fully advised, made and entered its judgment, granting peremptory writ of *mandamus*, directing the said defendant, S. L. Hogue, as justice of the peace, to issue execution in said case for the enforcement of said judgment; and from which judgment granting said writ the said defendant appealed to this court.'"

It is contended by the appellant that the peremptory writ of mandate issued to the justice who tried the case and rendered the judgment was improper because, as is alleged—*First*, the judgment was void from the fact that it was based upon a verdict of the jury which failed to find the value of the property, for the recovery of which, or its alternative value, the action was in-

stituted; *second*, because, as is claimed, the judgment does not contain a sufficient description of the property sued for, and is void on its face.

We cannot concur in the view of the law thus entertained by the appellant. The verdict of the jury was erroneous in that it did not find the value of the property; but the court, when it came to render the judgment, in the exercise of its judicial functions, evidently concluded that the jury intended to find for the plaintiff upon all the issues made by the pleadings, except with reference to his demand for \$50 damages for the detention of the property, which was found against him. The value of the detained property was set out in the complaint as \$275, the amount for which the court gave judgment, and, from an inspection of the verdict of the jury, it is plain that their intention was to find the plaintiff entitled to recover this sum of money from the defendant in case the specific personal property sued for should not be returned to him.

In rendering the judgment the court committed an error; but the judgment being regular in form, and jurisdiction being had by that tribunal, both of the person of the defendant and the subject-matter of the action, the judgment was not void on that account, but might have been reversed on appeal. We have been able to find no case which is precisely in point, but the reasoning of this court in *Hunter v. Hoole*, 17 Cal. 420, seems conclusive of the view we entertain.

The second point made by the appellant is not tenable, for, upon inspecting the complaint to which the judgment refers for a description of the property sued for, it will be found that it is full and ample, and therefore, under the rule of law, *certum est quod certum reddi potest*, the judgment is not void for want of certainty.

The defendant did not appeal from the judgment, and it being merely erroneous, and not void, it was the duty of the justice to have issued execution as requested. Failing in this duty, it was the plaintiff's right to invoke the writ of mandate issuing from the superior court. Section 1085, Code Civil Proc. The judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the forgoing opinion the judgment is affirmed.

2 Cal. Unrep. 774

CUMMINGS v. CUMMINGS and others. (No. 11,881.)

(Supreme Court of California. 1887.)

1. DIVORCE—JOINDER OF PARTIES AND CAUSES OF ACTION—FRAUDULENT CONVEYANCE.

With a suit for divorce, plaintiff also joined an action for the division of community property, uniting Ketchum, Simpson, and the Bank of Watsonville as defendants. The complaint alleged that, during the coverture of plaintiff and defendant Cummings, the latter acquired, by the joint efforts of himself and wife, a quantity of real estate, which was community property, and part of which, without the knowledge or consent of plaintiff, he attempted to convey to defendant Ketchum; that this was done with the purpose and intent on the part of both parties to the conveyance to defraud plaintiff of her rights in the property; that the conveyance was without consideration; that the Bank of Watsonville claims some interest in the property by reason of a mortgage thereon, given by Ketchum, but that the mortgage was taken with knowledge of the fraud of the above-named defendants, and for the purpose of assisting in carrying it out; that said Simpson claims an interest in the land, but that his interest or claim is subordinate to plaintiff's interest therein. Defendants Ketchum and the Bank of Watsonville demurred, on the grounds (1) that several causes of action were improperly united; (2) that there was a misjoinder of parties defendant. *Held*, that the demurrers should have been sustained.

2. HUSBAND AND WIFE—ACTION BETWEEN—FRAUDULENT CONVEYANCE.

An action to set aside the conveyance of community property made by a husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists.

Department 2. Appeal from superior court, Santa Cruz county.

A. S. Kittredge, for appellant. *Thomas H. Laine, Goldsby & Jetter*, and *Z. N. Goldsby*, for plaintiff.

THORNTON, J. This action is brought by the plaintiff, Mary R. Cummings, against her husband, William N. Cummings, defendant, for a divorce from the bonds of matrimony, and for a division of the community property, etc. Morgan L. Ketchum, James L. Simpson, and the Bank of Watsonville were also made defendants.

It is averred in the complaint that, during the coverture of plaintiff and defendant Cummings, the latter acquired, by the joint efforts of plaintiff and defendant just above named, a large amount of real property in the city of Santa Cruz, of the value of \$16,000 or thereabouts, which was community property, and that a portion of the property was a lot situate in the city of Santa Cruz, which is particularly described in the complaint. It is further averred that defendant Cummings, by an instrument in writing by him signed, acknowledged, and delivered on the eighteenth of May, 1876, in form a deed of conveyance, without the knowledge, approbation, or consent of plaintiff, purported to convey to defendant Ketchum the lot of land above mentioned, in which instrument \$8,000 is stated as the consideration thereof; that Cummings and Ketchum, in the execution and delivery of the pretended conveyance, combined and confederated willfully for the purpose and with the intent to defraud plaintiff of her rights and interest in and to said property, and to fraudulently cover up and conceal the legal title for the sole use and benefit of defendants Cummings and Ketchum; that said conveyance was without consideration, and that no part of it was ever paid or ever agreed to be paid by Ketchum to Cummings; that the whole scheme is a contrivance to defraud plaintiff of her rights and interest in the property aforesaid.

As to the Bank of Watsonville, it is alleged that it has or claims to have some interest in the lot above mentioned; that its claim is based on a mortgage executed by Ketchum to it, dated on or about the sixteenth day of August, 1881; that said mortgage was taken with knowledge of the fraud of Ketchum and Cummings above set forth, and with the intent to enable Ketchum and Cummings to carry out the fraud aforesaid; that defendant Simpson has or claims to have some interest in the lot in controversy, but said interest is subordinate and subject to the interest of plaintiff in said lot. A like averment as that just preceding is made as to the interest of the Bank of Watsonville.

Ketchum and the bank demurred to the complaint on the following among other grounds: (1) That several causes of action have been improperly united, to-wit, an action for a divorce, and an action based on a fraud alleged to have been committed upon plaintiff's marital community rights, said fraud being wholly without relation to, connection with, or anticipation of, a divorce, or any proceedings therefor. (2) That there is a misjoinder of parties defendant,—William N. Cummings, defendant in an action for divorce, and these defendants as parties to an alleged fraud upon plaintiff's marital community rights,—said fraud being wholly without relation to, connection with, or anticipation of, a divorce, or any proceedings therefor. The demurrer was overruled, and the cause proceeded to trial. A nonsuit was granted as to the bank, and a judgment was rendered adverse to Ketchum.

It is contended that the demurrer on the grounds above mentioned should have been sustained, and we concur in this contention. The joinder of causes of action is governed by section 427, Code Civil Proc. That section is as follows:

"The plaintiff may unite several causes of action in the same complaint, where they all arise out of (1) contracts, express or implied; (2) claims to recover specific real property, with or without damages for the withholding

thereof, or for waste committed thereon, and the rents and profits of the same; (3) claims to recover specific personal property, with or without damages, for the withholding thereof; (4) claims against a trustee by virtue of a contract, or by operation of law; (5) injuries to character; (6) injuries to person; (7) injuries to property. The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person."

We do not find the causes of action here united, viz., an action for a divorce and an action to set aside a conveyance on the ground of fraud, to belong to any of the classes of action allowed to be united by the above section. Nor can Ketchum or the bank be made defendants in such a cause as this. They have no concern in the action for a divorce between plaintiff and her husband.

Furthermore, we are of opinion that the action to set aside a conveyance of the community property made by the husband, on the ground of fraud, cannot be maintained by the wife while the marriage bond exists. The reasons for this conclusion are given in *Greiner v. Greiner*, 58 Cal. 119, 121, where the point is decided. We think the ruling in that case is correct, and should be adhered to. The action which the wife can probably maintain during coverture is set forth in *Greiner v. Greiner*, 58 Cal. 121. When a decree of divorce has been obtained, the plaintiff can bring an action to redress any such wrong as she alleges she has sustained by the conduct of Ketchum. The court erred in not sustaining the demurrer to the complaint.

The appointment of the receiver is without any ground to sustain it. Ketchum was a mortgagor in possession, with the right to collect the rents and profits. It is found that he had committed no fraud. He had a right to retain the whole property as security for the payment of the amount due him, and there was no ground to deprive him of the possession of any portion of the lot involved herein.

The judgment is reversed and the cause remanded, with directions to discharge the receiver on his properly accounting, and to sustain the demurrer as to Ketchum. Ordered accordingly.

We concur: McFARLAND, J.; SHARPSTEIN, J.

2 Cal. Unrep. 778

LEVY v. BURKLE and others. (No. 11,967.)

(Supreme Court of California. July 27, 1887.)

1. FRAUD—As DEFENSE TO TRUST DEED.

In an action to foreclose a trust deed, where the answer set up that the property conveyed was the separate property of the wife; that her husband had been arrested on a criminal charge, and obtained bail; that he became financially embarrassed; and that the wife signed the trust deed upon the representation made to her by her husband and the plaintiff, who was a creditor of the husband and one of his bondsmen, that unless she signed the deed the bondsmen would withdraw, and her husband would have to go to jail, and would probably be convicted, and go to the penitentiary, and that by signing the deed she would not lose anything, and that the deed would not divest her of her homestead: *held*, that a demurrer to such answer was properly sustained.

2. TRUST DEED—ORDER OF SALE—RIGHT OF REDEMPTION.

A court has no authority to order a sale of property without the right of redemption given by statute; and it makes no difference whether the security under which the sale is ordered is a mortgage or a trust deed.

Department 2. Appeal from superior court, Los Angeles county.

This was an action to obtain an order to sell certain property under a trust deed. The complaint alleges that, on the twenty-third of May, F. Burkle, one of the defendants, was indebted to sundry persons in about the sum of

\$3,000; that on that day he entered into an agreement with his creditors to pay to the plaintiff, Levy, as trustee, the amounts of his debts, in 12 monthly installments; that, to secure the payment of said sums, Burkle and his wife, Elizabeth Virginia Burkle, executed a trust deed to Levy; that in October, 1885, the Burkles commenced an action against Levy to have the trust deed vacated and set aside on the ground of fraud; that a judgment was rendered against them in this action, and subsequently they commenced another suit against Levy to have the deed vacated on the ground that the land conveyed was the homestead of defendants, and the separate property of the wife, and that the wife had been induced to sign the deed by fraud and undue influence; that the Burkles had declared that they intended to harass perpetually said Levy by litigation; that the threats, the bringing of the second suit, and the possession of the property by the Burkles, tend to cloud plaintiff's title, as such trustee, and he prays that the title of the trustee be declared good, and the trust property be sold without the right of redemption.

The defendants demurred to the complaint. The demurrer was overruled, and they answered, denying the alleged threats to harass plaintiff, and setting up as new matter, by way of separate defense, that at the time of the execution of the trust deed the property conveyed was the separate property of the wife, and the homestead of herself and husband; that the wife executed the trust deed through fraud and undue influence on the part of the plaintiff. The fraud relied on was that on the second of May, 1884, her husband, who was a merchant in San Pedro, Los Angeles county, assaulted one Jones, and was arrested and taken to Los Angeles; that upon securing bail he was again arrested on a second complaint by Jones, and again compelled to give bail; that, from that time until the date of the execution of the trust deed, he was engaged in preparing to defend these proceedings; that his attorney and friends had told him that he would probably be convicted, and go to the penitentiary; that he became financially embarrassed, and his creditors began to harass him; that Levy, the plaintiff, who was one of the creditors, and a trusted adviser, suggested that he and his wife join in a deed of all her property to him (Levy) in trust, to conciliate the other creditors; that he was given to understand that his bondsmen, (Levy and one Jacoby,) both creditors, would withdraw from the bond, and he would have to go to jail, unless the deed was given; that prior to the date of the execution of said trust deed he confided to his wife all his troubles, as they were known to himself and Levy; that in consequence she became greatly agitated and unfitted for business, and while in this condition she was asked by Levy, he at the time knowing her condition, to attend a meeting of her husband's creditors, and was then asked to sign the trust deed; that she refused to do so until told by her husband and Levy that by so doing she could relieve her husband from his embarrassments, and that she would not lose anything thereby, and that the deed would not divest her of her homestead; that it was only upon the faith of these assurances that she signed the deed; that all the representations so made by her husband and Levy were intentionally and deliberately false on the part of said Levy. To this answer the plaintiff demurred, which demurrer was sustained, and defendants appealed.

For a former action between these parties, involving the same facts, see 11 Pac. Rep. 643.

P. W. Dooner, for appellants. *Chapman & Hendrick* and *Graves & O'Melveny*, for respondent.

THORNTON, J. The demurrer to the answer of defendant Elizabeth Burkle was properly sustained. We are of opinion that there is error in the judgment in the direction for the sale of the property without the right of redemption. The right to redeem is given by statute, and the defendant cannot be deprived of it by the court. It makes no difference that the security here in-

volved is a deed of trust. It was held at an early day in *Kent v. Laffan*, 2 Cal. 595, and ever since, that the statutory redemption applied to a sale on foreclosure of a mortgage. If it applies to a mortgage, it as well applies to a deed of trust. Both are securities only. The difference is only in form. In one case the mortgagee is the trustee; in the other a third person.

The judgment is ordered to be modified in the court below by striking out the direction for the sale without the right of redemption, and when so modified will stand affirmed. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 609

PEOPLE v. KERNAGHAN. (No. 20,209.)

(Supreme Court of California. June 27, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTIONS—REASONABLE DOUBT.

In the charge to the jury in a trial for murder the language, "Your minds should be able to rest *reasonably satisfied* of the guilt of the defendant before a verdict of that character is given;" and, "On the other hand, however, mere probabilities of innocence or doubts, however reasonable, *which beset some minds on all occasions*, should not prevent such a verdict,"—does not injure the defendant, and is no ground for setting aside a verdict of guilty of murder in the first degree, when the court in other parts of its charge has fully and correctly stated the law on the subject of reasonable doubt.¹ TEMPLE, J., dissenting.

2. HOMICIDE—MANSLAUGHTER.

In a charge to the jury in a trial for murder, after giving a proper definition of manslaughter, the court added that it was homicide, "not excusable, not justifiable, but yet not intentional." Held that, as the intent in manslaughter, if present, may be disregarded, in accordance with the settled rule in California, the difference between the absence of intention and the presence of an intention which may be disregarded is too slight to be ground for setting aside a verdict of guilty of murder in the first degree. THORNTON, J., dissenting.

3. INSANITY—DEFENSE TO CRIME—EMOTIONAL INSANITY.

It is not error to state, in a charge upon the defense of insanity, that "the law rejects the doctrine of what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off when it is committed."

In bank. Appeal from superior court, San Francisco county.

Robert Ferral and Clarence Gray, for appellant. Atty. Gen. G. A. Johnson, for respondent.

MCFARLAND, J. The jury found the appellant guilty of murder in the first degree, and assigned the punishment of death. He now contends for a reversal of the judgment upon the grounds that the court erroneously instructed the jury—*First*, as to reasonable doubt; *second*, as to manslaughter; *third*, as to excusable homicide; and, *fourth*, as to insanity. The difficulties in this case arise mostly out of the attempt of the learned judge of the court below to employ new and unusual forms of speech to state old principles, the proper expression of which has long since settled into well-considered and well-chosen language. For instance, the definition—or, rather, the description—of "reasonable doubt" given by Chief Justice SHAW in the *Webster Case* has been adopted by this court, and by nearly all American courts, as a statement of that mental condition sufficiently accurate. Therefore, where a *nisi prius* court had given the language used by Chief Justice SHAW, and had confined itself to such language, we would be slow to reverse the case, although other instructions upon the subject, not objectionable, had been asked by defendant, and had been refused. But, in the case at bar, the court, in addition to a correct statement of the law concerning reasonable doubt, taken substantially from the *Webster Case*, used other expressions which are objectionable;

¹ Respecting what is a reasonable doubt, see *People v. Lee Sare Bo*, *ante*, 310, and note; *McCullough v. State*, (Tex.) 5 S. W. Rep. 175.

and the question to be determined is, does it appear from the whole charge, considered as an entirety, that the defendant was not injured by that part of it which, considered by itself, might be admitted to be erroneous? *People v. Doyell*, 48 Cal. 93. For the solemn verdict of 12 men, rendered upon their oaths, will not be set aside for a mere "slip of the judge" in charging them, when no prejudicial injury was done thereby.

The first objection to the charge on this subject is to the following language, which constitutes the latter clause of a sentence: "Your minds should be able to rest reasonably satisfied of the guilt of the defendant before a verdict of that character is given." "Reasonably satisfied," as here used, is undoubtedly an unfortunate expression. If it had stood alone, it might possibly have been understood by the jury as meaning "satisfied by a preponderance of evidence." But how could that be when the court had repeatedly told them that they must be convinced of defendant's guilt beyond a reasonable doubt, and when, in a former part of the very sentence in which the objectionable words occur, it had said that "the probability of guilt outweighing the probability of innocence" was not sufficient to warrant a conviction? Keeping the whole charge in view, the jury could not have understood the words "reasonably satisfied" other than as an equivalent of the phrase "satisfied beyond a reasonable doubt." We do not think, therefore, that this objection to the charge should work a reversal of the judgment.

The other main objection on this point is directed to the following language, which constitutes the first clause of a sentence: "On the other hand, however, mere probabilities of innocence or doubts, however reasonable, *which beset some minds on all occasions*, should not prevent such a verdict." To this language, standing by itself, we can attach no definite meaning, and it is not to be presumed that the jury could, or that they did, attach a meaning to it prejudicial to defendant. The latter part of the sentence is as follows: "But if the whole testimony in the case produces in your minds this degree of conviction of the guilt of the defendant,—that is, satisfies you beyond a reasonable doubt of his guilt,—it is your duty to say so by your verdict; if it does not, it is your duty to say, not guilty."

It must be remembered that the court, in other parts of its charge, had fully and correctly stated the law on the subject of reasonable doubt. Among other things, having said that the doubt was not sufficient if merely "chimerical, or based on groundless conjectures," it correctly defined reasonable doubt as "that state of the case which, after an entire consideration and comparison of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." The practical administration of justice should not be allowed to depend too much upon nice questions in philology. In a case like the one at bar the real question should be, was the correct exposition of the law given in the main body of the charge so qualified by the injudicious expressions complained of as to impair its truthfulness as a whole? We think that this question, put in this case upon the point under discussion, should be answered in the negative; although, of course, we cannot commend all that was said in the instructions.

The charge of the court on the subject of manslaughter is correct, with the exception of the use of the words "not intentional." After giving a proper definition of manslaughter, and saying that "the distinguishing feature between murder and manslaughter is the presence or absence of malice," the court adds as follows: "In other words, gentlemen, manslaughter is a homicide, not excusable, not justifiable, but yet not intentional." The latter part of this language is, in one sense, inconsistent with former decisions of this court. It has been held by some eminent jurists that the sudden, irresistible passion, overcoming the reason, and deadening the conscience to the voice of humanity, which reduces unlawful homicide to manslaughter, is inconsistent

with the notion of intention. And while this court has said in *People v. Freel*, 48 Cal. 436, that the intent to kill may be present in manslaughter, yet, in the same case, it said that "the law, out of forbearance for the weakness of human nature, will disregard the actual intent." In *People v. Doyell*, 48 Cal. 96, this court uses the same expression; and in discussing the distinction between murder in the second degree and manslaughter, says: "In the former cases the slayer is presumed to be actuated by an intent which may not exist; in the latter, out of forbearance for the weakness of human nature, the slayer is presumed not to be actuated by an intent to kill, although such intent may, in fact, exist." Now, the distinction between no intent at all, and an intent which the law "disregards," and by which the slayer is "presumed not to be actuated," is a very slight basis for the reversal of a judgment. And the distinction becomes less apparent when we consider that one of the definitions of malice given in section 7, Pen. Code, is "an intent to do a wrongful act, established either by proof or presumption of law;" and that, in section 188, practically the same definition is given, although, in dividing malice into express and implied, the former is described as existing when the "intention" to kill is "manifested" by direct proof, and in the latter as resting on a "presumption of law." Indeed, the primary and generally received legal definition of malice includes the notion of intent. Some of the common definitions are, "the doing of a wrongful act *intentionally*, without just cause or excuse;" a "conscious violation of law;" "the intent from which flows any unlawful and injurious act, committed without legal justification." 2 Bouv. Law Dict. 33, and cases there cited. It is difficult, therefore, to reconcile the absence of malice with the presence of an intent to kill; and we would hesitate to set aside a verdict on such a delicate distinction, even in a case where it was apparent that the jury may have had doubts which involved the boundary line between manslaughter and murder in the second degree. But, in the case at bar, there were evidently no such doubts. The evidence tending to reduce the crime to manslaughter was of the very slightest character; and the jury, passing over murder in the second degree, not only found the defendant guilty of murder in the first degree, but imposed the extreme penalty of death, when it was in their discretion to assign the punishment of imprisonment for life. Under these circumstances we are of the opinion that the judgment should not be reversed for the alleged error here under discussion.

With respect to the charge of the court on the subjects of excusable homicide and insanity,¹ we deem it necessary to say, only, that in our opinion it

¹The instruction referred to is as follows: "One of the defenses interposed, as I understand it, is the plea of insanity; or, in other words, under a plea of not guilty, the defendant may interpose several defenses. He may rely upon insanity existing at the time of the alleged offense, and at the same time he may rely upon self-defense, or that the act was excusable or justifiable, and it is for you to determine, from all the evidence in the case, the validity of any defense he may have interposed. All men have not the same mental force or characteristics, nor is the same man at all times in the same condition as to his mental force or physical strength. His faculties may be impaired or diminished by sickness or bodily ailment, or by certain causes calculated to disturb or influence his passions; yet, if he be in possession of his senses, and able to judge of the moral qualities of his acts, and of the particular act for which he is arraigned, and to distinguish between right and wrong in regard to it, he is morally and legally responsible for his conduct, and amenable to the laws of the land. It is claimed, as I understand it, on the part of the defendant, that if he killed this Martha A. Hood, as alleged in the information, that he was mentally unconscious of the act in which he was engaged, and legally irresponsible for it. Insanity is a valid defense, if satisfactorily shown by the evidence. If the defendant was not in the possession of his faculties, was at the time incapable of distinguishing between right and wrong in regard to the transaction, or of appreciating the moral qualities of his act, and the evidence satisfies you this is so, then he is not responsible, and should be acquitted. You are to judge of the character and quality of the defendant's acts, his state of mind, as evidenced by his conduct, declarations, acts, temperament, disposition, the influence which produces it, and all other circumstances which have been shown before you, and all

was not erroneous. This court has frequently warned the judges of trial courts against the dangers of lengthy and ill-considered instructions to juries in criminal cases. We here repeat the admonition,—with little hope, however, that it will be heeded.

Judgment and order denying a new trial affirmed.

I concur: PATERSON, J.

We concur in the judgment: SEARLS, C. J.; MCKINSTRY, J.

TEMPLE, J., (*dissenting*.) I dissent. I think the judgment should be reversed. I think there was harmful error in the instruction in regard to reasonable doubt. It is true, the jury were also fully and correctly instructed upon this subject; that is, the other instructions given would have been correct if they had not been qualified by the erroneous one complained of. I see no possible purpose in the instruction unless it was intended to direct the jury as to the proper understanding of those given at the request of defendant. It must have been understood, and it was probably intended it should be, as

are important subjects for you to consider in determining whether the defendant was sane or insane at the time of the commission of the alleged offense, if you find that he did commit it; and it is your duty, gentlemen, to bring your personal knowledge of human nature, the tendency of the human mind, to bear upon all the evidence in the case,—all facts proved or admitted before you, the acts and conduct of the defendant at the time, before, and subsequent to the alleged commission of the offense; and, in order to hold defendant criminally responsible, you must be satisfied that he has sufficient mental capacity to distinguish between right and wrong, as applied to the act he was about to commit, and was conscious that he was doing wrong. I will here state, gentlemen, that frenzy arising from the passion of anger, hatred, or revenge, no matter how furious, if not the result of a diseased mind, is not legal insanity. You must not confound anger or wrath with actual insanity; because, however absurd or unreasonable that may be, or a man may act when suddenly angered, if his mind is not absolutely deranged, it is not a legal excuse for the violation of the law. The law recognizes partial, as well as general, insanity; that is, that a person may be insane on one or more subjects, and sane as to the others, and that he may be laboring under a mental aberration in regard to some matter regarding a particular person or thing, and generally sane as to all other subjects. The law presumes everybody sane and responsible for his acts until the contrary is shown by the evidence; and, when insanity is set up as a defense to an alleged criminal act, the burden of proving it is upon the defendant to show, by a preponderance of evidence, that he was affected by insanity at the time of his act, to such extent that he did not know what he was doing was wrong. You will therefore understand, gentlemen, that where insanity is relied upon as a defense, that, as I have before stated, the burden of proof is upon the defendant, and the proof must be such in amount that, if the single issue of sanity or insanity should be submitted to a jury in a civil case, they must find that he was insane. A man may be of sound mind. He may be insane in many respects,—indeed, he may be a monomaniac on any given subject,—and yet his mind may be sane in all other respects. Such a man, though quite capable of judging between right and wrong in regard to an act of the nature of that of which he might be accused, cannot be said to be possessed of a sound intellect; yet he would be held responsible for the commission of a criminal act, except in a case where his peculiar unsoundness or monomania was involved. The law, therefore, does not require, as a condition on which criminal responsibility shall follow the commission of a crime, the possession of all the faculties with full vigor, or a mind wholly unimpaired by disease. But, to establish a defense on the ground of insanity on a criminal charge, you must be satisfied, as I have before remarked, by a preponderance of proof, that, at the time of committing the act charged, the accused was laboring under such a defect of reason from a diseased mind as not to know the nature and quality of the act that he was doing, or, if he did know it, that he did not know it,—that he did not know what he was doing was wrong. The law rejects the doctrine of what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off and ends when it is committed. Insanity is a manifestation of a disease of the brain; and the doctrine that an individual can be entirely sane the moment before and after the act was committed, and yet insane at the instant the act was committed, is contrary to every principle of law and sense. In this state the law is well settled that a morbid state of passion, though unsettling the moral system, the

qualifying the other instructions upon the same subject. For instance, the jury were told that they must be satisfied of the guilt of the defendant beyond a reasonable doubt; that they must have an abiding conviction, to a moral certainty, of his guilt, etc., but also that such degree of conviction was consistent with a well-founded doubt, and with a *mere* probability of innocence, however reasonable, and that, after all, to be satisfied beyond a reasonable doubt only meant that they should be reasonably satisfied; that is, that the degree of certainty was only that required in civil cases, which merely consists in ascertaining the preponderance of evidence,—was, in fact, something less; was even consistent with a reasonable probability of innocence.

I readily admit that a case should not be reversed because the judge, in some part of his charge, has omitted a needed qualification of some proposition, if it has been elsewhere supplied, and we can see that on the whole the jury has not been misled. Here, however, I am unable to resist the impression that the judge intended to lessen the effect of the forcible, though correct, statement of the doctrine of reasonable doubt in the instruction asked for, and that it probably did have that effect. I presume the judge used the

mental faculties remaining meanwhile in a normal, healthy condition, does not excuse a relaxation. Indeed, emotional insanity, consisting of an irresistible impulse, co-existing with mental sanity, is no defense to a criminal charge. If you believe, from the evidence in the case, that the defendant was affected, and had an insane impulse to kill the deceased, but he could have successfully resisted it, he should have done so, and, if he did not do it, he is criminally responsible for the act. Whether he had any such impulse, and whether he could have resisted it, are questions for you, gentlemen, alone to determine. You are not to acquit the defendant on the ground of insanity unless you are satisfied, by a preponderance of evidence, that the killing of the deceased was produced by mental disease. It matters not, however, what the cause of the disease may be, if it is proved that the defendant did the killing in a moment of insanity. In such case he is not responsible or guilty. But if you believe, from all the evidence and circumstances in the case, that the defendant was in possession of a sound mind, and allowed his passion to escape control, he cannot claim from such acts the protection of insanity; for criminal laws are passed and enforced to restrain the evil passion of men, and it is no defense to an action to say that the defendant, though of sound mind, was carried away by rage and ungovernable passion. If his mind was not diseased to such an extent as to deprive him of self-control, he is bound to govern and control his actions, and if he gives way to his passions, and takes human life without cause, he must answer for his acts, and be held to strict accountability.

"Again, the law does not recognize a form of insanity in which the capacity of distinguishing between right and wrong exists, with the power of choosing between them. A criminal cannot be excused upon the ground of an irresistible impulse, when the offender has the ability to discover and exercise and see his legal and moral duty in respect to it. The law assumes and commands that one not insane can and must control his impulses, and holds him responsible if he does not. You will observe, gentlemen, from what I have already said, that in a criminal case, if the defendant relies upon insanity as a defense, the burden of proof is cast upon him; that the allegation of insanity is an affirmative proposition, which must be proved to your satisfaction, to overcome the presumption of sanity. Of course, you will understand that this may be established by a preponderance of proof. By a preponderance of proof I do not mean the greater number of witnesses on one side or the other which do not produce conviction in your mind, as against a less number whose testimony does produce such conviction; but by a preponderance of proof I mean and intend that you should understand the greater weight of evidence which satisfies your minds of the truth of the proposition in support of which it was given.

"And in conclusion, gentlemen, of this branch of our instructions, I will again say that the test of insanity in a case like the one at bar, and which will excuse the commission of a crime, is whether the accused, at the time of the commission thereof, was conscious that he was doing what he ought not to do; or, in other words, was the insanity of the defendant, if any such has been shown, such a diseased and deranged condition of the mental faculties as to render him incapable of distinguishing between right and wrong in relation to the act with which he is charged? If you are satisfied of this by a preponderance of the testimony, then he is not criminally responsible for any act which he may have committed. But, on the contrary, unless you are satisfied of this by a preponderance of testimony, then he is not relieved from any criminal responsibility of any act which he may have committed."

word "probability" of innocence by inadvertence, intending to say a "mere possibility of innocence." The judge's probable intentions, however, do not sure the error.

I do not think there was harmful error in the instruction in regard to manslaughter. The jury were told manslaughter is a homicide, not excusable, not justifiable, but yet not intentional. Other instructions fully and correctly defining manslaughter were also given. Applying the erroneous definition to the true one, as a qualification, they were told voluntary manslaughter is the unlawful killing of a human being, without malice, upon a sudden quarrel or heat of passion, but is unintentional. Now, if this definition involves a contradiction in terms, it is still but a harmless one. It simply tells the jury that an unlawful homicide, without malice, in a sudden heat of passion, is not intentional. It creates no confusion, and leaves no doubt as to the nature of the acts constituting voluntary manslaughter.

But whether it can properly be said that no homicide is intentional, when committed without malice, under an irresistible passion caused by a sudden and sufficient provocation, when there has not been time for reason to resume its sway, is merely a question as to the use of words. If there had been sufficient time for the voice of reason and humanity to be heard, the killing will be attributed to malice. Does that not mean that the provocation, the irresistible passion, and the rapidity with which the act follows, preclude the idea of intention; that such intent, if it exist, has not been realized in the judging mind, or recognized by the conscience, and therefore does not, in law or reason, amount to an intent? The definition of malice in the Penal Code would seem to favor this view. Section 7, Pen. Code. One of the definitions of malice there given is, "an intent to do a wrongful act." If the killing be unlawful and intentional, it is difficult to comprehend how it can be otherwise than malicious. There certainly would be an intent to do a wrongful act.

At all events, it seems to me that it is merely a choice between different forms of expression, whether we say that voluntary manslaughter is intentional, but because of the irresistible passion, upon a sufficient provocation, and the lack of time for reflection, out of compassion for the weakness of human nature, the law attributes the act to the passion; or that the sudden heat of passion is followed so quickly by the act as to preclude the idea of intention. The essential elements of the crime are the same. I do not think the case should be reversed for that portion of the charge in regard to emotional insanity.

To my mind, however, it resembles more the testimony of a medical expert than the charge of a court. It is not a statement of the doctrine of the case of *People v. Hotn*, 62 Cal. 120. That case merely says irresistible impulse, *if it exists*, does not constitute the insanity which is a legal defense. The court there left the question whether it could exist to be determined as a fact from evidence. Here the court announces as a fact that one cannot be entirely sane a moment before and after the criminal act, and insane at the time. It is also announced that there may be a morbid state of passion which would unsettle the moral system, while the mental faculties remain in a normal and healthy condition. That may all be true, but it is not matter of law.

I think the judgment should be reversed for the reasons given.

THORNTON, J., (*dissenting*.) I dissent. We have examined the charge of the court upon the question of reasonable doubt, and are of opinion that it contains nothing which calls for a reversal. The direction on this point must be considered in its entirety; and if the whole charge, taken together, without giving a strained meaning to any portion of the language employed, harmonizes, and fairly and correctly presents the law bearing on the point, the judgment should not be disturbed because some of the words of the charge, taken by themselves, do not fully present the rule which is to be gathered

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from the whole text of the direction. *People v. Doyell*, 48 Cal. 93. In this view, we find nothing contradictory in the direction given as to reasonable doubt.

The charge on the point above referred to is certainly, as to some expressions used in it, obnoxious to criticism. For instance, the learned judge of the trial court told the jury: "It is not every possible doubt, however slight, or *however well founded*, which should prevent a verdict of guilty; but a doubt, to have that effect, must be a reasonable one, arising from the evidence in the case,—that is, it must be founded in reason, arising out of the evidence, which leaves a rational uncertainty as to his guilt which nothing else in the case removes." Then follows this language: "The degree of conviction, in any mind, of the guilt of the defendant, should be something more than the mere probability of guilt outweighing the probability of innocence. Your minds should be able to rest *reasonably satisfied* of the guilt of the defendant before a verdict of that character is given." The court further said: "On the other hand, however, mere probabilities of innocence, or doubts, however reasonable, which beset some minds on all occasions, should not prevent such a verdict; but if the whole testimony in the case produces in your minds this degree of conviction of the guilt of the defendant,—that is, satisfies you beyond a reasonable doubt of his guilt,—it is your duty to say so by your verdict; if it does not, it is your duty to say, not guilty."

What is meant by a well-founded doubt, which should prevent a verdict of guilty, taken by itself, would present a singular question of law. But it is clearly explained by the clause which immediately follows. So also the words "*doubts however reasonable*" are clearly explained by the words which follow. The words "*reasonably satisfied*," conceding that they, by themselves, define only a preponderance of evidence, and that the jury were told that they could rest a verdict of guilty on such preponderance, such a gloss is removed by the language which follows, and the clear direction that reasonable doubt "is that state of the case which, after an entire consideration and comparison of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

It seems to us that the learned judge of the trial court used the expressions "doubts * * * *well founded*" and "doubts, however reasonable," with reference to doubts which might arise on a consideration of the evidence less than the whole,—on a consideration which might be called *partial*, and not embracing the testimony in the case in its entirety.

While we will not reverse for the expressions in the charge above given, and hold that the charge, as a whole, is not erroneous on the point of reasonable doubt, we feel bound to say that we cannot commend it. And we think it proper to admonish the judges of the trial courts to follow the beaten paths of the law, to instruct the jury in the formula of words well settled in this court, and refrain from the use of expressions in their directions which present questions on which appeals will be generally taken, and may sometimes demand a reversal of a judgment. It is safe to travel along the beaten paths, —*ire super antiquas vias*. It is dangerous to attempt to hew out a new one, when the old way lies patent before one. We are not convinced as yet that the directions as to reasonable doubt sanctioned by this and other courts can be improved; and we feel an abiding conviction, beyond a reasonable doubt, that this attempt to improve on the approved directions in this case was not a success.

It is contended that the court erred in giving the direction which follows: "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: *First*, voluntary, upon a sudden quarrel or heat of passion; *second*, involuntary, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death in

an unlawful manner, or without due caution or circumspection. The distinguishing feature between murder and manslaughter is the presence or absence of malice. If malice enters into the unlawful act by which death is caused, it is murder; but if malice is wanting, it is manslaughter. In other words, gentlemen, manslaughter is a homicide, not excusable, not justifiable, but yet not intentional." The court, having thus given the definition of manslaughter in its phases as *voluntary* and *involuntary*, concludes on this point by telling the jury that "manslaughter is a homicide, *not excusable, not justifiable, but yet not intentional.*"

How the learned judge of the court below could say to the jury that manslaughter, a species of homicide, could be *voluntary*, and, if intentional, was not manslaughter, is a question defying solution. This latter direction, predicated of manslaughter, that to constitute it the homicide must be unintentional, is in direct contradiction of the former portion of the direction that it could be voluntary, and contrary to the definition of it given by the Code, which is quoted in the first part of the direction, (Pen. Code, § 192,) which is as follows: "Manslaughter is the unlawful killing of a human being without malice," and one kind of it may be "voluntary, upon a sudden quarrel or heat of passion." To say that manslaughter must be "*not intentional*" is in effect to say that it cannot be voluntary. It cannot be *unintentional* if it is voluntary. A voluntary homicide, upon a sudden quarrel or heat of passion, is manslaughter. It must be with a will or volition to kill. When there is volition there is intention. To predicate of volition that it is unintentional is to say that volition must be involuntary, *i. e., without volition*, which is, in terms, a plain contradiction and a solecism. This court has so held in *People v. Freel*, 48 Cal. 436, cited approvingly in *People v. Crowley*, 56 Cal. 42, 43.

In *Freel's Case*, the question arose on a direction to the jury in these words: "You will also observe that the difference between murder and manslaughter is that in manslaughter there is no intention whatever either to kill or do bodily harm. The killing is the unintentional result of a sudden heat of passion, or of an unlawful act committed without due caution or circumspection." Of this direction the court said: "This is clearly erroneous. Whether the homicide amounts to murder, or manslaughter merely, does not depend upon the presence or absence of the intent to kill. In either case there may be a present intention to kill at the moment of the commission of the act. But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter. In such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder." 48 Cal. 437.

But it is said that, conceding the instruction to be erroneous, the defendant was not injured by it, as the jury found him guilty of murder. Injury is always presumed from error, and it must be held that injury was done defendant, unless the record shows that it was not. That is not the case here. Though there is evidence of threats and of deliberation, still there is testimony which, in our judgment, calls for a proper definition of manslaughter. The testimony shows that defendant ordered the person slain out of his house, and that she refused to go; that he took hold of her to put her out, when she seized a hammer which he had in his pocket, and struck him on the head with it. Under these circumstances, we are of opinion that the defendant had a right to have the offense of manslaughter correctly defined to the jury, which was not done here.

This is no merely technical point. It is one of substantial importance. Indeed, it may have caused the conviction of the defendant, for the instruction given was equivalent to a direction to the jury that, if the killing was in-

tentionally done, it was murder. And as the evidence showed without a doubt the blows were intentionally given from which death resulted, the jury, if they obeyed the instruction, could have found no other verdict than that which affirmed that defendant was guilty of murder.

The court did not err in using this language to the jury in the connection in which it was used: "But the killing is not excusable, if it was apparent to the party killing at the time the act was committed, or would have been apparent to a reasonable man in his place and situation and stead, the crime resisted could have been prevented or arrested by other means." The words just quoted were employed to qualify the following, which preceded them: "The law authorizes the killing of one who is in the act of committing a forcible felony, and even one who appears to be in the act of doing so, for the purpose of prevention and not punishment, but the killing is not punishment." It is manifest here that the direction intended was in relation to the killing of a person to prevent his committing a crime, and in that view the language objected to was not objectionable.

A point is raised in regard to some of the language used in the charge in regard to the defense of insanity. The law as affirmed in it was correctly laid down and explained, in accordance with the ruling of this court in *People v. Hoin*, 62 Cal. 120. The rule of the case cited will be adhered to by this court, and should be by all courts. There was nothing objectionable in the language used by the court in regard to "what is called 'emotional insanity,' which begins on the eve of the criminal act, and leaves off and ends when it is consummated." The court said, and said properly, the law rejects the doctrine of emotional insanity, using the words quoted above. This is correct. The law does reject it; and casts it out of the temple of justice as one which should not be allowed to enter its precincts. It should ever be a stranger there. The law condemns such a defense as founded in fraud and folly, and, when permitted, is always used as a pretext by weak-minded jurors, unmindful of their oaths, to render a verdict of acquittal in cases where guilt has been incurred.

For the error of the court above pointed out the judgment and orders should be reversed, and the cause remanded, and a new trial ordered.

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STOKES v. BALAAM. (No. 11,663.)

(Supreme Court of California. July 27, 1887.)

1. CONDITIONAL SALE—CONVERSION—DAMAGES.

Where A. sold B. wood on A.'s land, to be cut by B., the wood to remain the property of A. until one dollar per cord was paid on it, and, before such payment was made, the wood was seized and sold upon attachment and execution against B.'s husband, *held*, in an action brought by A. against the sheriff for conversion, that A. retained, not merely a lien upon the wood for the payment of the one dollar per cord, but the title to it, and should recover the full value of the wood.¹

2. SAME—EVIDENCE—RELEVANCY.

In such an action, such questions as, "How long did that wood remain there?" "How much is that wood worth that remains upon the premises after this wood that had been sold under execution had been taken away?" "How much stumps is due upon that five or six hundred cords?" "How much stumpage is there due upon the wood that was sold by Mr. Balaam?" "How much of that 195 cords of wood is now on, or was at the time of the sale upon, your land?"—are irrelevant.

Department 2. Appeal from superior court, Tulare county.

Action for conversion of wood.

Atwell & Bradley, for appellant. *C. A. Webb* and *O. Sanders*, for respondent.

¹See note at end of case.

THORNTON, J. The evidence in this cause shows plainly that the wood, for the conversion of which this action was brought, was cut under an agreement made with the plaintiff by Mrs. Rachael Bashore, under which the latter was to cut the wood on plaintiff's land, and when cut it was to remain the property of plaintiff until one dollar a cord was paid to plaintiff by Mrs. Bashore. This one dollar per cord was never paid. The wood was seized by the defendant as sheriff of Tulare county, as the property of the defendant, under a writ of attachment issued in an action brought by Ah Sing against John Bashore, who was the husband of Rachael Bashore. The wood was afterwards sold by the defendant under a writ of execution issued on a judgment recovered in the action above stated.

There was no controversy as to the value of the wood at the date of the conversion, which was put at \$877.50. The evidence shows that the wood was the property of the plaintiff, and he was entitled to recover damages for the sum above mentioned.

The verdict, which was for \$195, is not sustained by the evidence, and the judgment must therefore be reversed. There is no testimony on which to base a verdict on the theory that the plaintiff had only a lien for \$195, the amount for which the verdict was rendered, and the directions of the court on such a theory tended to and must have misled the jury.

The following questions, allowed to be put to the witness, (Stokes,) were clearly irrelevant, and should have been ruled out: "How long did that wood remain there?" "How much is that wood worth that remains upon the premises after this wood that had been sold under execution had been taken away?" "How much stumpage is due upon that five or six hundred cords?" "How much stumpage is there due upon the wood that was sold to Mr. Balaam?" "How much of that 195 cords of wood is now on, or was at the time of the sale upon, your land?" All the above questions were entirely irrelevant to any legitimate matter of inquiry in the case.

The instructions in relation to a lien were erroneous, as not being founded on any testimony in the cause, and were misleading. In fact, it is evident from what occurred on the trial that the jury were actually misled by such instructions.

The bill of exceptions shows that the jury, after their deliberation, came into court and a juror said, "We have decided the ownership of the wood, leaving out any claim for damages." To this the court replied, "Yes; but the wood itself is worth something." The juror said further, "We find the plaintiff still owns the wood." The court said, "There is other wood there," etc. The jury again retired, and found a verdict for \$195 and interest; whereas, if they had already determined that the plaintiff was the owner of the wood, they should have found the admitted value of the wood, \$877.50, as damages in favor of the plaintiff. The verdict could only have been found on the idea that the plaintiff had nothing more than a lien on the wood for \$1 a cord, and was therefore only damaged \$195.

In accordance with the foregoing, the judgment and order denying plaintiff's motion for a new trial must be reversed, and the cause remanded for a new trial in accordance with the views herein set forth. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

NOTE.

A CONDITIONAL SALE, by which the title of chattels does not pass, is valid, as well against third persons as against the parties to the transaction. *Harkness v. Russell*, 7 Sup. Ct. Rep. 51; *Gorham v. Holden*, (Me.) 9 Atl. Rep. 894; *Simpson v. Shackelford*, (Ark.) 4 S. W. Rep. 165, and note; *De Saint Germain v. Wind*, (Wash. T.) 13 Pac. Rep. 763, and note. But see *Loving Pub. Co. v. Johnson*, (Tex.) 4 S. W. Rep. 532.

Where one to whom a conditional sale of personal property has been made, sells it to a third person, without the knowledge or consent of the vendor, such third person

acquires no better title, as against the original vendor, than the first purchaser had, and may be held liable to him for conversion. *Baals v. Stewart*, (Ind.) 9 N. E. Rep. 403. In such case the measure of damages for the unlawful detention of such property would be, ordinarily, the value of the use of the property from the time it was illegally refused to be surrendered to the vendor, till the rendition of the verdict of the jury, excluding any compensation for the use of the property while the vendee held it legally, and abating nothing from the damages because of payments made by the vendee to the vendor for the property, under the contract. *McGinnis v. Savage*, (W. Va.) 1 S. E. Rep. 746.

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GOLSON and others v. DUNLAP and others. (No. 11,512.)

(*Supreme Court of California*, July 30, 1887.)

1. FRAUD—SALE BY DEVISEE TO EXECUTOR.

In an action by a devisee to set aside a sale made by him to the executor, in which the complaint alleges that the land sold aggregated in value more than four times the amount paid, the court must pass upon the question of adequacy of consideration, and, if no evidence is introduced, should find in accordance with the presumption which in such cases exists against the defendant.

2. SAME—INADEQUACY OF CONSIDERATION—EVIDENCE AND PRESUMPTION.

In an action by a devisee to set aside a sale made to the executor, on the ground of inadequacy of consideration, mere proof of a valuable consideration having passed will not be held to rebut the presumption of an insufficient consideration raised in such cases by Civil Code Cal. § 2235, providing that all transactions between a trustee and his beneficiary, during the continuance of the trust, are presumed to be without sufficient consideration, but, the issue of inadequacy of consideration being raised, the facts must be found.

3. SAME.

In an action by a devisee to set aside a sale made to the executor, it is not necessary, in order to establish the fact of adequacy of consideration, to show more than that a fair, reasonable value, and not necessarily the full value, at the time was paid for the property, and a subsequent advance will not be regarded as affecting the question.

4. JUDGMENT—ESTOPPEL—EXECUTORS.

Where an executor buys land from a devisee, and a deed thereof is made to his wife, and afterwards the executors make a deed of the same property to her, under a power of sale in the will, and thereafter the property is distributed to her under a decree of the probate court, the executor cannot plead such order of distribution by way of estoppel to an action brought against him by the devisees to set aside the sale; the question of setting aside the deed not having been presented and considered upon the application for distribution.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

Smith & Hupp and *Chapman & Hendrick*, for appellants. *C. E. Thorn* and *Bicknell & White*, for respondents.

HAYNE, C. Action by devisees to set aside a sale to executors. The executors, who were old residents of Los Angeles, where the property is situated, caused their attorneys to write to Texas, where the devisees resided; that, after settling up most of the estate, there remained "certain odds and ends of land" which would have to be sold or divided; that it was for the best interest of the estate that these odds and ends should be sold together; and that they were willing to become the purchasers at a reasonable figure, but that an investigation must first be had by the parties interested, and requesting that an agent be sent out with power to act, and offering to advance the expenses of the trip. The devisees thereupon sent out an agent with power to act. This agent could neither read nor write. He was accompanied, however, by a friend who was a competent business man. It is not entirely clear as to what was the function of this latter. He did not hold the power of attorney, and testifies that he was not the agent of the devisees. He seems to have been some sort of relative of the decedent, and to have come along to advise the agent. After remaining a week in Los Angeles, a bargain was concluded, whereby the interests of the devisees were sold for \$10,000. A deed was

thereupon made to Susan Dunlap, the wife of one of the executors. After this the executors, acting under a power of sale in the will, made a deed of the same property to Susan Dunlap. A week after this deed, the property was distributed to Susan Dunlap by decree of the probate court, and within a month thereafter she conveyed to the executors. It is admitted that she acted for the executors throughout the transaction.

The two conveyances to Susan Dunlap illustrate an important distinction with reference to attempts of trustees to acquire the trust-estate, which distinction has been frequently pointed out, but not always observed. Where the trustee is charged with the duty of selling the property, and he does not deal directly with the *cestui que trust* there, whether the trustee holds the legal title or not, and whether he takes a conveyance directly to himself, or acts through the intervention of a third person, the sale, although not, as a general rule, absolutely void, (*Blockley v. Fowler*, 21 Cal. 329; *Boyd v. Blankman*, 29 Cal. 19.) is voidable at the election of the *cestui que trust*, (*Blockley v. Fowler*, 21 Cal. 329; *Guerrero v. Ballerino*, 48 Cal. 118; *Tracy v. Colby*, 55 Cal. 71.) without reference to the question of the adequacy of the price, (*San Diego v. Railroad Co.*, 44 Cal. 106; *O'Connor v. Flynn*, 57 Cal. 293.) These decisions are in accordance with the great preponderance of authority elsewhere. See *Ex parte Bennett*, 10 Ves. 398; *Hamilton v. Wright*, 9 Clark & F. 128; *Michoud v. Girod*, 4 How. 508; *Wormley v. Wormley*, 8 Wheat. 441; *Davous v. Fanning*, 2 Johns. Ch. 260, 261; *Van Epps v. Van Epps*, 9 Paige, 241; *Jewett v. Miller*, 10 N. Y. 405; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Scott v. Freeland*, 7 Smedes & M. 418; *Romaine v. Hendrickson*, 27 N. J. Eq. 164, 165; *Thorp v. McCullum*, 1 Gilman, 626, 627. Whether an exception obtains where permission to buy is granted by the court, or by the *cestui que trust*, having full knowledge of the situation, need not be considered; there being no permission of the court in this case, and nothing to show that the devisees had any knowledge of the executor's deed. This deed from the executors to Susan Dunlap may, therefore, be dismissed from consideration.

The distinction between the above class of cases and those in which the trustee purchases directly from his *cestui que trust*, although not always observed, has been frequently pointed out. See Lewin, Trusts, 463; 2 Pom. Eq. Jur. § 957; *Ex parte Lacey*, 6 Ves. 626; *Covee v. Cornell*, 75 N. Y. 100; *Brown v. Cowell*, 116 Mass. 465. In this latter class of cases inquiry will be made into the fairness of the transaction, and, under proper conditions, it will be sustained. In the language of Lord ELDON: "A trustee may buy from the *cestui que trust*, provided that there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, provided the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him in the character of trustee." *Coles v. Trecothick*, 9 Ves. *247.

It is obvious that an investigation of questions of this kind is a very delicate and difficult affair, and courts of equity have emphasized the strictness with which such transactions should be viewed. As was said in *Whelan v. Whelan*, 8 Cow. 576, 577, by WOODWORTH, J., adopting the language of Sir SAMUEL ROMILLY: "If the court sees that any arts or stratagems, or any undue means, have been used; if it sees the least speck of imposition at the bottom; if there be the least *scintilla* of fraud,—this court will and ought to interpose." Nevertheless, it is well settled that under proper conditions the transactions would be sustained.

Applying this rule, can the sale from the devisees to the executors be allowed to stand? One of the important elements of this inquiry is as to the adequacy of the consideration. Was there inadequacy of consideration? This question is presented by the record in distinct outlines. The complaint alleges that

the odds and ends of land aggregated in value the sum of \$47,008, of which the share of the devisees was \$39,278. The court made no finding upon this issue, but simply stated that there was no evidence "from which the court is able to find the actual value of the residue of the estate at the time of the conveyance." This cannot operate as a finding. *Speegle v. Leese*, 51 Cal. 415; *Campbell v. Buckman*, 49 Cal. 367. If no evidence was introduced, the court should have found the fact against the parties upon whom was the burden of proof, or, in other words, in accordance with the presumption, which, in this instance, was against the defendants.

It is contended, in support of the judgment, however, that the issue was immaterial, and that, therefore, no finding upon it was necessary. This proposition is based upon section 2235, Civil Code, which is as follows: "Sec. 2235. All transactions between a trustee and his beneficiary during the continuance of the trust, or while the influence acquired by the trustee remains, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." The argument is that the words "sufficient consideration," in this section, do not mean an adequate consideration, but a consideration which is sufficient to support a contract between ordinary parties; and that, since it appears that there was a valuable consideration in this case, the court is not to inquire further.

It is to be observed of this proposed construction that it would place all trustees upon a level, and measure their obligations by the same standard. But the analogies of the law of trusts have been extended to so many classes of cases, and the term "trustee" is applied to so many persons whose obligations certainly vary in a considerable degree, that we think it could hardly have been intended to apply a Procrustes rule to them all. A fixed standard might gratify a love of symmetry, and be easy of application, but would not further the ends of justice. In our view, the words "sufficient consideration" mean, not sufficient to support a contract between ordinary parties, but sufficient to support the particular transaction. And, with reference to what consideration is sufficient to support the particular transaction, resort must be had to the rules of courts of equity. These rules were flexible in character, and adapted to the varying circumstances which chance or ingenuity might present. With respect to adequacy of consideration, no unbending rule, applicable to all cases, can be framed, because there are classes of cases which have features which prevent the operation of a fixed rule. The leading text writers speak of adequacy of consideration as essential. See 1 Perry, Trusts, § 195; 2 Pom. Eq. Jur. § 958; 1 Story, Eq. Jur. § 311. Compare, also, *Grosvenor v. Sherratt*, 28 Beav. 668; *Edwards v. Meyrick*, 2 Hare, *70; *Boyd v. Hawkins*, 2 Dev. Eq. 331; *Coffee v. Ruffin*, 4 Cold. 515; *Rose v. Mynatt*, 7 Yerg. 36; *Kisling v. Shaw*, 33 Cal. 440; *Rubidoez v. Parks*, 48 Cal. 220. But this is too sweeping. For there may be cases in which no valuable consideration is necessary. Thus, while a gift from a *cestui que trust* to his trustee is exceedingly difficult to sustain, (see *Hatch v. Hatch*, 9 Ves. *296,) it will in proper cases be upheld. See *Hunter v. Atkins*, 3 Mylne & K. *113; *Harris v. Tremenhoe*, 15 Ves. 39; *Marshall v. Stephens*, 47 Amer. Dec. 604. The principle upon which such cases rest is that it was the intention of the *cestui que trust* to part with his property without consideration; and if a court of equity can clearly see that such intention was induced by laudable motives, and not by want of knowledge of the situation, or by undue influence or deceptive arts on the part of the trustee, it will allow the intention to prevail. So there may be cases where, owing to special circumstances, it is necessary for the *cestui que trust* to sell without delay, and no one can be found who will buy, and the trustee, acting in entire good faith, gives more for the property than any one else will give. In such case it is for the interest of the *cestui que trust* to allow the trustee to buy, and it would be hard measure to set aside the sale merely because the

sum which the trustee was able or willing to give was less than the value of the property,—the transaction being unexceptionable in other respects. It is too sweeping, therefore, to say that in all cases there must be an adequate consideration, if the word is to be used in any ordinary acceptance.

On the other hand, the element of adequacy of consideration is most important. The great object of the rule is to prevent imposition on the part of trustees; and, in one sense, this may be said to be to prevent trustees from acquiring the property of their *cestuis que trust* for an inadequate consideration. To disregard the question of inadequacy, therefore, is to attempt to apply a rule while shutting one's eyes to its object and purpose. The writers above referred to are not very far out of the way in speaking of adequacy of consideration as essential. It is safe to say that while mere inadequacy of price is not itself the ground upon which a transaction between trustee and *cestui que trust* is set aside, yet that any considerable inadequacy, taken by itself, raises a presumption of imposition by the trustee, which is only to be rebutted by clear proof of special circumstances showing the propriety of the transaction. It certainly cannot be ignored, and the transaction sustained without reference to it, as was done in the court below.

Nor can it be said that this is a mere matter of evidence. It rises to the rank of a probative fact, such as has frequently been held by the court to be proper in findings. The ultimate ground upon which transactions between trustees and *cestui que trust* are set aside is fraud, actual or constructive, as the case may be; and the rules of pleading require that the facts constituting the fraud (of which this is one) shall be set forth. Being properly pleaded, such facts must be found. For, under our system, whatever is properly in issue must be found, unless there are other issues which effectually and finally dispose of the case.

It is proper to say, for the guidance of the court below upon a retrial, that it is not the highest possible price that must be taken as the standard, but the fair, reasonable value of the property. Speaking of transactions with expectant heirs and reversioners, a class to whom, on grounds of public policy, the greatest protection is afforded, (compare *1 Perry, Trusts*, § 188,) Judge Story says: "It is not necessary to establish in evidence that the full value of the reversionary interest or other expectancy has been given according to the ordinary tables for calculations of this sort. It will be sufficient to make the purchase unimpeachable if a fair price, or the fair market price, be given therefor at the time of the dealing." *1 Story, Eq. Jur.* § 336.

As remarked in the foregoing extract, the time to be taken is the time of the dealing. A subsequent advance is not to be regarded. In the leading case of *Fox v. Mackreth*, *1 Lead. Cas. Eq.* 115, Lord THURLOW would not give any weight to the circumstance that the trustee happened to sell at an advanced price, saying: "The money would be due, not in consequence of what Mackreth afterwards sold it for, but what Fox lost by it at the time." So, in *Coles v. Trecothick*, *9 Ves.* 246, where the trustee had subsequently sold for a greater sum, Lord ELDON said: "Inadequacy of price does not depend upon a person giving a *pretium affectionis* from any peculiar motive, beyond what any other man would give,—the reasonable price. * * * Accidental subsequent advantage made of a bargain is nothing." The fair value at the time, under all the circumstances, must be the criterion.

Finally, it is contended that the decree of distribution to Susan Dunlap operates as an estoppel against the plaintiffs. But if we assume, in favor of the respondents, that this question of setting aside the deed for fraud could have been presented and considered upon the application for distribution, it nevertheless was not so presented or considered. And the rule is that a party having an equitable defense may let judgment go at law, and proceed in equity. *Lorrains v. Long*, *6 Cal.* 452; *Hough v. Waters*, *30 Cal.* 310.

It is unnecessary in the view we take to consider the other points made.

We therefore advise that the judgment and order appealed from be reversed and the cause remanded for a new trial.

BELLOHER, C. C., concurs.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order reversed, and cause remanded for a new trial.

73 Cal. 176

CONNEAU v. GEIS. (No. 11,617.)

(*Supreme Court of California.* August 1, 1887.)

1. JURY TRIAL—JURORS' FEES.

Where in a civil action the defendant demands a trial by jury, but fails to deposit the jury fees required by the rules of the court to be paid in advance, the case may be tried without a jury.

2. ESCROW—SUBSEQUENT PURCHASERS.

Where a deed made in consideration of a prior indebtedness is deposited with a third party in escrow, to be delivered to the grantee in case the grantors do not sell and pay off the indebtedness within an agreed time, and they make a sale, but do not make the payment within the time, a purchaser with notice of the escrow obtains no right under a second deed made the grantors.¹

Commissioners' decision. Department 2.

Appeal from superior court, Stanislaus county.

S. W. Geis, in pro. per., and Frank H. Farrar, for appellant. Wright & Hazen, for respondent.

HAYNE, C. The defendant demanded a trial by jury, but failed to deposit the sum of \$24, which, according to its rules, the court required to be deposited with the clerk, as jury fees, before the commencement of the trial. The case was thereupon tried without a jury, and judgment rendered for the plaintiff. The first question is whether the court could rightfully require the advance of this sum. We think that the advance of the fees was a reasonable regulation of the mode of the enjoyment of the right of a jury trial, and that the making of such a regulation cannot be said to be a denial or impairment of the right.

The expense of a jury demanded by a party is expense incurred on his behalf, and at his instance. It is reasonable and just that he should bear this expense; and it always has been the law and the practice to collect it from one or the other of the litigants. The point is not and could not be that the court had no right to make the parties pay it, but that it could not be collected in advance. But if the court has the right to make the parties pay, it does not seem that the time of its collection is of such importance as to change the character of the requirement. A rule requiring the fee to be paid in advance is a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties, and to prevent the demand of a jury being used as a pretext to obtain continuances and thus trifle with justice. The right to bring suit, and the right to appeal to a higher court, are as fully secured by the constitution as the right to a trial by jury; yet it has always been the practice to collect the fees therefor before the suit is commenced or the record on appeal is filed. And we do not see how such a proceeding impairs the right in the one case any more than in the other. If the court has a right to require the payment of a jury fee in advance, the refusal to pay it is the refusal to have a jury trial, and, since this is the party's own act, he cannot be said to

¹ Where a deed is placed in the hands of a third person, to be delivered to the grantee upon the performance of a stated condition, a delivery to the holder of the deed, without the performance of the condition, is not a valid delivery. *Daggett v. Daggett*, (Mass.) 10 N. E. Rep. 311, and note.

be deprived of anything. Upon analogous principles it was held, even in a criminal case, that where, after a demurrer, a defendant refused to plead, such refusal was a refusal of a jury trial or any trial, and that judgment should be entered against him without further ceremony; the court, per SANDERSON, C. J., saying: "The intent of the constitution is to secure every person charged with crime a fair and impartial trial by jury, but not to place it in his power to evade a trial altogether." *People v. King*, 28 Cal. 266.

The authorities in other states bear out the proposition that the making of a reasonable regulation of the mode of enjoyment of the right of trial by jury is not a denial or impairment of the right. Thus in *Biddle v. Com.*, 13 Serg. & R. 410, the provision was for a trial in the first instance before a magistrate without a jury, but, upon complying with the requisite conditions, the party could appeal to a higher court, where the case was to be tried by a jury. The condition of the appeal was that the party should make affidavit that "he verily believed injustice had been done him, and that the appeal was not made for the purpose of delay." The court held that there was no impairment of the right of trial by jury, and TILGHMAN, C. J., delivering the opinion, said: "Laws such as these promote justice, and leave the substance of the trial by jury unimpaired, and that is all that is required by these expressions in the constitution." A similar ruling was made in *Keddie v. Moore*, 2 Murph. 45, in which case the condition was that the party should give a bond, the court, per LOCKE, J., saying: "The party wishing to appeal may be subjected to some inconvenience in getting security, but this inconvenience does not in this, nor in any other case where security is required, amount to a denial of the right." A similar ruling was made in *Beers v. Beers*, 4 Conn. 539, the court, per HOSMER, C. J., saying: "A law containing arbitrary and unreasonable provisions, made with the intention of annihilating or impairing the trial by jury, would be subject to the same considerations as if the object had been openly and directly pursued. But, on the other hand, every reasonable regulation made by those who value this palladium of our rights, and directed to the attainment of the public good, must not be deemed inhibited, because it increases the burden or expense of the litigating parties. Such a degree of morbid sensibility may be excited on this subject as to generate an opinion that the legal requisition of a bond, the increase of jurors' fees, and other trivial changes, although imperiously demanded to promote justice and the general convenience, if they only operate to subject the trial by jury to a burden not unreasonable, are a violation of the constitution. * * * As the interests of a state, however, do not essentially depend on the existence of one right only, but on many, it is proper to preserve them generally, and not to sacrifice one important consideration to another equally important." And similar decisions have been made in other cases. See *Jones v. Robbins*, 8 Gray, 341; *Flint River Co. v. Foster*, 5 Ga. 195; *Morford v. Barnes*, 8 Yerg. 446.

The foregoing cases seem to us to proceed upon the principle above stated, viz., that a reasonable regulation of the mode of enjoyment is not a denial or impairment of the right, although, in the cases referred to, the regulation was not the prepayment of the jury fees. But in *Adams v. Corrison*, 7 Minn. 456, (Gil. 365,) the precise point was decided. The court below refused a jury trial, because the defendant declined to advance a jury fee of three dollars, and tried the case without a jury. On appeal, this was held to be proper, the court, per EMMETT, C. J., saying: "The objection to the jury fee we do not think is well taken. It is altogether too broad. It is not that the fee is so unreasonably high as to impede the due administration of justice, but because a fee is charged at all. We can see no valid objection to a reasonable fee of this kind. The constitution does not guaranty to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy

in the law, or impede the due administration of justice. And that a party who demands a trial by jury should be required to advance a small jury fee, whether it is considered as a tax on litigation or as a part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection than is the requirement that the fees of the clerk, sheriff, and other officers shall be paid in advance when demanded. If the clause in the constitution means that we shall be permitted to litigate literally 'without price,' there is an end to all fees, from the issuing of summons to the entry of satisfaction of the judgment." And see, also, *People v. Hoffman*, 3 Mich. 248; *Randall v. Kehlor*, 60 Me. 44, 45; *Venine v. Archibald*, 3 Colo. 165.

If it be objected that a regulation might be made which would amount to a denial of the right, the answer is that, when such shall be the case, the court will doubtless afford the appropriate remedy.

Upon the merits, the case turned upon the delivery of a deed to the plaintiff. The deed, which was in consideration of a prior indebtedness, (*Schluter v. Harvey*, 65 Cal. 159, 3 Pac. Rep. 659,) was left with one Perley in escrow. There is a conflict in evidence as to what the condition was. One of the grantors testified, on behalf of the defendant, as follows: "The contract was that, if in thirty days I made a sale of the property, the deed was to be given to me, and, if I did not, it was to be delivered to Conneau." On the other hand, Perley testified as follows: "It was left with me by consent of all parties, to be delivered to Conneau in case Manning & Steffin failed to sell the land in thirty days and pay the money. * * * The transaction was a complete and fair understanding. The deed was delivered to me to remain in my possession for thirty days, and, in case they then failed to pay Conneau his mortgage within that time, it was to be delivered to him." In view of this conflict, it must be taken, from the findings in favor of the plaintiff, that the payment of plaintiff's indebtedness was part of the condition upon which the deed was to be ineffectual. And since the money was not paid, Manning & Steffin had no right to make a second deed to the defendant, who took with notice of the escrow.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and order are affirmed.

ELAM and others v. GRIFFIN and others. (No. 1,254.)

(Supreme Court of Nevada. June 30, 1887.)

VENUE—ACTION BROUGHT IN WRONG COUNTY—PRACTICE.

Gen. St. Nev. § 3043, provides that, when an action is brought in a county which is not the proper county for the trial of the action, it "may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court." Held, that a change of place of trial cannot be had upon motion without previous demand.

Appeal from an order of the district court in and for Lincoln county, granting change of venue, upon motion of defendants.

C. H. Patchen, G. S. Sawyer, and T. Coffin, for appellants. *Baker & Wines and T. J. Osborne*, for respondents.

BELKNAP, J. The defendants are residents of Eureka county, and are sued in an action of debt in the district court of Lincoln county. Upon their motion, the place of trial of the action was changed to the county of their residence, but no demand in writing therefor was made, as contemplated by sec-

tion 3043, Gen. St.¹ The object of the demand is to allow the plaintiff an opportunity of voluntarily correcting his error by amendment, stipulation, or otherwise, without the expense and delay of a motion. *Vermont C. R. Co. v. Northern R. Co.*, 6 How. Pr. 106. By omitting to make the demand, respondents waived the right to have the case heard in Eureka county, and the action became triable in Lincoln county. *Hasbrouck v. McAdam*, 4 How. Pr. 342; *Houck v. Lasher*, 17 How. Pr. 520; *Milligan v. Brophy*, 2 Code Rep. 118; *Estrada v. Orena*, 54 Cal. 407; *Byrne v. Byrne*, 57 Cal. 348; *Watkins v. Degener*, 63 Cal. 500.

Order reversed and cause remanded.

RANDALL v. LYON Co. (No. 1,261.)

(Supreme Court of Nevada. July 15, 1887.)

1. JAILERS—COMPENSATION—STATUTORY SALARY.

Under Gen. St. Nev. § 2139, authorizing the sheriff of Lyon county to employ a jailer, and making it the duty of the commissioners to allow "a fair and adequate monthly compensation" for his services, the commissioners have no authority to fix the compensation on a *per diem* basis, and to confine it to such times as prisoners were detained in the county jail. If the commissioners reject the claim for the services of the jailer, it is for the district court, in a suit against the county to recover it, to determine from the evidence what is "a fair and adequate monthly compensation."

2. VOLUNTARY PAYMENT—RIGHT TO SET-OFF.

A claim of a sheriff for services rendered by him in arresting a prisoner that had escaped from the county jail into another state, allowed by the commissioners with full knowledge of all the facts, and without any fraud or mistake, is a voluntary payment, and cannot be made the subject of an offset in a suit by the sheriff against the county to recover the compensation allowed by law to the jailer employed by him.

3. COUNTIES—ACTIONS AGAINST—COSTS.

Under Gen. St. Nev. § 1964, requiring any person having a claim against a county to present it to the board of commissioners before suit, and providing that, in an action therefor, he shall be entitled to costs where he recovers judgment for more than the sum allowed by the commissioners, a sheriff who, in a suit by him against the county to recover the compensation given his jailer by law, recovers more than was allowed by the commissioners, is entitled to costs, although the amount of the recovery is less than \$300.

Appeal from district court, Lyon county.

W. E. F. Deal, for Randall, appellant. *Geo. W. Keith*, Dist. Atty., and *J. A. Stephens*, for respondent.

HAWLEY, J. 1. This cause was tried and determined upon the theory that the county commissioners have the right to declare that the compensation of a jailer shall be fixed *per diem* and confined to the times when prisoners are confined in the county jail. The statute prescribes a different method of determining this question.

¹ Gen. St. § 3043, is as follows: "If the county designated for that purpose [trial] in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as is provided in this section. The court may, on motion, change the place of trial in the following cases: *First*, when the county designated in the complaint is not the proper county; *second*, when there is reason to believe that an impartial trial cannot be had therein; *third*, when the convenience of witnesses and the ends of justice would be promoted by the change; *fourth*, when, from any cause, the judge is disqualified from acting in the action. When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by consent of the parties in writing, duly filed, or by order of the court; and the papers shall be filed or transferred accordingly."

The sheriff of Lyon county was authorized by law to employ a jailer, for whose acts he is made responsible, (Gen. St. § 2139,) and it is "made the duty of the county commissioners to allow * * * a fair and adequate monthly compensation for the services of all jailers by the sheriff employed or appointed." Gen. St. § 2140. The commissioners having rejected the claim presented for the services of the jailer, and refused to make any allowance thereon, it was the duty of the district court to determine, from the evidence introduced by the respective parties, what was "a fair and adequate monthly compensation" for the services performed by the jailer employed by the sheriff.

2. Respondent is not entitled to the offset allowed by the court. With a full knowledge of all the facts, and without any fraud or mistake, the commissioners, prior to the presentation of the claim for the services of a jailer, allowed a claim of \$120.40 for services rendered by the plaintiff in arresting a prisoner that had escaped from the Lyon county jail and fled to California. This was a voluntary payment of money for services actually performed. The rule is well settled that money voluntarily paid, with full knowledge of all the facts, although no obligation to make such payment existed, cannot be recovered back.

3. We are of opinion that in actions of this character the plaintiff is entitled to costs, notwithstanding the fact that the amount recovered is less than \$300, provided the amount recovered is more than the commissioners allowed. Gen. St. § 1964.

The judgment of the district court is reversed, and cause remanded for a new trial.

STATE *ex rel.* SPRINGER *v.* PREBLE. (No. 1,251.)

(Supreme Court of Nevada. July 18, 1887.)

1. STATE LANDS—APPLICATION FOR—SETTLER.

Where there is but one applicant, claiming a preferred right to purchase lands under the Nevada act of 1873, entitled "An act to provide for the selection and sale of lands that have been, or may hereafter be, granted by the United States to the state of Nevada," the register should proceed at once, under the provisions of the statute, and enter into a contract with the applicant, provided his claim presents a *prima facie* case, and was filed "within six months after the date of approval of the state of the lands occupied or possessed by him;" and his duty in this respect, being ministerial, may be enforced by *mandamus*.

2. SAME—APPLICATION—REQUISITES.

The claimant of a preferred right need not, under the act, set forth in his application the facts upon which his occupancy or possession is based, so as to enable the register to determine therefrom whether the applicant possesses the requisite qualifications prescribed by the statute.

Application for *mandamus*.

A. C. Ellis, for relator. R. H. Lindsay, for respondent.

HAWLEY, J. This is an application for the writ of *mandamus* to compel respondent to enter into a contract with relator for the sale of certain lands. Relator, on the thirtieth day of August, A. D. 1882, presented to the surveyor general and *ex officio* land register of this state a written application to purchase certain lands under the provisions of the act entitled "An act to provide for the selection and sale of lands that have been, or may hereafter be, granted by the United States to the state of Nevada." St. 1873, 120. On the same day, and at the same time, three other persons presented similar applications for the purchase of portions of the same lands. These several applications were filed and treated by the register as simultaneous applications. The lands described in said applications were listed to the state on the third day of March, 1883. On the third day of September, 1883, relator presented to and filed with the register a claim of preferred right to purchase the lands under the provisions of section 12 of the act of 1873. Neither of the other

parties, or any one else, presented any claim of preferred right. On the twenty-seventh of November, 1885, the register certified the several applications to the district court in and for the county of Churchill, where said lands are situate, and said court, for want of jurisdiction, remanded the applications back to the register. Relator subsequently made a demand upon the register to enter into a contract with him for the purchase of said lands, according to law, and such demand was refused.

If respondent, in the performance of the duties required of him by the statute, had the right to exercise his judgment or discretion in acting upon relator's application for a preferred right, then the writ should be denied.

Section 12 of the act of 1873 reads as follows: "An occupant or party in possession shall have a preferred right to purchase, not exceeding three hundred and twenty acres of land, at the minimum price, for the period of six months after the date of approval to the state of the lands occupied or possessed by him or her; and when two or more persons, claiming a preferred right, by reason of occupancy or possession, apply to purchase the same lands, the register shall certify such applications to the district court of the county in which such lands are situated, and notify the contesting applicants thereof. The judge or court shall then appoint a commissioner, in the vicinity of the land so in dispute, to take and report to such court all the testimony of the parties in the case. The contest shall then be tried and determined as ordinary actions in said court; and, when so determined, shall be certified to the register, who shall proceed thereafter with the successful contestant, in the same manner as if he alone had applied in the premises: * * * and provided further, that a preferred right shall be based upon occupancy or possession, dating prior to any application to purchase the land having been filed with the register. When two or more persons, neither claiming a preferred right, apply to purchase the same lands, the first applicant shall be allowed to purchase."

In contested applications, the register is not vested with any discretionary power whatever. His duty is clear and imperative. He must "certify such applications to the district court of the county in which such lands are situated, and notify the contesting applicants thereof." He cannot, in such cases, exercise any judgment or discretion. He has nothing to do in passing upon or determining the sufficiency of the respective applications. It was evidently the intention of the legislature that the disputed questions of fact arising under the operation of the law should be heard and determined by the courts. If there should be but one applicant claiming a preferred right, then the legislature intended that the register should proceed under the provisions of the statute, and enter into a contract with the applicant, if his claim was filed within time, and presented a *prima facie* case.

There is no provision in the act requiring an applicant for a preferred right to set forth the facts upon which his occupancy or possession is based, so as to enable the register to determine therefrom whether the applicant possessed the requisite qualifications prescribed by the statute. The relator, in making his application, used a printed form of "affidavit of preferred right," filled in the blank spaces, and stated on oath as follows: "I am the identical Jacob Springer who made application to the state land register of the state of Nevada on the thirtieth day of August, 1882, according to law, to purchase the following described lands; * * * containing 640 acres of land, more or less. I claim a preferred right to purchase the same under section 12 of an act approved March 5, 1873, * * * and the acts amendatory thereof and supplementary thereto, and base my claim upon occupation or possession, dating prior to any application to purchase the same, viz., from the month of September, 1876. I have placed permanent improvements on said land of the value of \$75, consisting of an irrigating ditch and levee. I also have included said land in my claim by fencing and using sloughs as my boundaries."

This statement, in so far as it attempts to state the facts upon which his occupancy or possession is based, is very imperfect and indefinite, and, if the register was invested with any discretionary power, would be so unsatisfactory as to justify him in refusing to act. But in examining all the provisions of the statute we are forced to the conclusion that the legislature did not intend to clothe the register with any such power, and that it was his duty in this case to enter into the contract with relator for the purchase of the land.

It is therefore ordered that the peremptory writ issue as prayed for, and that it be directed to the present surveyor general and *ex officio* land register of this state.

STATE *ex rel.* SOHL v. PREBLE. (No. 1,252.)

(*Supreme Court of Nevada. July 18, 1887.*)

STATE LANDS—SALE OF—SIMULTANEOUS APPLICATIONS.

The Nevada act of 1873 entitled "An act to provide for the selection and sale of lands that have been, or may hereafter be, granted by the United States to the state of Nevada," makes no provision for cases where there are two or more simultaneous applications for the same lands, and neither applicant claims a preferred right to purchase by reason of prior occupancy or possession. *Mandamus* to the surveyor general and *ex officio* land register, to compel him to sell to one applicant, in preference to the others, will therefore be denied, in such a case.

Application for *mandamus*.

A. C. Ellis, for relator. R. H. Lindsay, for respondent.

LEONARD, C. J. This is an application for a writ of *mandamus* to compel respondent, on behalf of the state, as surveyor general and *ex officio* land register of the state of Nevada, to enter into a contract with relator for the sale of certain lands described in the petition, or to sell said lands to him at the price of \$1.25 per acre.

Relator filed his application to purchase said lands August 30, 1882, and on the same day three other persons filed their several applications, covering, in the aggregate, the same lands. Relator alleges in his petition that his application was prior in time. Respondent denies this allegation, and alleges the priority of the other three applications mentioned. All the applicants were entitled to purchase the lands in question, and each complied with the statute governing the purchase of state lands.

It was the duty of respondent, under the statute, to enter into a contract with relator for the purchase of the lands described in the petition, or to sell the same at the price above stated, if relator's application was prior to any other valid application, but such was not his duty if all the applications named were simultaneous. The statute governing this case makes no provision for cases where there are two or more simultaneous applications for the same lands belonging to the state, and neither applicant claimed a preferred right to purchase by reason of prior occupancy or possession.

It will serve no useful purpose to review the evidence in this case. We have examined it carefully, and are satisfied that the four applications were simultaneous, and ought to be so considered. *Mandamus* denied.

EARLES and others v. GILHAM. (No. 1,255.)

(*Supreme Court of Nevada. July 22, 1887.*)

NEW TRIAL—PRACTICE ON MOTION—AMENDMENT OF STATEMENT.

The provision of Civil Prac. Act Nev. § 197, to the effect that the statement on a motion for a new trial must contain the specifications of error relied upon, is imperative; and, after the time allowed by statute for amendments has passed, it

is not competent for the trial court to allow the paper filed as a statement to be amended by adding thereto specifications of error which had, as claimed in the affidavit in support of the motion, been inadvertently omitted.

Appeal from district court, Eureka county.

Baker & Wines, for appellant. *H. K. Mitchell*, for respondents.

HAWLEY, J. A judgment was rendered in this action in favor of appellant, on the second day of July, 1886, and, within the statutory time thereafter, respondents served and filed what purported to be a statement on motion for a new trial. There were no assignments or specifications of error stated therein. Appellant did not file any amendments thereto, and the time for filing such amendments expired on the twentieth of August, 1886. On the twenty-first of September, 1886, respondents moved the court to amend the paper on file by adding thereto the specifications of error which had, as claimed in an affidavit, been inadvertently omitted. The court made an order permitting such an amendment to be made.

Did the court have any authority to make this order? Was there any statement on file to be amended? Statements on motion for a new trial must be filed within the statutory time. *Clark v. Strouse*, 11 Nev. 76; *Harrison v. Lockwood*, 14 Nev. 263; *Tull v. Anderson*, 15 Nev. 426; *Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co.*, Id. 450; *Elder v. Frevert*, 18 Nev. 278, 3 Pac. Rep. 237; *Robinson v. Benson*, 19 Nev. —, 10 Pac. Rep. 441. Courts have no authority to extend the time for filing a statement after the statutory time has expired. *Clark v. Strouse*, *Elder v. Frevert*, *supra*. The statute declaring how and when statements shall be prepared and filed, provides that "when the notice designates, as the ground upon which the motion will be made, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, error in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded." Gen. St. § 3219; Civil Prac. Act, § 197. These provisions have always been deemed imperative.

Since the adoption of the statute, this court has uniformly and repeatedly declared that, if the statement does not contain the specifications, it will be disregarded. *Corbett v. Job*, 5 Nev. 201; *Caldwell v. Greely*, Id. 258; *McWilliams v. Herschman*, Id. 263; *Meadow Val. M. Co. v. Dodds*, 6 Nev. 261; *Clarke v. Lyon Co.*, 8 Nev. 182; *Sherman v. Shaw*, 9 Nev. 148; *Elder v. Shaw*, 12 Nev. 81; *Lamance v. Byrnes*, 17 Nev. 201. The conclusions arrived at were reached upon the ground that the specifications of error, by the clear language of the statute, are made an essential part of the statement. If omitted, there is no statement for the courts to act upon.

In *Corbett v. Job*, the court disregarded a so-called statement on appeal which did not contain a statement of the particular errors or grounds relied upon, because it was "in no sense a statement."

In *McWilliams v. Herschman*, the court, in commenting upon the statutory requirements of a statement on motion for a new trial, said: "The statement, until the errors to be relied on are properly specified, is virtually no statement," and that "the court has no more right to grant a new trial upon a statement, defective as this is, than it has where there is no statement at all."

The paper filed by respondents did not comply with the provisions of section 197. One of the essential elements of a statement on motion for a new trial was entirely omitted. The court had no more authority to allow an amendment to this paper, after the time for filing a statement had expired, than it would have to grant leave to file a statement after the expiration of

such time, or to grant a new trial without any statement. There was no statement on file upon which to base an amendment, and the court could not, under such circumstances, impart vitality and life to a thing that did not exist.

The order appealed from is hereby reversed and set aside.

EARLES and others v. GILHAM. (No. 1,256.)

(Supreme Court of Nevada. July 22, 1887.)

APPEAL.—ABSENCE OF STATEMENT—AFFIRMANCE.

Where, owing to the absence from the statement on motion for a new trial of the specifications of error, required by Civil Prac. Act Nev. § 197, to be set forth therein, there is virtually no statement before the appellate court, and no error appears in the judgment roll, the judgment and order of the trial court, denying a new trial, should be affirmed.

Appeal from district court, Eureka county.

H. K. Mitchell, for appellants. *Baker & Wines*, for respondent.

HAWLEY, J. The order of the district court, allowing an amendment to appellant's motion for a new trial, having been reversed and set aside, upon an appeal taken therefrom by the defendant Gilham, (*Earles v. Gilham*, ante, 586,) it follows from that decision that there is no statement, on motion for a new trial herein, which can be considered by this court; and, as it is not claimed that there is any error in the judgment roll, the judgment and order of the district court denying a new trial must be affirmed. It is so ordered.

OREGON RY. & NAV. CO. v. DAY.

(Supreme Court of Washington Territory. January 18, 1887.)

1. RAILROAD COMPANIES—EMINENT DOMAIN—AGREEMENT TO CONVEY LAND.

A railroad company, 11 days after it commenced to construct its road through certain lands, obtained an assignment of a contract by which the owner agreed to convey a strip of land to another company, in consideration of its building its road between certain points. *Held*, that the right of the owner to compensation accrued when the company entered upon the land, and that, having entered and built its road without reference to the agreement in question, the company could not claim any right thereunder to have the land conveyed, which it had already appropriated under the power of eminent domain.

2. SAME—ESTOPPEL.

Held, also, that the land-owner was not estopped from claiming compensation by his previous contract; the company having acted independently, and not upon the faith of the contract, which was not assigned to it until after its road was commenced.

Statutory proceedings by Henry B. Day against the Oregon Railway & Navigation Company, to recover compensation for lands taken by the latter under its right of eminent domain. The opinion states the case.

TURNER, J. The appellant, a railroad corporation, appropriated a strip of land, 100 feet wide, through the farm of appellee, for the right of way of a railroad which it proposed to build thereon. The appellee, finding himself unable to agree with the company as to the compensation to be paid for said right of way, instituted proceedings before a justice of the peace to have his compensation determined agreeably to the provisions of chapter 188, Code. The case proceeded to a determination before said justice, and subsequently found its way into the district court, agreeably to the provisions of the chapter before referred to. In the latter court pleadings were filed as in an advisory civil action, and among other defenses interposed by the appellant to the

claim of the appellee was one averring a contract in writing, made by the appellee and wife with Jay Lynch and W. E. Wilson, trustees of the Pataha Railroad Company, in which appellee and wife agreed to convey to the persons last named a strip of land 100 feet wide through said farm, for the purpose of constructing a railroad thereon. The answer averred due assignment of this contract to appellant, and prayed that appellee be enjoined from further prosecuting his action for damages, and that he be required to execute and deliver to appellant a conveyance as called for by said agreement. The issues made by this equitable defense were first tried by the district judge, sitting as chancellor, and, said issues having been found for the appellee, the cause proceeded to trial before the court and jury upon the question of damages, as in an action at law.

The only rulings of the court to which the appellant adverts in the brief of its counsel as error, are those made by the judge in the trial of the equitable defense; and as the case is here by appeal, pure and simple, none others could probably be urged. Coming, then, to the merits of the case, we do not deem it necessary to examine and pass upon the various findings of facts and conclusions of law made by the learned judge in the court below. These findings relate principally to the sealing and acknowledgment of the agreement pleaded in the answer of appellant, and to the validity of the assignment of said agreement to appellant. Admitting the validity of the agreement,—and we may say, in passing, that we see no necessity that an agreement to convey land should be sealed or acknowledged,—and admitting that the interest of the Pataha Railroad Company therein passed to the appellant by the assignment, the facts disclosed in the record present an insuperable obstacle to the equitable relief which the appellant seeks.

The appellant entered on the land of the appellee, and surveyed its right of way thereon about November 1, 1885, and early in November its graders were at work thereon. These facts are deposed of by the engineer of the company, and are not denied by any witness examined. Thereupon, the right of the appellee to compensation under the statute became fixed. Without deciding what right, if any, appellant took, by virtue of the contract assigned to it, on November 11, 1885, eleven days after it had appropriated the land, we are clear that it took no right thereunder to have conveyed to it by the appellee the land which it had already appropriated under the power of eminent domain.

The consideration moving to the appellee for the agreement to convey his land was the building of a railroad through his premises, from some point to some point not disclosed by the agreement, but which, no doubt, the parties had in mind. Appellant having built its road without reference to that agreement, to now give it the benefit of the agreement as a defense to the suit for compensation would be to give it something for nothing. When it proposes to build a new line of road through the lands of appellee on the faith of this agreement, and shows that its line is one substantially like that which the original parties to the agreement had in mind,—something not shown of its present line,—it may have some rights under the agreement; it will then be time enough to determine what they are.

This view of the facts disposes of the contention of counsel for appellant, that, if the contract be one upon which specific performance may not be decreed, yet its execution by the appellee, and the construction by the appellant of its line of road partly on the faith of it, raise an equitable estoppel against the appellee to claim compensation. We have seen that the lands of appellee were appropriated before the appellant took any rights under the agreement. It did not, then, construct its road partly on the faith of said agreement, and no estoppel against the appellee arises. A different coloring might be given to this branch of the case if the testimony offered in the lower court and rejected were before us; but it is not before us, and appellant has not contended

that it was prejudiced by the action of the lower court in respect to said testimony. Nor are we prepared to say that it was prejudiced.

The judgment of the lower court is affirmed.

GREENE, C. J., and HOYT, J., concur.

AINSWORTH and others v. TERRITORY.

(*Supreme Court of Washington Territory. January 21, 1887.*)

1. BAIL—POWER TO ACCEPT.

The judge of a criminal court of record may accept and approve a bail-bond in vacation, especially as Code Wash. T. §§ 2138, 2139, authorizes a judge at chambers to determine all matters where a jury is not required. That the prisoner has been previously committed in default of bail, and is in the custody of the sheriff, is immaterial.

2. SAME—CONDITIONS OF BAIL-BOND—DEFENSE.

It is no defense to an action on a bail-bond, voluntarily given, that the conditions of the bond are more onerous than the statute permits.

3. SAME—DECLARING FORFEITURE—SIGNING JOURNAL.

In such action, a defense that the bond was not shown to have been declared forfeited by a proper court, because the journal was not signed by the court, *held* not sustained, both because the judge's signature is not necessary to make journal entries valid, and because the journal was in fact signed by the judge at the end of the term.

4. SAME—PARTY TO ENFORCE.

Washington Territory is a municipal corporation, of which the several counties are agencies, and the territory is the proper authority to accept and enforce bail-bonds.

Geo. M. Foster, for plaintiff in error. *S. C. Hyde*, Pros. Atty., for the Territory.

LANGFORD, J. This is an action brought by the territory on a bail-bond, in which the territory is the obligee and the defendants are the obligors. The bond itself is in the usual form of a common-law bond. Hon. Judge WINGARD was the presiding judge of the court in which the indictment was found, and at which the order of commitment was entered against one of the defendants, who was indicted, in default of his giving bail, for his appearance at said court from day to day and from term to term. In default of such bail, on a warrant upon said order of commitment, the sheriff of Spokane county was holding the prisoner in confinement. The said term was the regular October term of the district court for Spokane county. The judge was not only a presiding judge for this court, but also of several other courts of the First judicial district. This October term of court was adjourned to meet again on the first Monday of February, and in the mean time the judge went to Walla Walla, his place of residence, and the place where he held court at chambers for the whole district, including Spokane county. While there the attorney for the defendant prepared and offered to him, for acceptance and approval, the bond in question. The judge approved it, and filed it with the clerk of said court. At the time Judge WINGARD, at chambers, approved the bond, at the instance of the defendants, he made an order that the prisoner be discharged, which was also sent to the clerk of said court. Upon learning of this proceeding of the judge, and that the order and bond was filed with the clerk, and upon faith that the bond was a good bond, the prisoner was released, and went into the possession and custody of his bondsmen. Judge WINGARD returned, and continued the session of the court; and the prisoner being called, and the other defendants, in due form, and making no appearance, the court caused the default to be entered and bond forfeited.

The defendants claim that after the prisoner was held by the sheriff, the sheriff alone could accept bail, and that the action of Judge WINGARD in ac-

cepting and approving the bond was void. If this were so, if the sheriff found the bond which was left with the clerk with intent that it should be delivered and did, upon the faith that it was a good bond, release the prisoner on account thereof, then this was an acceptance and approval by the sheriff by implication. We are satisfied, however, that by virtue of his office, a judge of a criminal court of record, in vacation, can accept a bail-bond for the territory. Particularly is it so under our statute, which authorizes the judge at chambers to hear and determine any subject-matter which can be decided without a jury. Code, 2138, 2139.

The next error claimed is that the defeasance in the bond is more onerous than the statute permits as to bail-bonds. We think that this is true. Defendants infer that this vitiates the bond itself. Decisions have been read that sometimes, and in some circumstances, courts have held a bail-bond was void on this account. There could not have been any such plea made at common law, in an action for debt upon a bond; yet the common law is the rule of decision in this territory. Duress could have been pleaded. It was probably upon what was considered duress that bonds have been held void, because the same were more onerous than the law permitted. There is no such plea in this case, and no evidence to support such a plea. The evidence shows that, without request or demand from any one, defendants inserted these conditions on their own motion, and did it voluntarily. The permission that the defendants may insert lawful conditions, and add unlawful ones, if they choose, is not contrary to public policy. The court would not probably enforce a condition, unauthorized by law, thus inserted, and the court did not forfeit this bond for any breach of such conditions, nor is suit brought on account of the breach of any unlawful conditions. The defendant claims that one of the unlawful conditions was that the prisoner should appear at said court on the first Monday of February.

The judge presided over many courts of separate jurisdiction, of which this was one. No term of court of the same territorial jurisdiction intervened between the sitting of the court in October and February. No term of court had been adjourned,—only the sitting of the same term had been adjourned; hence a trial by jury could have been had at the time the bond was forfeited. Had this not been so, we know of no plea which could have been made to the sufficiency of a bond on that account, and no authority has been cited that so holds.

It is claimed that the territory is not the real party in interest. The territory is a municipal corporation and government representing all the people within its borders. The county of Spokane is an agency of the territory to carry on certain functions of government. Neither the territory nor county is the real party in interest, but the inhabitants are. The territory by statute is authorized to accept and collect these bonds, for the use of the people, and is a trustee of a trust expressed by statute.

It is claimed that there is no evidence that the bond was declared forfeited by a proper court, for that the journal had not been signed by the judge. Such signature is unnecessary to make journal entries valid. If it were necessary, the journal was signed at the end of the term by the presiding judge. The authorities cited, that recognizances can only be taken in term-time, refer exclusively to recognizances of record. Our statute would permit the judge at chambers even to take these. Our statute provides that several officers may take bail who have no records, and among them are magistrates. This class of bail is by deed, signed, sealed, and delivered. The bail-bond here is bail by deed. Judge WINGARD was a magistrate. It is not doubted that the statutes might by express terms, or by implication, prohibit bail by deed, but our statute, by necessary implication, commands such bonds to be taken. It was unnecessary to invoke section 749, Code. The real act containing that provision is an act entitled "An act to regulate the practice and proceedings

in civil actions in the district court." This title is not broad enough to include bonds not used in the practice and proceedings in the district court in civil actions. The section refers to such proceedings, and bonds taken therein, and to none other. The statute has another provision for bonds in criminal proceedings. Code, § 1167. It is not necessary to invite the aid of this section, for this bond is a sufficient one without the aid of either section.

Judgment is affirmed.

GREENE, C. J., and HOYT, J., concur.

CARSON v. CHANDLER and others.

(*Supreme Court of Washington Territory. January 22, 1887.*)

1. APPEAL—CERTIFICATE OF CLERK—TESTIMONY.

The legislature of Washington Territory has power to authorize the clerk of the trial court to certify, in cases in which the evidence consists wholly of written testimony, that the evidence contained in the transcript is "all the evidence introduced by the parties in the court below," and to require the supreme court to receive such certificate as proper evidence of the facts certified.

2. SAME—EQUITY CAUSES.

Section 451 of the Code, containing such provision, applies to equity causes, notwithstanding section 464 requires depositions, and all papers used as evidence in equity causes, to be certified up to the supreme court, "not by transcript, but in the original form." The word "transcript" is used in section 451 in a loose sense, as including all that is to be certified in a case to the supreme court.

John P. Judson, for appellant. *Struve, Haines & McMicken*, for appellee.

TURNER, J. The evidence in this case is certified by the clerk of the lower court agreeably to the provisions of section 451 of the Code. We know of no reason why the legislature may not direct the clerk to make this certificate in an equity cause, and why it may not require this court to receive such certificate as proper evidence of the facts therein certified. The direction to the clerk to make the certificate is, in effect, a command to him to inform himself of facts, during the progress of trials, necessary to enable him to make the same. No officer is in better position, save the judge alone, to make such certificate intelligently; and if the clerk is present, performing his duties, his opportunities are equal to those of the judge to know that to which both or either may certify; namely, that the evidence contained in the transcript is "all the evidence introduced by the parties on the trial in the court below." We are referring, of course, to cases in which "the evidence consists wholly of written testimony," the clerk being authorized to make the certificate in such cases only.

Looking carefully into the record in this case, we find that all the testimony therein contained is "written testimony," as that term has been construed by this court in other cases. Taking this fact, in connection with the certificate of the clerk that "the transcript contains all the evidence," etc., we are enabled to see that the case is one in which the law obliges us to receive the evidence on the faith of the clerk's certificate.

It is insisted, however, that section 451 does not apply to an equity case, because, under the provisions of section 464 of the Code, "the depositions, and all papers which were used as evidence, are to be certified up to the supreme court, and shall be so certified, not by transcript, but in the original form." We think the word "transcript" was used in section 451 in a loose and inaccurate sense, as including all that was to be certified in a case to the supreme court.

The motion to affirm is denied.

GREENE, C. J., and LANGFORD, J., concur.

NORAGER v. NORWALD.

(Supreme Court of Washington Territory. January 10, 1887.)

APPEAL—TRANSCRIPT—FILING—PENDENCY OF MANDAMUS PROCEEDINGS.

Where, from an application for a writ of *mandamus* to the trial judge, it appears that the failure of the appellant to file a transcript was occasioned by the neglect or refusal of the trial judge to settle the facts of the case, a motion by the appellee for affirmance of the judgment of the lower court will be held over pending the result of the proceedings for *mandamus*. HOYT, J., dissents.

TURNER, J. An appellant in an action at law who has saved exceptions which can be preserved by a statement of facts only, or by a bill of exceptions, and who has done all that the law requires to entitle him to a settlement of such facts by the judge of the lower court, ought not to be considered in fault if, pending action on his proposed statement, he fails to cause an incomplete transcript to be filed in this court. *Actus curiæ neminem gravabit*. In such a case, it being shown to this court, on application for a writ of *mandamus*, that the judge has failed or refused, on insufficient grounds, to settle the statement of facts, and an alternative writ having issued, the appellee ought not, pending the determination of the court in the *mandamus* proceeding, to have an affirmance of his judgment under section 461 of the Code. The court would not have awarded the alternative writ without a showing establishing, at least, that the failure to complete the record in the court below, so that a proper transcript could be filed here, was owing to circumstances over which the appellant had no control. The showing, on the motion for *mandamus*, may properly be looked to, and considered on the application to affirm. The writ of *mandamus* goes from this court only in aid of its appellate jurisdiction, and, while not properly a step in the main cause before the latter has reached this court, it yet bears sufficient relation to it to permit the showing to be considered therein, when the latter has reached us by the intervention of the appellee.

It may be that the appellant has been guilty of laches in failing to sooner prosecute the *mandamus* suit. If so, he will not succeed in that suit. But certainly, if he deserves to succeed therein, the appellee is not entitled at the time to an affirmance of his judgment; and whether he deserves to succeed therein is to be determined in that suit and not on this motion to affirm. We think the motion to affirm should stand over without action for the present.

LANGFORD, J., concurs.

HOYT, J., (*dissenting*.) The notice of appeal herein was given June 23, 1885, but the transcript was not brought up by the appellant, as required by statute, nor was any showing made, or attempted to be made, for the failure thus to file the transcript in the cause. Under these circumstances the appellee, on the first day of this term, filed here a copy of the judgment and notice of appeal, and asked that the judgment be affirmed; and it is conceded that his notice must be granted, unless some reason to the contrary is properly made to appear to the court. But my brothers are of the opinion that the pendency of an original proceeding in this court for a mandate to compel the judge of the court below to settle a statement of facts in the case, is in itself a sufficient reason for denying appellee's said motion; but with this conclusion I am unable to agree—*First*, because I do not think such proceeding has any such connection with this cause as to entitle the court to at all consider the same in deciding any question herein; *second*, because if it is considered as being on file in this case, it is not in itself of any force as against appellee's motion, as it is nowhere suggested by the appellant that, if the writ of mandate issues, and the judge settles the statement, as therein required, it is his intention thereafter to bring up a transcript of the cause for investiga-

tion, and, for aught that this court can know, such *mandamus* proceedings are not prosecuted for the purpose of this case at all, but simply with the object of establishing a correct practice for the future.

In my opinion, it is the duty of the appellant in any case to file a transcript in this court within the time provided by law, or, in case any reason exists why he cannot do so, to file a showing, by affidavit or otherwise, of such reason, and a motion for leave to be allowed to file such transcript when the obstacle preventing the present filing is removed; and that the appellee, in the absence of such transcript or showing and motion, has a right to avail himself of the provisions of section 461, Code, and have the judgment affirmed; and I am of the opinion that appellant cannot, as a matter of right, appear and make any objection thereto, as his failure to file the transcript is in the nature of a default, which the appellee, by the filing of his papers, has made effective, and, before the appellant can further appear in the case, he must file his motion and showing, and obtain an order relieving him from such default. Moreover, I am inclined to the opinion that this court should not relieve an appellant from the consequences of a failure to file a complete transcript, unless it appeared that he had brought up such parts thereof as he reasonably could; and I think the only safe course for an appellant would be to timely file such part of the transcript as he is able to procure, and then, if for any reason he cannot make it complete, to show such reason to this court, and ask for time, and, if necessary, the aid of the court.

In a case like the present, the appellee, not being advised in any way of the intention of appellant further to prosecute his appeal, has a right to assume that he is entitled to the benefit of said section 461; and after he has gone to the expense of having sent up a copy of the judgment and notice of appeal, and of coming here to avail himself of the benefits of said section, he should not be prevented from so doing by proceedings of which he has no notice, and to which he is in no sense a party, and which are not even on file in the case. It follows that, in my opinion, the motion should be granted.

BRADSHAW v. TERRITORY.

(*Supreme Court of Washington Territory. January 21, 1887.*)

1. CONSPIRACY—INDICTMENT—COMMON-LAW OFFENSE.

Under Code Wash. T. § 782, the common-law offense of conspiracy is indictable, and an indictment which contains sufficient to charge the crime as at common law will support a judgment of conviction.

2. SAME—CONSPIRACY TO DEFRAUD.

Conspiracy to defraud a person is indictable at common law.

3. SAME—SENTENCE—CONVICTION OF CO-CONSPIRATORS.

A person convicted of conspiracy may be sentenced although no co-conspirator has been convicted. It is only when all of the co-conspirators have either been acquitted, or been discharged under circumstances tantamount to acquittal, that a conspirator cannot be convicted.

4. SAME.

Where a conspirator has not been indicted, in order to obtain his evidence for the prosecution, and the indictment of two other conspirators has been dismissed on the motion of the prosecuting officer, as permitted by the laws of Washington Territory, leaving the question of guilt or innocence undetermined, these conspirators have not been acquitted or discharged under such circumstances that the remaining conspirator may not be indicted and sentenced.

Indictment for conspiring to defraud. Verdict of guilty and sentence. The defendant appeals.

Geo. M. Foster, for appellant. *S. C. Hyde*, for the Territory.

GREENE, C. J. This is a writ of error, bringing up from the district court the judgment and record of a case wherein the plaintiff in error was convicted of the crime of conspiracy. He and two others were indicted together

for conspiring with a fourth person to defraud, by means specified in the indictment, the person's business partner. He was tried first and alone. There is nothing to inform this court that any of his co-conspirators have ever been convicted.

In course of the proceedings before conviction, exceptions were taken to quite a number of rulings of the trial judge, and to his giving and refusing instructions to the jury; which action of his, if to defendant's prejudice, was corrigible by a new trial, but cannot be corrected in this court, because no motion for a new trial, definitely pointing out any statutory ground for the motion, was ever made. Only two questions upon which this court can pass are before us, both of which are presented by the motion in arrest of judgment,—one as to the sufficiency of the indictment; the other as to the power of the district court to pass sentence before the conviction of any co-conspirator.

There is no statute of this territory defining conspiracy. Hence, according to section 782, Code, the common-law offense of conspiracy is indictable. But it is contended that conspiracy to defraud a person is not indictable at common law. This is a mistake. 2 Bish. Crim. Law, § 207, and cases cited; 2 Bish. Crim. Proc. § 215; Bish. Div. & Forms, § 285; 2 Whart. Crim. Law, §§ 1337, 1338, 1347-1349.

We have examined the indictment with care, and find it unnecessarily verbose, but not lacking in any of the requisites of a good criminal pleading. As regards the point that the plaintiff in error could not be sentenced until a co-conspirator had been first convicted, the law is not as his counsel contends. For, while it is true that the conviction of a single conspirator, or even his indictment, cannot be had, or, if had, will be invalidated, in case every one else who is charged to have been conspirator with him has been or is acquitted, or, under circumstances that amount to an acquittal, discharged, yet we understand that it is also the law, on the other hand, that a person may be indicted for conspiracy, and convicted, and, if convicted, sentenced, although every person who is charged to have been co-conspirator with him is unindicted, or has, in some mode not inconsistent with guilt, been released from liability under the indictment. 2 Whart. Crim. Law, §§ 1338, 1339, 1393; 2 Bish. Crim. Law, § 188 *et seq.*

From the transcript before us, it appears that there was an unindicted conspirator who gave evidence for the territory upon the trial, and who, we presume, was excluded from the indictment in order that he might give evidence for the people. It further appears, both from the record and the concession of parties, that after the trial of plaintiff in error, and a subsequent mistrial of his two co-defendants, the indictment was dismissed, as to them, upon motion of the prosecuting officer, as permitted by our statute; leaving the question of the guilt or innocence of these co-defendants undetermined and undeterminable, except so far as upon the trial of plaintiff in error, and as against him individually, it had already been passed upon by the jury that tried him.

Let the judgment of the district court be affirmed.

LANGFORD and HOYT, JJ., concur.

O'HARE and others v. WILSON and another.

(*Supreme Court of Washington Territory. January 17, 1887.*)

APPEAL—FAILURE TO PROSECUTE—JUDGMENT ON BOND.

Where a cause is brought to the supreme court of Washington Territory, under the appeal act of 1883, and the appellant fails to prosecute his appeal, the appellee may have the judgment of the district court affirmed, and judgment rendered in

the supreme court against the sureties on the appeal-bond, upon production of the appeal-bond and a transcript of the judgment, and of the journal entry of notice of appeal, duly authenticated.

GREENE, C. J. We are of opinion that when a cause is brought to this court, under the appeal act of 1883, and the appellant fails to prosecute his appeal, the appellee may have the judgment of the district court affirmed, and judgment rendered in this court against the sureties on the appeal-bond, upon production to this court of the appeal-bond and a transcript of the judgment, and of the journal entry of notice of appeal, duly authenticated.

LANGFORD, J., concurs.

ZENKNER v. NORTHERN PAC. R. Co.

(*Supreme Court of Washington Territory. January 21, 1887.*)

APPEAL—STATEMENT OF FACTS—CERTIFICATE OF JUDGE.

Under act Wash. T. 1883, providing that "in all causes removed to the supreme court, * * * the party so removing the same may have the facts, or any portion thereof, transmitted thereto, with the transcript of the cause; and such facts shall be certified to by the district judge before whom the cause was tried, to be all the material facts in the cause,"—a statement of facts not so certified will, upon motion, be struck from the record, and an appearance by the parties does not waive the right to object to the statement for that reason.

P. P. Carroll, for plaintiff in error. *McNaught, Ferry, McNaught & Mitchell*, for defendants in error.

GREENE, C. J. The principles decisive of the case of *Mulkey v. McGrew* 2 Wash. T. 259, 262, are decisive also of this motion to strike. A mass of paper writing, purporting to be a statement of facts under the appeal act of 1883, is here, but it is not certified as required by that act, and there is nothing to assure us that it contains "all the material facts in the case." It is a superfluity. Appearance would not waive the right to object to it. The motion to strike it from the cause is granted.

LANGFORD and TURNER, JJ., concur.

SMITH v. WINGARD.

(*Supreme Court of Washington Territory. January 21, 1887.*)

SUPREME COURT, WASHINGTON TERRITORY—APPEALS—WHAT JUDGES SIT.

Under act of congress of July 4, 1884, providing that no justice of the supreme court of Washington Territory "shall act as a member of the supreme court in any action or proceeding brought to such court by writ of error, bill of exceptions, or appeal, from any decision, judgment, or decree rendered by him as judge of a district court," the decision, judgment, or decree which disqualifies a justice on appeal must be the final one from which the appeal, bill of exceptions, or writ of error is taken. A justice is not disqualified by having made interlocutory orders, or decrees in the action below.

GREENE, C. J. This is a motion for a continuance on the ground of the alleged disqualification of all but two of the justices to act as members of this court. One of the justices rendered the final judgment from which this appeal is prosecuted, and another of them made an interlocutory order which is complained of as error.

By the act of congress of fourth July, 1884, reconstructing the supreme court of this territory, three justices are necessary to constitute a quorum. If, therefore, only two of the justices are qualified, there can be no quorum, and there can be no action of the court, whether to grant a continuance or do anything else. In regard to qualification, the same statute provides that "no

justice shall act as a member of the supreme court in any action or proceeding brought to such court, by writ of error, bill of exceptions, or appeal from any decision, judgment, or decree rendered by him as judge of a district court." I consider that this provision contains within itself a reference to, and must be interpreted as directly connected with and modifying, that part of section 9 of the organic act which is now incorporated in section 1869, Rev. St. U. S., and which says that "writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of the district court to the supreme court," etc., and that it in effect ordains that no justice shall act in any action or proceeding brought to the supreme court, under section 9 of the organic act, in which he is that judge who rendered the decision, judgment, or decree from which the appeal, bill of exceptions, or writ of error has been allowed. Such is the exact tenor of the statute, and it is indicative of an intention on the part of congress to provide for the territory a supreme court which shall be measurably and generally free from the embarrassment of any of its members having previously expressed a judicial opinion upon the merits of the very matter brought up for review. Congress do not say that no justice shall act who, in the action or proceeding to be reviewed, has made any ruling claimed to be erroneous. They choose a different form of expression, the natural and obvious meaning of which is to my mind quite different and distinct. Here is a case in which congress is absolute arbiter of the situation. It is about to reconstruct the supreme court of a populous and growing territory. It seems a desirability in having the remodeled tribunal so constituted as to be partly or wholly independent of the mind that passed judicially upon the case in the district court. It determines to place such a restriction upon the qualifications of the judges as shall favor this independence. But it is unwilling, on the score of economy, to give the territory more than four justices, and there is a question as to what ought, under the circumstances, to be the extent of the restriction. Shall it exclude every judge who has made a ruling on any point sought to be reviewed, or shall it exclude that judge only who has made the judgment from which the appeal or writ of error is prosecuted? These are considerations on the one side and on the other. It were good to have an appellate court, no justice of which had ever passed judicially on any question to be reviewed; but it were also good to have an appellate court which should be accessible for all suitors in all cases. Sickness is liable to befall any district judge, or some emergency may call him out of the territory, so that temporarily his duties have to be performed by his neighbor judge. Or a new assignment of judges among the districts is liable to be made by any legislature, when every judge will drop the cases on his docket unfinished and take up the unfinished docket of another judge. But to attempt to enumerate the considerations, or assign the compelling reasons that determine the action of a circumspect and omniscient congress, were an idle endeavor. Enough for us to discern that there were considerations and reasons that were or might have been operative to produce the language of the act in question.

It is as if congress, being about to reconstruct this court, were approached by some person, interested in that behalf, and asked to give the territory such a court that a justice of it would never have to pass on a previous ruling of his own in the same cause, and as if congress had answered: "We cannot give you that, but we can give you an approximation to it, and we will give you the nearest thing to it that we can. We will give you a court which will ordinarily, and almost always, be such as you desire. We will give you a court from which that judge whose decision, being the last made, definitely passes upon, affirms, heads up, and concludes all other and previous rulings in the case, shall be excluded. And this is the best we can do, for we are not prepared to give your territory more than four judges; and since our dominant purpose is to supply the most perfect and beneficial facilities possible for re-

views of decisions of the district courts, we must make your supreme court one that will harmonize with your organic act, and — whatever the changes among the judges—be of general benefit to suitors in all cases."

This line of reasoning is satisfactory to my mind, and would be controlling, did the language of the act of congress call for construction. But it needs no construction. What is the good sense of construing a form of words which has a natural, sensible, literal meaning, plain to see? What authority have I as judge—what authority has any judge—to say that congress intended anything but that literal sense? Congress could have meant to say what their words naturally mean; it would have been sensible for them to have meant to say it. Why should anybody presume to say they have not succeeded in saying it, when their words are plain and apt for the purpose? My opinion is that they have plainly said that no justice can act in the supreme court who has rendered the decision, judgment, or decree from which the appeal or writ of error is prosecuted, and thereby, by implication, said that every other justice, not otherwise disqualified, can and ought to act. I could wish that the duty had not been cast upon me to pass upon this question in a case involving my own qualification. But I remember with complacency that up to within a year or two some judge whom this act would disqualify has participated in almost every hearing and decision in this court, without, as I am happy to believe, any very serious detriment to justice, and without any manifest public horror at the impropriety; and I perceive that in the case now before the court the point of the supposed disqualification is of the finest and most microscopic, and, as far as I can judge, of the very softest, description imaginable.

As a majority of us are of opinion that the justice whose disqualification has been suggested is not disqualified from sitting in this case, the motion is denied.

DIXON v. AHERN. (No. 1,240.)

(Supreme Court of Nevada. June 25, 1887.)

1. USE AND OCCUPATION—REQUISITES TO MAINTAIN.

To maintain an action for use and occupation, it is necessary to show that the relation of landlord and tenant existed between the parties during the time of occupation. A mere trespasser cannot be held liable in such action.

2. SAME—TRESPASSER—PRESUMPTION.

The burden of proof rests upon the owner of land to show that a person who at first entered upon the land as a trespasser afterwards became a tenant. The presumption is that he continued to hold the land in the same character as he first held it.

3. SAME—ACKNOWLEDGMENT OF TENANCY—INSTRUCTION.

An instruction was requested by defendant, in an action for use and occupation, to the effect that the plaintiff could not recover unless the jury found that defendant had acknowledged the relationship of landlord and tenant between himself and plaintiff. The instruction was refused, on the ground that it assumed a condition of facts without evidence fairly tending to prove it. *Held*, that the instruction was a correct statement of the law; and, as there was some evidence tending to show that defendant had never been other than a trespasser upon the land, the refusal was error.

Appeal from district court, Eureka county.

Plaintiff had judgment below.

Baker & Wines, for appellant. *Wren & Cheney* and *Fitzgerald & Beatty*, for respondent.

LEONARD, C. J. Action for use and occupation of a tract of land. It is alleged in the complaint that on or about September 10, 1880, plaintiff was the owner and in the possession of said tract, at which time, with plaintiff's permission, defendant entered into the use and occupation thereof, for the purpose of piling and storing cord-wood, and so continued in such use and

occupation for said purpose until October 18, 1885; that said use and occupation are reasonably worth a certain sum stated, which sum was demanded prior to the commencement of the action, no part of which has been paid. Defendant denied plaintiff's ownership or possession, or that he entered with plaintiff's permission, or that he used or occupied said tract at any time with plaintiff's permission, or that said use and occupation were worth the sum stated, or any sum, or that said sum, or any sum, was due from defendant to plaintiff. Plaintiff recovered judgment for the amount claimed, besides costs. Defendant appeals from the judgment, and specifies as error the court's refusal to give the following instruction to the jury: "The court also charges you that, if you believe from the evidence in this case that the defendant, some time in the spring and summer of 1880, entered into or upon the tract of ground mentioned in the complaint, being the ground upon which his wood was corded, against the will and consent of plaintiff, and without the knowledge or permission of plaintiff, and without any previous understanding had with plaintiff in relation to such entry, and that said defendant continued to so hold the possession, and so continued to use and occupy the same against the consent of plaintiff, and that defendant, during such time, denied the plaintiff's right thereto, and never at any time promised or agreed to pay plaintiff for the use and occupation of said premises, but at all times refused to admit the right of plaintiff to recover from defendant for such use and occupation,—then I charge you that plaintiff cannot recover in this action, and your verdict should be for the defendant."

In order to recover in this action, plaintiff was obliged to allege and prove that the relation of landlord and tenant subsisted between him and defendant. That relation may be created either by an express or implied contract. *Knickerbocker Co. v. Hall*, 3 Nev. 198; *Carson River Lumb. Co. v. Bassett*, 2 Nev. 249; *Railroad Co. v. Harlow*, 37 Mich. 554; *Lloyd v. Hough*, 1 How. 154; *Watson v. Brainard*, 33 Vt. 90; Tayl. Landl. & Ten. § 19.

"Every contract, whether express or implied, includes a concurrence of intention between the two parties, one of whom promises something to the other, who, on his part, accepts such promise." 1 Wait, Act. & Def. 70-72.

"The mere occupation of premises does not, of itself, necessarily imply that the relation of landlord and tenant exists." Wood, Landl. & Ten. § 3; Tayl. Landl. & Ten. § 25; *Eustman v. Howard*, 30 Me. 60; *Ward v. Warner*, 8 Mich. 521; *Executors of Smith v. Houston*, 16 Ala. 115.

"A tenant is one who occupies lands or premises of another, in subordination to that other's title and with his assent, express or implied. But, in order to create the relation, the two elements must concur. The fact that one is in possession of the lands of another does not, of itself, establish a tenancy, because, if he is in possession under claim of title in himself, or under title of another, or even in recognition of the owner's title, but without his assent, he is a mere trespasser, and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, all the elements requisite to create the relation of landlord on the one hand, or of tenant on the other, are lacking, to-wit, assent on the one hand, and subordination to the title upon the other. If the owner gives his assent to the occupancy of one who has entered upon his lands adversely, a tenancy is not thereby created. In order to have that effect, the person in possession must accept such permission, and consent to hold under him, and in subordination to his title. Where a person goes into the possession wrongfully, it is undoubtedly competent for the parties, by a contract subsequently made, to change the relation from that of a trespasser to that of a tenant. But in such a case the contract must be explicit, and embrace all the elements previously referred to; and if it is intended to have the tenancy commence from the date of the original entry, so as to change the owner's remedy for the period of wrongful occupancy from trespass to an action for rent, the contract should

explicitly embrace the whole period of occupancy, or neither the character of the prior occupancy nor the remedy will be changed. PATTERSON, J., in an English case, said: 'Use and occupation may arise from the waiver of a tort, or from simply letting into possession.' But it is apprehended that an action for use and occupation could not be maintained for a *tortious* entry and occupancy, because the owner of the premises cannot, by electing to do so, compel a person, who entered into the possession of premises against the owner's right, to occupy towards him the relation of tenant, unless such person elects to assume that relation; that is, the owner cannot, at his option, elect to treat such person as a wrong-doer or tenant; but, in order to enable him to treat him as a tenant, and proceed against him for rent, *the relation between them must be such as to raise the presumption* of a contract, or the remedy is by an action *ex delicto*. * * * In order to create the relation of landlord and tenant, no particular words are necessary; but the intention of one party to dispossess himself of the premises, and of the other to enter and occupy them as the former himself had a right to do, must, in some way, appear, and, in all cases where the facts are disputed, the question as to whether a tenancy exists is for the jury." Wood, Landl. & Ten. § 1; *Young v. Coleman*, 43 Mo. 179.

"When a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, this action will not lie." *Butler v. Cowles*, 4 Ohio, 213; *Waller v. Morgan*, 18 B. Mon. 142; *Lankford v. Green*, 52 Ala. 104.

"Where, however, possession is taken by one, with the permission or assent of the owner, from such possession the relation of landlord and tenant is implied, as well as a promise to pay rent." Wood, Landl. & Ten. § 3; Tayl. Landl. & Ten. § 19; *Watson v. Brainard*, *supra*.

In commenting upon an instruction given in *Ackerman v. Lyman*, 20 Wis. 456, the court said: "But the instruction is to the effect that, if he entered as a trespasser, without claim of title, and remained in possession with the assent of Holdridge, the law will imply a promise to pay rent. If this be so, then all that is necessary to convert a trespasser into a tenant is for the owner of the premises to say to him, 'I assent to your possession,' and a trespasser becomes a tenant without his own consent, or even against his will. A tort cannot thus be converted into a contract. * * * It [the agreement] may be implied from the defendant's entering into possession by the permission of plaintiff, or from acts showing the assent of the defendant, after a tortious entry, to hold under the permission of the plaintiff. *Henwood v. Cheeseman*, 3 Serg. & R. 500; *Ryan v. Marsh*, 2 Nott & McC. 156; *Stockett v. Watkins*, 2 Gill & J. 326; *Wiggin v. Wiggin*, 6 N. H. 298. * * * In this case the plaintiff alleges in his complaint that Holdridge permitted the defendant to have, hold, and occupy the premises, and 'that the defendant, according to that permission, held and occupied,' etc. The defendant, in his answer, denies the permission of Holdridge, and denies that he, according to the permission, held, occupied, and enjoyed the premises. It appears to us the instruction ignored the material part of the issue, to-wit, that formed by the denial of the defendant that he held possession according to the permission of the plaintiff, and was therefore erroneous. A trespasser cannot be converted into a tenant without his consent." And see *Ward v. Warner*, *supra*; *Jackson v. Tyler*, 2 Johns. 445; *Richey v. Hinde*, 6 Ohio, 378; *Peters v. Elkins*, 14 Ohio, 345; *Hathaway v. Ryan*, 35 Cal. 193; *Hurley v. Lamoreaux*, 29 Minn. 138, 12 N. W. Rep. 447; *Kittredge v. Peaslee*, 3 Allen, 237.

It is not claimed by counsel for respondent that the instruction refused is an incorrect statement of the law in the abstract, but it is said that it assumes a state of facts without any evidence fairly tending to prove them. Unless there was some evidence tending to establish all the hypotheses upon which

the instruction was based, or some evidence from which the jury might have inferred the existence of the facts stated, then the instruction was properly refused. *Williams v. Barksdale*, 58 Ala. 288. On the other hand, defendant was entitled to an instruction applicable to the theory he contended for, and which the evidence tended to support. *Comstock v. Norton*, 36 Mich. 280; *Anderson v. Bath*, 42 Me. 346; *Moresi v. Swift*, 15 Nev. 221. "He was entitled to have specific charges upon the law applicable to each of the hypotheses or combinations of facts which the jury, from the evidence, might legitimately find." *Sword v. Keith*, 31 Mich. 255.

In *Bradford v. Marbury*, 12 Ala. 527, the court say: "It is at all times a question of much delicacy to refuse a legal charge on the ground that it is not supported by evidence, but to do so when there is any evidence before the jury to warrant the proposition is clearly erroneous." It is settled law that, if there is any evidence tending to establish a point, it is error to instruct a jury that there is no such evidence.

In *Harley v. McAuliff*, 26 Mo. 523, it is said an instruction that there is no evidence on which a verdict can be founded is incorrect, if there is the least particle of evidence, whether direct or inferential, on which such verdict could be founded; and to the same effect is *Emerson v. Sturgeon*, 18 Mo. 170.

A charge is not abstract when there is any evidence, however weak, at all tending to support it. *Hair v. Little*, 28 Ala. 236; *McNeill v. Arnold*, 22 Ark. 477; *Hopkins v. Richardson*, 9 Grat. 496.

Juries may infer the existence of a fact from other facts. *Memphis & C. R. Co. v. Bibb*, 37 Ala. 699; *Morris v. Hall*, 41 Ala. 534; *Cambria Iron Co. v. Tomb*, 48 Pa. St. 398; *Lawson*, Presump. Ev. 557. They are bound by all the rules and presumptions of law, as far as they apply. *Starkie*, Ev. side p. 816; *Proffatt*, Jury Trials, § 360; 1 Tayl. Law of Ev. § 171.

Whether a legal presumption has or has not been rebutted is a question for the jury. *Foster v. Berkeley*, 8 Minn. 361, (Gil. 310.)

Taking the law applicable to the present case to be as above expressed, we are now prepared to examine the instruction in question in connection with the pleadings and evidence admitted. It was agreed by both parties at the trial that defendant entered upon the tract of land described in the complaint, and corded all of his wood thereon, against the will, and without the consent or permission, of plaintiff, and without any previous understanding in relation to such entry or use. There can be no doubt, therefore, that, until after the wood was corded, there were no facts that would justify an action for use and occupation. Up to that time the relation of landlord and tenant did not exist, and there was no contract, express or implied, to pay rent.

At the request of plaintiff, the court instructed the jury as follows: "If you believe from the evidence that the defendant entered into the use of the premises without any express agreement as to the rent to be paid therefor, but that, after so entering, the defendant consented to and acquiesced in the right and claim for rent for such use, the defendant is liable for the reasonable value of such use as long as he continued to use the same after so consenting and acquiescing in the claim and demand of plaintiff. The silence, conduct, and acts of defendant during the time he occupied said premises, and in removing the wood therefrom, are proper matters for you to consider in determining whether defendant impliedly agreed to pay rent for the use of said premises."

It is patent, therefore, that plaintiff claimed—*First*, that he was in possession of the land when defendant entered; and, *second*, that, after the entry, defendant impliedly consented to and acquiesced in his right and claim for rent, that defendant impliedly admitted plaintiff's right to the premises, and that his occupancy was in pursuance of plaintiff's permission, and in subordination to plaintiff's title. On the other hand, defendant claimed—*First*, that plaintiff's possession was not such as to entitle him to maintain an ac-

tion for use and occupation; and, *second*, that he entered upon the land without plaintiff's knowledge, against his will and consent, believing the same to be a part of the public domain, and that, after entering, he did not consent to or acquiesce in the right and claim of plaintiff for rent, or admit his right to the land. In a word, he denied completely by his answer, and as fully as he was able by his evidence, both claims of plaintiff above stated.

Referring, now, to the instruction under consideration, it is admitted by counsel for respondent that there was evidence to the effect that "defendant entered, against the will and consent of plaintiff, and without his knowledge or permission, and without any previous understanding had with plaintiff in relation to such entry, and that defendant never at any time promised or agreed to pay plaintiff for the use and occupation of said premises."

But it is earnestly urged by them that there was no evidence "that said defendant continued to so hold the possession, and so continued to use and occupy the same against the consent of plaintiff;" or "that defendant, during such time, denied the plaintiff's right thereto;" or "that defendant at all times refused to admit the right of plaintiff to recover from defendant for such use and occupation." It is true that no witness testified in terms to the facts hypothetically stated in the instruction, and objected to by counsel for respondent; but, without deciding or intimating as to the *sufficiency* of the evidence to establish the several facts supposed, we think it is equally certain that there was evidence of facts which, together with the presumption arising therefrom, tended, at least, to establish the facts stated.

At plaintiff's request the court instructed the jury to the effect that if, after entering, defendant consented to, and acquiesced in, the right and claim of plaintiff for rent, the defendant was liable; and in determining the question of acquiescence they might consider the silence, conduct, and acts of defendant while he occupied the premises, and in removing the wood. And counsel for respondent say that, inasmuch as the jury by their verdict found that defendant did acquiesce in plaintiff's claim, and did impliedly agree to pay rent, *their finding is conclusive*. But we cannot know what the finding would have been if the minds of the jury had been directed to the facts stated in the instruction.

In *State v. Carnahan*, 17 Iowa, 256, the court gave an instruction wherein he grouped many facts legitimately provable in such a case, and which the evidence tended to establish, and instructed the jury that "such facts as these, if shown by the testimony, constitute circumstantial evidence. Circumstantial evidence is legal evidence, and convictions had upon it are legal convictions. In the case before them, the jury will look at all the evidence, and from it make up their minds as to the guilt or innocence of the defendant." The supreme court said: "But it is claimed in argument here that the facts thus grouped together by the court all bear upon one side, and against the defendant. * * * If there were, however, any facts shown, or which the evidence tended to show, bearing in his favor, it was clearly competent for his counsel to group them together in like manner, and ask the court to give such instruction to the jury, and a refusal to give it would doubtless be error; but a failure to give such instruction, without request, cannot be regarded as error."

And in *McCausland v. Cresap*, 3 G. Greene, 161, the court said: "If the charge were not sufficiently direct on this or any other point involved in the case, it was in the power of the defendant's attorney to request of the court, in writing, instructions in such a manner as to bring the matter directly to the mind of the court, and have it, on the law, presented to the jury."

If there was evidence in this case which tended to establish the facts stated, the defendant had the right to have the minds of the jury directed to them, in determining the question of acquiescence subsequent to entry, which was the turning point in the case.

We have seen what facts were admitted by both parties at the trial, and that from them the relation of landlord and tenant could not have existed until after defendant had entered and piled his wood. It was agreed also, and the court so instructed the jury, that defendant never expressly promised to pay rent. Plaintiff testified that the wood was placed on the ground without his consent or knowledge; that he did not want it there, and always objected to it, as he needed the ground for his own use, but was willing it should remain if he was paid rent. He testified that, in one of the two or three conversations which he said he had with defendant in the summer or fall of 1880, he told defendant that he must have five dollars per month ground-rent, and that he would hold the wood as security; but defendant denied that plaintiff ever notified him that he would be required to pay for the use of the ground. Defendant also testified that he never had but one conversation with plaintiff, in regard to the ground or wood, until just before the commencement of this action, when plaintiff presented his bill; that at the first conversation plaintiff asked him if the wood was defendant's or Brisacher's, and that he replied, "It is mine or Brisacher's." Plaintiff did not testify that defendant at any time admitted plaintiff's right to the land, or his right to collect rent. There was no evidence that plaintiff had any other title than that given by possession, and defendant testified that in June, 1880, he and Brisacher went upon the ground looking for a suitable place to pile wood; that there was no fence of any kind along the western side, and nothing that would indicate a line or the extent of any one's possession; that he piled his wood there, believing the ground was a part of the public domain, and that he had the same right to pile it there as he had to pile it anywhere on the public lands. Plaintiff presented his bill for rent, and it was not paid. In his answer he denied plaintiff's allegations of possession, and his use and occupation by plaintiff's permission. At the trial he endeavored to disprove plaintiff's claim of possession, and the court informed the jury what acts were necessary to give plaintiff sufficient possessory title to maintain an action for use and occupation.

On this appeal the verdict of the jury is conclusive as to plaintiff's possession when defendant entered, no exception having been taken to the court's instruction upon that question. But the facts above stated, and particularly those admitted concerning defendant's entry; the evidence that he believed the land was possessed by no one, and that he had a right to occupy it; that, prior to the entry, there was no fence on the western side, or anything to show the extent of any one's possession; that defendant did not settle plaintiff's claim when it was presented, before this action was commenced; that he contested the claim in the court below, as before stated; that he never promised to pay rent; that plaintiff, during the five years of occupation, never notified him that he would be required to pay rent,—this evidence tended, at least, to show that defendant entered upon, and continued to use, the land under claim of right in himself, not in subordination to plaintiff's right and title, not as plaintiff's tenant, and that he did not acquiesce in plaintiff's claim for rent; and, if the evidence tended to establish the facts just stated, it tended also to sustain every fact objected to in the instruction.

Again, if defendant entered against the will and consent of plaintiff, and without his permission, under claim of right in himself, there was a legal presumption that the same state of facts and defendant's state of mind continued as before, until the contrary was shown, and the burden of proof was upon plaintiff. 1 Greenl. Ev. § 41; Best, Ev. 303, note c, 389; Lawson, Presump. Ev. 167; *Table Mt. M. Co. v. Waller's Defeat M. Co.*, 4 Nev. 220; *O'Neil v. Mining Co.*, 3 Nev. 147; *Hanson v. Chiatovich*, 13 Nev. 397.

In *Lepout v. Todd*, 32 N. J. Law, 128, it was an undisputed fact that Drake, while possessed of the premises in question, declared that he had entered as the tenant of Hanna, who was admitted to be the owner. The court refused defendant's request to charge the jury, if they believed from the evidence

that Drake entered as tenant of Hanna, he was presumed to have continued there as tenant until the contrary was proved. The appellate court held the refusal as error, and said: "I think the court should have charged, as requested, to the effect that it is a legal presumption that a possession, beginning in the assent of a landlord, continues, in subordination to his title, until a change of tenure is shown by the evidence." There was an equally strong opposite presumption in this case.

In *Cummins v. James*, 4 Ark. 616, the trial court refused the following instruction: "If the jury believe from the evidence that the legal right to the money in controversy is in the Bank of the United States, they must find for the defendants;" and, "unless the jury believe from the evidence that the plaintiffs are legally the assignees of the bank, they must find for the defendants." Said the court: "The principle is unquestionably true that a party to maintain an action must be entitled to the legal interest in the suit. If the legal interest is shown to be in plaintiff, the action will lie; if in another, it cannot be maintained. If there is a contrariety of testimony as to the person in whom the legal interest is vested, and that question is a matter of fact, to be determined by the jury, then, of course, it would be error in the court to take the question from the jury. There was certainly a conflict of testimony as to the legal interest. * * * Now, the refusal of the first instruction virtually took from the jury the question of fact as to the right of action. The court, by refusing to instruct the jury that, if they believed the legal interest was in the Bank of the United States, then they ought to find for the defendants, clearly decided the point that there was no evidence tending to show that the bank was the legal owner of the money. In this they were mistaken; for, by admitting the proof that the money was collected upon a judgment rendered in favor of the bank, there was a presumption raised that the bank possessed the legal interest. This presumption was rebutted and contradicted by other testimony in the cause; but whether it was fully overthrown was a matter for the jury, and not for the court, to determine, being a question of contested fact."

But in this case, as we have endeavored to show, there were, besides the presumption mentioned, facts and circumstances tending to show that defendant did not enter, or, after entry, hold possession, in subordination to plaintiff's title, or acquiesce in plaintiff's claim for rent; and, if such was their tendency, they tended also to establish every fact stated in the instruction under consideration.

Judgment reversed, and cause remanded.

WARD v. MATTHEWS. (No. 11,590.)

(Supreme Court of California. June 30, 1887.)

1. RESULTING TRUST—PURCHASE OF LAND—FRAUD.

In an action in the nature of ejectment the court found as matter of fact that defendant, in June, 1881, made an agreement with a railroad company to purchase the land in question, the first payment of \$225.28 to be made July 8, 1881, when a written contract should be entered into allowing defendant five years from the latter date for the payment of the balance of the purchase money; that on July 5, 1881, the plaintiff paid to the company the \$225.28 for the use and benefit of defendant; that it was verbally agreed between the parties that the contract should be taken in the name of plaintiff as security for the sum advanced, and it was further agreed that the \$225.28, with interest, should be repaid to plaintiff in one year; that plaintiff, within the year, extended the time of payment six months; that, before the six months expired, plaintiff paid the balance, \$703, to the company, and took a deed to himself of the land; that this payment was voluntary on the part of plaintiff, and was unknown to defendant; that plaintiff had never demanded payment of any of the money advanced; that defendant had been ready to pay the amount due, but plaintiff had refused to make any statement or accept payment; that defendant, with the knowledge and approval of plaintiff, had resided on and improved the land since May, 1880; that plaintiff did not purchase from defendant his rights

under the contract of sale with the railroad company. *Held*, that the evidence established a resulting trust in favor of the defendant which the court would enforce.¹

2. TRIAL—ISSUES—FINDINGS—RESULTING TRUST—REFORMATION OF CONTRACT.

In an action in the nature of ejectment in which the defendant pleaded that he was the equitable owner of the lands: that he had contracted to purchase them from a railroad company, and applied to the plaintiff to advance the first installment of the price, agreeing to allow him to *retain the land contract as security*; and that the plaintiff did advance such installment, but falsely and fraudulently, and without defendant's knowledge or consent, induced the company to make the contract in his own name,—a finding of the court that it was *verbally agreed* that the contract of sale *should be taken in the name of the plaintiff* is within the issues, and does not amount to a reformation of the contract, which was not prayed for.

3. STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN A YEAR—RESULTING TRUST.

In such action it appeared that the defendant, not having the money to pay for certain lands which he had purchased, obtained an advance of the necessary amount from the plaintiff. The title to the lands was taken in plaintiff's name for his security, and it was agreed that the amount advanced should be repaid within a year. The arrangement was verbal, and, although (as both parties concurred in stating) it was agreed that the contract should be reduced to writing, this was never done. Before the expiration of the year the plaintiff agreed to extend the time of payment for a further period of six months. *Held*, that the fact that the contract had never been reduced to writing did not render it void, since it was originally intended to be performed within one year, and the extension had taken place before the expiration of that period, and that, therefore, the defendant was entitled to enforce the resulting trust in his favor.²

4. CONTRACTS—PERFORMANCE—TIME AS OF THE ESSENCE.

Where B. agrees to advance A. the first installment of the purchase price of certain lands, which should be repaid within one year, the contract being taken in B.'s name for his security, and B., during an extension of such period of repayment, without A.'s consent or knowledge, pays the balance of the price, and obtains a title to the land in his own name by such payment of the balance, and B.'s refusal to afford A. any opportunity to pay the money he owed, either by a demand for payment, or by furnishing a statement when asked for by A., time ceases to be of the essence of the contract.

5. EQUITY—DECREE—DEPOSIT.

In an action in the nature of ejectment, the court found that the plaintiff had advanced the purchase price on behalf of the defendant, and that he held the legal title in trust for him, and ordered that, upon tender of the amount due, the plaintiff execute deed of the premises to defendant; and further directed that, should plaintiff refuse or neglect to execute such deed, the clerk of court was appointed commissioner with full power to make, execute, and deliver the same. *Held*, that the plaintiff could not object to the decree that, in the event of his refusal to make the deed, it deprived him of his security without his receiving the amount found due, as it was incumbent on the defendant to tender to and deposit the money with the commissioner before he was entitled to obtain a deed which would divest the plaintiff's title to the land.

Commissioners' decision. Department 1.

Appeal from superior court, Butte county.

Action to recover possession of certain real property, with damages for its detention. The defendant alleged that the plaintiff held the lands in trust for him; that he arranged to purchase the land from the Central Pacific Railroad Company; "that in June, 1881, or thereabouts, being required by said company to make the said first payment on said land, he made application to the plaintiff herein for money sufficient for that purpose, and said plaintiff thereupon agreed to advance for said defendant to said company the amount required to make said payment, in consideration of the defendant's promise to repay the same within one year, with interest at one and one-fourth per cent. per month. And it was further agreed by and between said plaintiff and defendant that, as security to said plaintiff for the repayment to him of the sum of money advanced, he was to receive and hold the contract thereafter to be

¹See note 1 at end of case.

²See note 2 at end of case.

made by said railroad company to this defendant; that said plaintiff did advance for the benefit of this defendant, and did pay to said company, the sum of \$225.28 on or about the eighth day of July, 1881; that by means of false and fraudulent representations, and without the knowledge or consent of this defendant, said plaintiff induced said company to make said contract in the name of the plaintiff, and said company did so make and execute said contract; that thereafter, and before the expiration of the year within which said sum of money was to be repaid to said plaintiff, said plaintiff, upon the request of defendant, extended the time of payment six months; that before the expiration of said time, and within the five years in which full payment could be made to the railroad company, the said plaintiff made to said railroad company full payment for said land without the knowledge or consent of this defendant, and received from said company a conveyance of said land."

"Wherefore defendant prays that the amount due the plaintiff from defendant by reason of the facts aforesaid be ascertained; that it be adjudged and declared that the plaintiff holds the title to the premises described in the complaint *in trust* for this defendant; and that he execute and deliver to the defendant a good and sufficient conveyance thereof upon the payment by this defendant, within such time as to this court may seem proper and reasonable, of the sum of money found due to the plaintiff as aforesaid, and for his costs of suit herein."

On trial in the superior court, judgment was rendered in the defendant's favor. The findings of the court are set out at length in the opinion. By the decree it was adjudged that there was due to the plaintiff the sum of \$225.28, with interest thereon at the rate of $1\frac{1}{2}$ per cent. per month, and also the sum of \$708, with interest thereon at the rate of 7 per cent. per annum,—said several sums amounting to the sum of \$1,192.93; that the defendant pay or tender to the plaintiff the said sum of \$1,192.93 within 20 days from the date of the decree; that if payment or tender of payment should not be made within the time herein specified, then the decree should be null and of no effect, and judgment shall be entered for plaintiff as prayed for in his complaint; that, upon the payment or tender of payment by the defendant to the plaintiff within the time herein provided, the plaintiff should execute and deliver to the defendant a deed of the premises; that if the plaintiff should refuse and neglect to execute and deliver such deed for the space of one day after such payment, or tender of payment, then the clerk of the superior court was appointed commissioner, with full power to make, execute, deliver, and have recorded such deed.

The plaintiff moved for new trial, but his motion was overruled.

Among the other errors specified was the following, viz.: That "finding four is contrary to the whole evidence, which shows that the verbal agreement there stated was to be reduced to writing, and signed by the parties thereto, and therefore such verbal agreement was invalid. Said finding four states the contract of sale should be taken in the name of plaintiff, to be held by him as security for the repayment to him, etc., which is in conflict with the allegation of defendant's answer declaring the verbal agreement to be otherwise; namely, that it was to be taken in defendant's name. Such allegation is the preponderating fact, concluding the court as to such condition in said defendant's agreement while such allegation stands. The evidence is also insufficient to justify said finding, or to show that on or about July 5, 1881, said plaintiff paid said railroad company the sum of \$225.28 *for the use and benefit of defendant*, etc.; but, on the contrary, the evidence clearly shows that plaintiff refused to advance any money for Matthews, or, as he says in his letter, 'to make any debt with him,' and that Matthews, finding that he could not raise the money, voluntarily surrendered all his rights under said limited preference, upon an inchoate agreement, never completed, that Ward would buy the land, taking the contract of purchase in his own

name, and that if defendant paid him the \$225.28, with interest at 1½ per cent. per month within a year, that Ward would assign the contract of purchase to Matthews. The evidence further shows that on July 9, 1881, after Matthews' time to make a contract with the C. P. R. R. Co. expired, that said company made a contract with plaintiff in his own right."

Thereafter the plaintiff moved the court to determine that the defendant had made default in complying with the conditions of the judgment, and that the court cause judgment to be entered for the plaintiff. The defendant opposed this motion, on the ground that on the last day named in the decree he had offered the sum of \$1,192.94 to the plaintiff at his house, and tendered him a deed for his signature, and plaintiff had refused to accept the money, or to sign the deed. The motion was overruled.

From the orders denying the motion for a new trial, and overruling the motion after judgment, the plaintiff appealed.

L. C. Granger and *J. W. Turner*, for appellant.

If any material part of the verbal agreement was to have been reduced to writing, until so done and signed said agreement was inchoate and incomplete. *Ewald v. Lyons*, 29 Cal. 550; *Farmer v. Grose*, 42 Cal. 169; *Fuller v. Reed*, 38 Cal. 99.

H. V. Reardon, for respondent.

It was not necessary that the agreement should have been in writing, although the parties agreed to do so and failed. Such might be the case where the agreement, if verbal, would be void under the statute of frauds; but, the verbal agreement here being valid, the failure to reduce it to writing does not invalidate it. *Ewald v. Lyons*, 29 Cal. 550, and *Farmer v. Grose*, 42 Cal. 169, are not in point.

FOOTE, C. This appeal is from an order denying plaintiff a new trial, and from an order made after final judgment, denying his motion for judgment as prayed for in his complaint. The action was brought by the plaintiff for the recovery of the possession of a certain tract of land, and damages for its detention. The defendant answered, denying all the allegations of the complaint, and setting up facts which went to show him entitled in equity to the title and possession of the land in controversy, which title he claimed the plaintiff held merely in trust for him.

The findings of fact were as follows: "(1) That in May, 1880, the land described in the pleadings herein was the property of the Central Pacific Railroad, and that at said time the defendant made application to said company to be permitted to purchase the same; (2) that in June, 1881, the said company recognized the right of the defendant to purchase said land, and at that time agreed with said defendant that, upon the payment, by said defendant, to it of the sum of \$225.28 on or before the eighth day of July, 1881, it (the said company) would execute to said defendant a contract of sale of said land; (3) that, by the terms of said contract, the said defendant would have five years from and after the eighth day of July, 1881, in which to make payment of the balance of the purchase price of said land, upon the payment, annually in advance, of the interest on the deferred payment; (4) that on or about the fifth day of July, 1881, the said plaintiff paid said railroad company, for the use and benefit of said defendant, the said sum of \$225.28, and at that time it was verbally agreed by and between said plaintiff and defendant that the contract of sale should be taken in the name of said plaintiff, to be held by him as security for the repayment to him by said defendant of the said sum of \$225.28, with interest thereon at the rate of 1½ per cent. per month, and it was also agreed between said parties that said sum, with the accrued interest, should be repaid in one year; (5) that the contract of sale of said land was made to said plaintiff by said railroad company; (6) that before the expiration of the year in which payment of the said sum of \$225.28, with accrued interest, was

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to be made, the plaintiff, at the request of the defendant, extended said time of payment six months; (7) that before the expiration of the six months, and in the month of July, 1882, and before the expiration of the five years specified in the contract of sale, the said plaintiff advanced and paid to the said railroad company the sum of \$708, being the balance of the purchase price of said land, and received from said railroad company a deed for said land on the eighth day of August, 1882; (8) that the payment by said plaintiff of said sum of \$708 was made without the knowledge of the defendant, and was a voluntary payment on the part of said plaintiff; (9) that said plaintiff never demanded payment of either the sum of \$225.28 or \$708, or both, from the defendant; (10) that the plaintiff never presented to defendant a statement of the amount due from him on the advance as made by plaintiff; (11) that defendant has at all times been ready and willing to repay to said plaintiff the amount due, when ascertained, but said plaintiff has declined and refused to make any statement or accept payment; (12) that in May, 1880, said defendant entered upon said land, and made improvements thereon, and has ever since resided upon said land, and has continued to improve the same, and said improvements were made with the knowledge, consent, and encouragement of said plaintiff; (13) that plaintiff did not purchase from said defendant his rights under the contract of sale with the railroad company."

We think that they were within the issues as made by the pleadings; that they are sustained by the evidence in the record, and are sufficient to uphold the judgment. A similar trust to this was enforced by this court in the case of *Walton v. Karnes*, 67 Cal. 255, 7 Pac. Rep. 676.

The trial court did not attempt to reform any contract made between the parties. It simply undertook and did determine, from all the evidence given upon both sides, what the contract actually was, as both parties to the record had diverse views as to that matter. Although an agreement existed to reduce the contract to writing for the protection of the defendant, yet the fact that it was never done did not have the effect of rendering the contract void, since in the *first* instance it was to have been performed within one year; and, *secondly*, since its extension for six months longer took place prior to the expiration of that year first agreed upon, and after that time was not of the essence of the contract between the parties, as the plaintiff, before the time fixed for its performance, advanced the largest portion of the purchase money for the lands without the knowledge of the defendant, and never afforded him an opportunity to pay the money he owed either by a demand for its payment or any statement as to its amount when it was asked for by the defendant, and refused to accept payment when the defendant was willing to make it.

According to the judgment rendered, if the plaintiff had received the money which was tendered him by the defendant, he would have been reimbursed, principal and interest, for all that he had paid out for the land in dispute for and on account of the defendant. He refused to accept the money thus tendered him, and which was all to which he was equitably entitled, and sought upon motion after judgment to have judgment rendered in his favor as prayed for in his complaint. This the court denied upon the ground that he had refused to accept the money tendered him on the day and in the exact amount ordered by the judgment or decree. And the plaintiff cannot complain; for, if his appeal here shall not be successful, it will still be incumbent on the defendant to tender to and deposit the money with the commissioner named in the decree, before he can obtain a deed to the land which will divest the plaintiff's title thereto.

We do not perceive anything in the affidavits presented on the motion for a new trial affecting the result of this controversy which due diligence might not have enabled the plaintiff to have presented on the trial, nor do we think such evidence would have changed the result.

There is no prejudicial error shown by the record, and the judgment and orders should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment and orders affirmed.

NOTE.

1. In some states, when a conveyance is made to one person, the consideration for which moves from time to time, by parol, for periods less than one year, will not be affected by the statute of frauds. *Donlin v. Bradley*, (Ill.) 10 N. E. Rep. 11; *Harris v. McIntyre*, (Ill.) 8 N. E. Rep. 182; *Springer v. Young*, (Or.) 12 Pac. Rep. 400; *Smith v. Brown*, (Tex.) 1 S. W. Rep. 573; *Bedford v. Graves*, (Ky.) 1 S. W. Rep., note, 537. And such trust results, even though the consideration has been in fact advanced by the grantee for the other person, the grantee holding the title as security for such advances. *Barroilhet v. Anspacher*, (Cal.) 8 Pac. Rep. 804; *Walton v. Karnes*, (Cal.) 7 Pac. Rep. 676. But see to the contrary, *In re Wood*, 5 Fed. Rep. 443; *Bear v. Koenigstein*, (Neb.) 20 N. W. Rep. 104.

2. Where it is expressly agreed that a contract is to be performed within one year, extensions from time to time, by parol, for periods less than one year, will not be affected by the statute of frauds. *Donovan v. Richmond*, (Mich.) 28 N. W. Rep. 516; and, when the party employed has continued from year to year to perform the services, it will be presumed that both parties have assented to the renewal of the contract. *Sines v. Wayne Co. Supt. of the Poor*, (Mich.) 25 N. W. Rep. 485. A verbal lease of land until such time as the lessor shall pay the lessee a certain sum of money is neither an agreement that by its terms is not to be performed within one year from the making thereof, nor an agreement for leasing for a longer period than one year within the meaning of the statute of frauds of California. *Raynor v. Drew*, (Cal.) 13 Pac. Rep. 866.

For further discussion of that provision of the statute of frauds relating to contracts not to be performed within one year, see *Treat v. Hiles*, (Wis.) 32 N. W. Rep. 517, and note.

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BOYLE ICE-MACHINE CO. v. GOULD and others. (No. 11,776.)

(*Supreme Court of California*. July 27, 1887.)

MORTGAGE—OF MACHINERY AND LEASE—RECORDING—PRIORITY.

To secure the price of machinery bought, the purchaser gave his note, secured by mortgage upon the machinery and upon some land which he had leased for 10 years, and upon which he placed the machinery, which mortgage was recorded in the records of mortgages of real estate. *Held*, that a judgment creditor of the mortgagor who purchased the machinery and lease on judgment sale after the recording of the mortgage was in no better position than the mortgagor, and his interest was subject and subordinate to the mortgage.

Department 2. Appeal from superior court, Los Angeles county.

The defendants Gould and Sweeney, in March, 1884, purchased an ice-machine from the plaintiff, and about the same time they leased some land and buildings in Los Angeles for 10 years, for the purpose of carrying on the ice business. The machine purchased from the plaintiff was placed upon these leased premises. Gould then executed two promissory notes to the plaintiff corporation, and both Gould and Sweeney executed a realty mortgage, without acknowledgment, on the leasehold and machinery, as though they owned the land in fee-simple, to secure the payment of the two notes. This mortgage was recorded on the third of May, 1884, in the records of mortgages of real estate in Los Angeles. On the nineteenth day of June, 1884, C. H. Shillaber recovered judgment against the defendant Gould in the superior court of San Francisco, for \$16,000, and costs; that amount having been loaned to Gould to conduct the ice business, and Gould having failed to pay it back at the time agreed. Execution was regularly issued upon said judgment, and sent to the sheriff of Los Angeles, and on the twenty-ninth day of July, 1884, the machinery was sold as personal property upon execution sale to C. H. Shillaber for \$5,000, she being the highest bidder, and the judgment was marked satisfied to that amount; and at the same time the lease was regularly

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assigned to her for a valuable consideration. At this time, C. H. Shillaber had no knowledge of the mortgage. She took possession of the premises and machinery, and leased them; and upon her death, on the eighteenth day of February, 1885, the appellant herein, the defendant Cook, as special administrator of her estate, assumed possession and control of the property. On the twenty-seventh day of October, 1884, the plaintiff corporation brought suit to foreclose its mortgage, and made C. H. Shillaber a defendant, and upon her death the appellant Cook, as special administrator, was substituted as a party defendant in her place. Defaults were obtained against the defendants Gould and Sweeney, but the defendant Cook, as special administrator, answered, setting up as separate defenses the purchase for value, without knowledge of any incumbrance, of the lease by assignment, and of the machinery by purchase on execution sale. A demurrer was interposed by plaintiff to these separate defenses on the ground that the facts stated constituted no defense. This demurrer was sustained, and judgment and decree of foreclosure made, entered, and recorded, and this appeal is taken to this court from that judgment.

Wm. Hoff Cook, for defendant Cook, appellant. *Bicknell & White*, for respondent.

BY THE COURT. We find no error in the record. The demurrer to the answer of Cook, special administrator, was properly sustained. The defendant occupied no position superior to that of the mortgagor, Gould, and whatever interest he acquired by his purchase was subject and subordinate to the mortgage of plaintiff. Judgment affirmed.

73 Cal. 29

GREEN and another v. STATE. (No. 11,169.)

(Supreme Court of California. June 30, 1887.)

1. STATES—SUITS AGAINST—WAIVER OF IMMUNITY.

When the state permits itself to be sued, the case is simply referred to the court to determine whether the claim constitutes a lawful demand against the state, and the only questions for determination are, what has been done, and what are the legal principles by which the responsibility of the state is to be measured, and whether upon these principles the state should be held liable.¹

2. SAME—CONSTRUCTION OF STATUTE—LIABILITY.

By California act approved March 12, 1885, plaintiffs were authorized to sue the state for damages alleged to have been suffered by them by reason of certain canal improvements made by the state, and to have judgment therefor "if it appears upon the trial * * * that damage has been done [to the plaintiffs] by any act for which the state is legally liable." *Held*, that the language of the act excludes the idea that any liability was admitted, or any defense waived, except that of immunity from suit. The state may still interpose the defense that it was engaged as a state in a public work for a common good.

3. CONSTITUTIONAL LAW—EMINENT DOMAIN—"TAKING" FOR PUBLIC USE.

Under the language of the California constitution as it existed prior to 1879, where the state, for public purposes, turns or straightens the channel of a river where it empties into another river, so that the land on the opposite side is, five years afterwards, injured or destroyed by the increased velocity of the current, such damage is not a *taking* of land for public use, and does not entitle the owner to compensation. THORNTON, J., dissenting.

In bank. Appeal from an order of the superior court, Sacramento county, sustaining demurrer to complaint in an action brought by appellants, Green and Trainer, against the state in pursuance of an act of the legislature, approved March 12, 1885, entitled "An act to enable John Hoagland, James Reid, Mrs. Rebecca C. Hoagland, George Cooper, William B. Todhunter, Mrs.

¹ Respecting the immunity of states from suit, see *Lowry v. Commissioners Sinking Fund*, (S. C.) 1 S. E. Rep. 141, and note.

Mary W. G. Van Arsdale, Henry Lienberger, Christopher Green, and Charles Trainer to sue the state of California" to recover damages alleged to have resulted to them in consequence of the straightening of the channel of the American river at its mouth or point of confluence with the Sacramento river, by the city levee commissioners of the city of Sacramento, done by them in the year 1862, in pursuance of an act of the legislature entitled "An act concerning the construction and repair of levees in the county of Sacramento, and the mode of raising revenue therefor," approved April 9, 1862. St. 1862, p. 151. The straightening of the American river is alleged to have been done in the year 1862. The damages resulting to the lands, etc., of appellant therefrom, are alleged to have occurred December 25, 1867. That the appellant owned lands on the west bank of Sacramento river, in Yolo county, and opposite the mouth of the new-made channel of the American river, through which the waters of said river were conveyed into the Sacramento with such force and volume as to press the waters of the Sacramento against its west bank, cause them to break over and through the natural and artificial barriers there, and overflow, undermine, and wash away the lands of appellant, etc.

The grounds of demurrer assigned were: (1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; (2) that the complaint herein does not state facts sufficient to constitute a cause of action; (3) that plaintiffs have no authority to sue the state, and the act of the legislature approved March 12, 1885, authorizing them to sue, is unconstitutional; (4) that whatever cause of action is stated in the complaint is barred by the provisions of sections 336, 337, 338, 339, 340, and 343, Code Civil Proc.

A. L. Hart and C. T. Jones, for appellants. E. C. Marshall, Atty. Gen., and John T. Carey, for respondent.

TEMPLE, J. This appeal has already been twice decided,—once in department, (11 Pac. Rep. 602,) and once by the court in bank, (12 Pac. Rep. 683.) In each decision the judgment was affirmed on the authority of *Green v. Swift*, 47 Cal. 536. The court held that, inasmuch as the question was there determined by the highest judicial tribunal existing under the former constitution, and as the former constitutional provision involved has been changed, they would not reconsider the conclusion there reached.

The last rehearing was granted because the court was impressed by the positive and confident assertion of counsel that the court had entirely misconceived or misunderstood the point upon which appellants mainly relied. Counsel asserted: "It is not and has not been contended that the act authorizing the commencement of the action against the state operated to create any new liability on the part of the state, or any which had not previously existed, nor is it contended that the act of March 12, 1885, amounted to a concession of the state's liability." It is said: "The real point upon which appellants rely is that when the state authorizes itself to be sued, and there is no statutory or constitutional provision fixing a different liability, its measure of responsibility is to be determined by the same rule as that which determines the liability of one of its own citizens."

Properly understood, we accept this rule as correct. A state cannot be sued, because it is sovereign. It is supposed that one has but to make his grievance known; and, if he has a lawful demand against the state, it will at once be satisfied. But, when the state permits itself to be sued, the matter is simply referred to the courts to determine whether the claim does or does not constitute a lawful demand against the state, and in such a case the only questions for the determination of the courts are, what has been done, and what are the legal principles by which the responsibility of the state is to be measured, and whether, applying these principles, the state should be held responsible. It consents to go before its courts, and permit the claim

against it to be determined upon those settled rules of law upon which the responsibilities of ordinary parties litigant are determined; that is, as already stated, whether it has committed the act complained of, and, if so, whether, according to established rules of law, it is responsible in damages.

Appellants contend that the liability of the defendant should be that of a citizen who straightened a stream on his own farm, diverting it from its natural channel in such manner as directly to produce the injury. But why? Such is not the fact. It was legally possible that the state should have been a proprietor, and that as such it should have straightened the stream. In such a case, no doubt, those considerations would determine the liability. But what is there in the act to force the state to trial upon an assumed case which is not true? If it had been a proprietor merely, it might have defended as such, and perhaps have claimed some right with reference to the property of defendant; but having in fact no other claim than that it is a state, and was engaged in a public work for the common good, if it cannot set that up because it waived its sovereignty so that it could be sued, then it must admit that it is without defense, and the act must be considered a concession of the state's liability, which appellants say they do not claim.

Some force must be given to the language of the act which expressly refers the matter to the courts to ascertain if it is legally liable. The language is: "If it appears upon the trial of any said actions that damage has been done to the plaintiff by any act for which the state is legally liable," etc. This language industriously excludes the idea that the liability was admitted, or that any legal defense was waived except that of immunity from suit. If, as is practically claimed, it waived not only its sovereignty, so that it could be sued, but also its only possible defense, that as a state it was engaged in a public work for the common good, it is difficult to see how any question of liability was involved to be referred to the courts.

It now remains to consider whether, under the settled rules and maxims of law, damage, such as the plaintiffs allege they have sustained, can be recovered. We are not, however, to approach this question admitting that the state is a wrong-doer. It is not to be assumed that the liability is that of one who, without claim of right, has changed the course of a stream and washed away the land of another. The complaint avers that the canal was a public work, constructed by the state for public uses. Is damage like this, occasioned by such work, actionable?

The canal was on the opposite side of the river to plaintiffs' land, about 150 yards above. The width of the river is not given, but we know the Sacramento to be a large, navigable stream. The work did not approach the land of plaintiff within 200 or 300 yards. There was no appropriation, occupation, or use of the land. The damage did not occur until five years after the work was completed. It could not have been known that any such injury would follow. The state could not then have condemned the land, and, admitting that it could, the damage could not have been determined. It is held that, to take land, compensation must be made, or at least provided in advance. Furthermore, a law which provides for a taking of private property for a public use without making provision for such compensation is void. Here, then, the state could not take, by any lawful method, what it is now contended, for the purpose of holding it liable for damages, it did in fact take at the time the work was constructed.

It is evident that those cases (if there be such) which hold that mere consequential damages is a taking within the limitation upon the power of eminent domain, use the word in an unusual and extended sense, and the reason for such extended sense is not hard to find. Of course, primarily the word was used in reference to the necessities of the government to use the property sought. But it has been held that the clause in the constitution, "property shall not be taken without compensation," is not a grant of power, but a lim-

itation. Therefore the state is liable only to pay for property taken for public use. Hence the meaning of the word was extended to cover cases which, though not within the letter of the limitation, were within its spirit and meaning.

Most of the cases, however, in which it has been held that property so damaged is taken to that extent, are cases of corporations engaged in the public service in the sense that they can be authorized to use the power of eminent domain to condemn land, but yet which are engaged in business for the gain and profit of their stockholders. It is merely held here that the delegation of the power of eminent domain does not relieve the corporation from ordinary liability for damages caused by carrying on its business. It was granted the power to take, because of its public utility, but that did not confer the right to damage. Though performing a public service, it is yet not the state, which only acts for the public good, and which is only responsible as provided in the constitution.

If there can be found a case in the books which holds that under such facts as are alleged in this case the state is liable, our attention has not been called to it. The damage is plainly not the natural consequence of the work which could and ought to have been anticipated and expected as the result. It was remote and consequential,—a purely incidental and unexpected effect. There was not enforced occupation of the property or interference with it. The owner was left in full possession, and there was done to the land or left upon it nothing to obstruct its use.

The case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, is most relied upon, and it is a case by which the right of the parties here may well be tested; for the opinion in that case seems to admit that the doctrine there announced, if not opposed to the current of authority upon the subject, at least modifies the rule as to the particular circumstances of that case. It is admittedly an extreme case in that direction. The court there says, speaking of this very point: "We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked that for a consequential injury to property of the individual, arising from the prosecution of improvement of roads, streets, rivers, and other highways, for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those states. But we are of the opinion that the decisions referred to have gone to the uttermost limit of judicial construction in favor of this principle, and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, and other material, or by having an artificial structure placed upon it, so as to effectually destroy or impair its usefulness, it is a taking."

It is evident there is nothing in this case in conflict with the doctrine of *Green v. Swift*. In the case from 13 Wall., a dam was built, which caused the water to continuously and permanently cover the land of plaintiff. If it was physically and permanently occupied by a foreign body, placed there by the defendant when the dam was built, it was easy to ascertain how much would be thus occupied. It was the natural, certain, and immediate consequence of the act. The land was really used by the defendant. There was no such state of affairs here. But that court has itself declared the case of *Pumpelly v. Green Bay Co.* to be an extreme case, and explained, if it has not modified, its meaning. The case of *Transportation Co. v. Chicago*, 99 U. S. 635, was an action on the case for damages sustained by reason of the construction of a tunnel by the city, under the authority of an act of the legislature. After saying that no action would lie at common law, the court says: "The decisions to which we have been referred were made in view of

magna charta, and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair their use, are universally held not to be a taking within the meaning of the provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him a right of action. This is supported by an immense weight of authority. Those who are anxious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542, and notes. The extreme qualification of the doctrine is to be found perhaps in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, and in *Eaton v. Boston, C. & M. R. R.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a taking. In those cases there was a physical invasion of the real estate of the owner, and a practical ouster of his possession. But in this case there was no such invasion. No entry was made upon the plaintiff's lots. All that was done was to render for a time its use more inconvenient. The present constitution of Illinois took effect on the eighth of August, 1870, after the work of constructing the tunnel had been substantially completed. It ordains that private property shall not be taken or damaged for public use without just compensation. This is an extension of the common provision for the protection of property."

The case of *Eaton v. Boston, C. & M. R. R.*, commented upon in the above extract is a very elaborately considered case, and strong ground was taken in favor of the proposition that, when property is damaged in any way, it is taken within the meaning of the constitutional limitation. There the injury was more like that complained of here than in the other cases. After a very full discussion and citation of authorities, the learned judge says: "The defendants do not stand in the position of public bodies constituted for the sole purpose of executing a public trust or duty, in the performance of which they have no other interest than that which every citizen has. True, the public benefit may be so promoted by works authorized to be made by such corporation that the property of individuals taken by them by virtue of their charters may be deemed to be taken for public use within the constitutional provision on that subject. Still they exercise their corporate privileges under a grant of the legislature conferring upon them specific powers for their own direct and private advantage." "They are trustees of public interests for their own benefit." "The defendants voluntarily accepted their charter with a view to their private emolument, and do not occupy the position of a municipality, invested, without their consent, with powers to be exercised solely for the public benefit." That is to say it is carrying on business for private gain, and should be held responsible for injuries resulting from its mode of doing business, like any one else.

Now, these are the extreme cases upon this subject. In each case it is expressly said that the weight of authority is apparently the other way. Neither case is inconsistent with the conclusion arrived at in *Green v. Swift*. Our constitution has now been amended so as to require compensation for property taken or damaged. This is itself an admission that property simply damaged is not taken. The question as here presented is no longer a vital one as to constitutional construction. We still adhere to our former opinion.

Coming to the conclusion we have, it has not been deemed necessary to discuss the objections to the act under which the action is brought, on the ground of unconstitutionality. Had we determined that it was intended to allow the plaintiffs to recover damages for which the state was not legally liable, it would have been necessary to inquire whether the act did not give cause of action where none existed before, and whether this were not a gift prohibited by section 31, art. 4, Const.

We have assumed merely that the act intended to refer to the courts the inquiry whether the state was liable according to the rules and principles of law applicable to the subject. That is practically, in this case, whether the damage is a *taking* within the constitutional limitation. This involves the assumption that the non-liability of the state does not depend upon its immunity from suit, but upon the nature of the injury as remote and consequential. There are careless expressions in some of the opinions which seem to indicate that the non-liability did depend upon the fact that the sovereign cannot be sued. But this is plainly contrary to the tenor and *rationale* of all the opinions, including those in which the expressions are used, which all make the solution turn upon the inquiry as to whether the damage was a taking of private property for public use, and therefore one for which the state must pay under the limitation. If we suppose a valid contract with the state under which materials have been furnished to the state for which no appropriation has been made, no one would hesitate to say that the state was legally liable; and, if it declines to pay, all would agree that it took advantage of its immunity from suit to avoid a legal obligation. See *Bass v. State*, 34 La. Ann. 500.

Judgment affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

McKINSTRY, J., (*concurring*.) I concur in the judgment. I concur in Mr. Justice TEMPLE's construction of the act of March 12, 1885, and in his conclusion that the act did not deprive the state of its right to rely upon any defense to this action which it had as *the state*, other than the right to claim that the state could not be sued, and that the act does not purport to do so. I decline to express any opinion as to whether the plaintiffs' property was "damaged." Section 14, art. 1, Const. 1879. The property of the plaintiffs, if "taken" at all, was taken prior to the adoption of the present constitution. I adhere to the views expressed herein in department 1, 11 Pac. Rep. 602.

The question whether the damages caused by the work done under the direction of the commissioners, appointed by the act of 1862, was a taking of private property, within the meaning of the provision of the former constitution prohibiting a taking of private property without compensation, was fully decided, adversely to such contention, by the highest judicial tribunal under that constitution. The questions involved in the judgment in *Green v. Swift*, 47 Cal. 536, must be considered as closed upon the doctrine of *stare decisis*.

THORNTON, J., (*dissenting*.) I dissent from the foregoing opinions. I think there was a taking of the property of plaintiffs here for which the state was legally responsible. See cases cited in notes to section 243, Gould, Waters.

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TODHUNTER v. STATE. (No. 11,283.)

(*Supreme Court of California*. July 2, 1887.)

In Bank.

BY THE COURT. The judgment of the court below is affirmed upon the authority of *Green v. State*, *ante*, 610, (No. 11,169, opinion filed June 30, 1887.)

THOMASON v. ASHWORTH. (No. 12,094.)

(*Supreme Court of California*. July 2, 1887.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS.

The California act of April 1, 1872, in relation to street improvements in the city and county of San Francisco, providing a general plan of street work by contract,

such contract to be entered into and the work performed before the collection of the money, was repealed by section 19, art. 11, Const. Cal. 1879, providing that "no public work or improvement of any description whatsoever shall be done or made in any city, * * * the cost and expense of which is made chargeable, or may be assessed, upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

2. SAME.

The California act of March 18, 1885, providing for work upon streets, sewers, etc., within municipalities, is constitutional, although it does not provide for the assessment and collection of the cost before the performance of the work.

3. CONSTITUTIONAL LAW—SPECIAL LAWS.

That act is not a special law within the meaning of section 6, art. 11, Const. Cal., enacting that "corporations for municipal purposes shall not be created by special laws, but the legislature by general laws shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns," but is a general law, and therefore constitutional and in full force within the city and county of San Francisco.

4. SAME—AMENDMENT.

The amendment of section 19, art. 11, Const. Cal., proposed by the legislature of 1883, and adopted by vote of the people in 1884, removing the restriction as to performing street work before the collection of the money, and leaving it to the legislature to pass such laws in that regard as it might deem expedient, subject only to such prohibitions as might exist regarding the application of such laws to existing charters, was constitutionally adopted, notwithstanding that such amendment was entered at large on the journal of the house, (Const. Cal. art. 18, § 1,) only by an identifying reference.

McKINSTRY and SHARPSTEIN, JJ., dissenting.

In bank. Appeal from superior court, San Francisco.

J. C. Bates, John F. Swift, and J. M. Wood, for appellants. *George Flournoy, Jr., and T. V. O'Brien*, for respondent.

THORNTON, J. Application for writ of mandate to the defendant, as superintendent of streets, commanding him to enter into and sign a contract under the street law for the city and county of San Francisco, passed April 1, 1872. The contract, the execution of which is sought to be compelled herein, is one to be entered into in advance of the assessment and collection of the money to be paid for the work done under it, under the provisions of the act of 1872, and in this regard this act may be held to be done away with by the provisions of the constitution. This we consider as settled in this court by the cases of *McDonald v. Patterson*, 54 Cal. 245, and *Donahue v. Graham*, 61 Cal. 277.

Since the adoption of the constitution, and on the sixth of March, 1883, the legislature enacted an act entitled "An act to provide for the improvement of streets, lanes, alleys, courts, places, and sidewalks, and the construction of sewers within municipalities." St. 1883, p. 32. This act was passed in conformity with the portion of section 19 of article 11 of the constitution relating to works on and improvement of streets, which is quoted in the opinion of the court in *McDonald v. Patterson*, *supra*, and repealed all acts or parts of acts in conflict with any of its provisions. See section 36 of the act above cited, (St. 1883, p. 47.) Thus such parts of the act of 1872 which remained in force after the adoption of the constitution as are in conflict with the act of 1883 were repealed by it.

Subsequently, and on the eighteenth day of March, 1885, a statute was passed and approved, with a title substantially the same as that of the act of 1883. St. 1885, p. 147. By the thirty-sixth section of this act, the act of 1883 was repealed, except as to work commenced under it prior to the passage of the repealing act. St. 1885, p. 165. The last-named act, like the act of 1872, did not provide for the assessment and collection of the money to pay for the street work done under it, until after the work was completed; and in this respect it was violative of section 19 of article 11 of the constitution as that

section was originally passed. But according to the ruling of this court in *Oakland Paving Co. v. Tompkins*, 12 Pac. Rep. 801, the section of the constitution above mentioned had been amended before the act of 1885 was passed, by which the objection of unconstitutionality to the latter act, on the ground that it was violative of the section referred to, was removed. We consider the decision in the case just above cited as settling finally the question as to the constitutionality of the amendment of section 19 above referred to.

But there is another objection urged to the constitutionality of the acts of 1883 and 1885. It is argued that, under section 6 of article 11 of the constitution, neither of the acts above mentioned could become laws, for the reason that they are special laws, and therefore beyond the power of the legislature to enact; and, further, that the legislature did not have the power to pass a general law affecting the charter of the city and county of San Francisco, without the consent of such city and county.

The sixth section of article 11 of the constitution is as follows: "Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

The entire legislative power is by the constitution vested in the senate and assembly, designated as the legislature. Any restriction of this power must be found in the constitution of the state, or in the constitution of the United States, and laws passed in pursuance thereof. Our attention has been called to no restriction in the constitution of the United States or the acts of congress in regard to the question to be herein considered. The restrictions in the sixth section of article 11 are as follows: (1) Corporations for municipal purposes can only be created by general laws. Prior to the adoption of the present constitution, the legislature could create a corporation for municipal purposes by a special law. This cannot be done since the present constitution became operative. (2) Prior to the adoption of the present constitution the legislature was not only competent to create a corporation for municipal purposes by a special law, but could compel a community of persons to accept a charter so created. As the constitution now stands, and since its adoption, a corporation can determine by a vote of its electors whether to accept a new charter or not, and such new charter or organization is accepted only when voted for by a majority of its electors voting at a general election. (3) A charter cannot be amended by a special law. But, while these restrictions exist, the legislature has the power to control the charters of all corporations by general laws. The restrictions above pointed out do not at all affect the power to control or regulate the charters of all municipal corporations by laws general in their character. This power is expressly recognized by the last clause of section 6 above cited, where it is declared that "cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

On reading the constitution it will be observed that its framers were particularly careful to restrict the legislature from passing local or special laws. See article 4, § 25; article 11, §§ 4, 5, 11, 12, 14; article 12, §§ 1, 5, 11; and article 10, § 11. Where legislative powers are conferred on counties, cities, towns, or townships by the constitution, such powers are still made subject to and liable to be controlled by general laws.

So it will be observed that the meaning attributed to the last clause of section 6 of article 11 is in accordance with the general plan on which the constitution is framed; that is, the inhibition of special or local legislation, and the allowance of general legislation. Evils constantly arise from special legislation,—and such evils it was the intention of the constitution makers to prevent. The evils of general legislation are such as spring from the imperfection of all things human and the abuse of power; but the abuse, or liability to abuse, affords no argument against the existence of such power. To prevent such abuses reliance must be had on the intelligence and fidelity of the representatives of the people, their accountability to their constituents, and the power to repeal statutes when found to be hurtful.

The acts of 1883 and 1885 include all municipal corporations in the state. This plainly appears from the first section of each act. Is it not, then, a general law? As the foregoing statutes each apply to all municipal corporations in the state, if they are not general laws it would be impossible to frame one which is general. The above view as to a general law accords with *Brooks v. Hyde*, 37 Cal. 376; *Wheeler v. Philadelphia*, 77 Pa. St. 348; *Kilgore v. Magee*, 85 Pa. St. 401; *Knickerbocker v. People*, 102 Ill. 218; *Hymes v. Aydelott*, 26 Ind. 431; *Chicago R. Co. v. Iowa*, 94 U. S. 155; *McAulinch v. Railroad Co.*, 20 Iowa, 343. In *Knickerbocker v. People*, *supra*, it is said: "A law applicable to all counties of a class, as made or authorized by the constitution, is neither a local nor special law. If it applies to all the counties of a class authorized by the constitution to be made, it is a general law, and whether there may be few or many counties to which its provisions will apply, is a matter of no consequence." It is said in *Wheeler v. Philadelphia*, above cited: "A statute which relates to persons or things as a class is a general law."

It is argued that, according to the views herein expressed a city may have its charter totally changed without its consent. This is a proper deduction from the ruling herein, but this cannot be done by a special or local law applicable alone to a particular charter. The result can only be reached by a general law affecting all municipal corporations, or may be all of a class, and we can see no probability that a city can be injured by general legislation. When such legislation is allowed, corporations are put on the same footing with individuals as to protection against special or local legislation, and liability to be affected by general legislation. Whatever the danger may be from such legislation, the constitution is so written as to allow it, and thus we must interpret it.

It follows from the above—*First*, that the act of 1872 was entirely done away with by the constitution; *second*, that the act of 1883 was constitutional when passed, and repealed all portions of the act of 1872 in conflict with it; *third*, that the act of 1885 is a constitutional act under the constitution as amended; that the act of 1885 repealed the act of 1883, and has been and is now in force since its passage, on the eighteenth day of March, 1885.

The judgment must be affirmed. So ordered.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.

MCKINSTRY, J. 1. I dissent. Section 19 of article 11 of the constitution of 1879-80, as the same stood prior to its amendment, reads: "No public work * * * shall be done or made, in any city, in, upon, or about the streets thereof, * * * the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to the benefits on the property to be affected or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized."

I have heard or read no argument which ought to induce a modification of my views with respect to the non-effect of the provision of the constitution above quoted upon the street law of 1872; the same being part of the consolidation laws of San Francisco. I adhere to the views expressed in the dissenting opinion in *Donahue v. Graham*, 61 Cal. 276, and still believe the provision of the constitution prohibits the legislature, created by the constitution, in any general law for the future organization of municipal corporations, passed in pursuance of the mandate in the first sentence of section 6, art. 11, from enacting that public improvements may be made or street work done until after the cost shall have been estimated and assessments therefor levied and collected. The prohibition also extends to provisions for street work, without previous assessment, in any charter framed for San Francisco in the manner laid down in section 8, art. 11.

Nor is this court estopped from reconsidering the question passed on in *Donahue v. Graham*. The conditions which would seem to prevent a review of *Green v. Swift*, 47 Cal. 536, were more formidable than any obstacles herein apparent to a reconsideration of *Donahue v. Graham*. A change in the constitution had extended and enlarged the provision prohibiting the taking of private property for public use without compensation. *Green v. Swift* did not purport to construe the meaning of a constitutional clause ("private property shall not be damaged without due compensation," etc.) which did not then exist. The decision applied only to events which occurred prior to the enactment of that clause, and it was made by the supreme court which expired with the constitution that gave it life, and whose provisions it interpreted. Except as to the parties in interest, no consequence of the judgment in *Green v. Swift* flowed this side of the adoption of the present constitution. Yet in *Green v. State*, ante, 610, (No. 11,169, filed June 30, 1887,) this court again inquired into the meaning of a section of the defunct constitution which, in *Green v. Swift*, had been construed by the appellate tribunal created by that constitution.

No property rights could have grown up under the judgment in *Donahue v. Graham*. Surely, there is no judicially recognized application of the doctrine of *stare decisis* which precludes us from returning to the true interpretation of a provision of the constitution, (set aside and annulled by the people, and the people's representatives, since the decision in *Donahue v. Graham*, and perhaps because of that decision,) and by the misinterpretation of which by this same court we have been led into the grave dilemma that we are called on to hold, either that there is no law for the reparation of streets in the great city of San Francisco, or that the legislature may change the entire chartered government without the consent of the people of the city and county.

Moreover, section 19 did not in terms purport to repeal any part of the charter of a city previously existing, nor did it supply a method of estimating the cost of street work within a city, or of assessing private property therefor. The constitution, even if self-operating, only prohibited in the future the letting of a contract for or the commencement of a public work or improvement, unless, etc. It might be argued, plausibly at least, that the prohibition was pointed at future action under a charter, and did not repeal the portion of the charter which originally authorized such action. No portion of the charter having been repealed when the constitutional prohibition ceased, street work could be proceeded with in the manner prescribed in the charter. *Board Com'rs Funded Debt, etc., v. Board Trustees*, 12 Pac. Rep. 224.

2. Sections 6 and 8, art. 11, of the constitution, read as follows:

"Sec. 6. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns

heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws."

"Sec. 8. Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state, by causing a board of fifteen freeholders, * * * to be elected, * * * whose duty it shall be * * * to prepare and propose a charter for such city. * * * Such proposed charter * * * shall be submitted to the qualified electors of such city at a general or special election; and, if a majority of such qualified electors voting thereat shall ratify the same, it shall thereafter be submitted to the legislature for its approval or rejection as a whole, *without power of alteration or amendment*; and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city, or, if such city be consolidated with a county, then of such city and county. * * * The charter so ratified may be amended at intervals of not less than two years, by proposals therefor, submitted by legislative authority of the city to the qualified voters thereof, * * * and ratified by at least three-fifths of the qualified electors voting, and approved by the legislature as herein provided for the approval of the charter."

The mandate that general laws shall be passed under which corporations may be formed is of modern date. The provision in state constitutions requiring such laws, and prohibiting special charters, was manifestly inserted to prevent abuses which experience had proved clung about the legislative practice of creating corporations and granting franchises by special act. Bouvier says of legislative charters of corporations that a charter is an act of the legislature creating a corporation. Strictly speaking, a general law under which they may be formed does not *create* the corporations. It provides the mode by which they may subsequently be brought into being. After a corporation is formed, the general law may not improperly be said to be the charter defining its powers, but the legislature does not confer the franchise directly upon individuals, or on the community. It is derived indirectly through the subordinate agency of the incorporators themselves. The distinction is immaterial except as it may aid to explain the last clause of section 6, art. 11, Const. It might seem at first glance that "charters framed by authority of this constitution" are spoken of as things different from "cities and towns hereafter organized." But the only section of the constitution which speaks in those terms of *framing charters* is section 8, art. 11, which provides for the election of 15 freeholders to frame a charter for San Francisco, the city in the state containing more than 100,000 inhabitants. It would appear the clause as to "all charters framed," etc., was inserted *ex abundanti cautela*, lest it might possibly be supposed that by framing a charter, and securing its approval by the legislature, the people of San Francisco could remove themselves beyond the control of the general laws of the state. Moreover, all cities and towns organized prior to the adoption of the present constitution, and, in a certain sense, all organized afterwards, were or will be created by charter. The terms "cities and towns organized" and "city or town charters" may be used interchangeably, and are used in the last clause of section 6, art. 11, as designating the same thing. That clause may be read: "And cities and towns heretofore or hereafter organized shall be subject to and controlled by general laws;" the words: "and all charters thereof framed or adopted by authority of this constitution" being omitted as not actually modifying the sense.

8. I do not understand it to be seriously disputed that the street law of 1872 constituted a very material portion of the charter of San Francisco as

the same existed when the present constitution was adopted. An independent act creating commissioners to fill up sloughs within the limits of a city, and an act creating park commissioners, have been held to be corporations for municipal purposes. *St. Louis v. Shields*, 62 Mo. 247; *People v. Salomon*, 51 Ill. 37. Municipal improvements, including work done "upon, in, or about" the streets, are matters particularly within the province of the city government, and have been so treated and considered. Provisions for street work, to be based on municipal ordinances, and done under the supervision of a street superintendent elected by the qualified voters of the city and county, were inserted in the "Act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof," approved April 19, 1856, and in amendments thereof enacted prior to the act of April 1, 1872, the last act being itself amendatory of the consolidation act, and its previous amendments.

Nor do I understand it to be at all disputed that the street law, so called, of 1885 (supposing that law to be a substitute for the street law of 1883, and the charter provisions as to street work in San Francisco to have been in force after the adoption of the constitution of 1879, or after the repeal of the first sentence of section 19, art. 11, Const.) does annul the material portion of the charter of San Francisco relating to work upon streets.

On the thirteenth of March, 1883, (seven days after the approval of the act "to provide for the improvements of streets," etc., "within municipalities,") an act was approved entitled "An act to provide for the organization, incorporation, and government of municipal corporations." The last act is a general statute providing for the incorporation, organization, classification, and government of cities and towns, and was unquestionably intended to be a compliance with the mandate of the first clause of section 6, art. 11, Const. It provides for the election of a superintendent of streets, and prescribes his duties, which are such as the title of his office would imply. Among the powers of the municipal council is enumerated the power of opening, altering, constructing, repairing, etc., streets, highways, etc., and in subsequent sections is supplied an entire scheme for street work. If both these statutes were valid, the provisions of the act of March 13th were substituted for those of the act of March 6, 1883,—at least so far as street work done in cities and towns organized under the act of March 13th is concerned. This would leave the act of March 6, 1883, operative, if operative at all, only within municipalities organized prior to the present constitution; that is, a law claimed to be "general," because operative upon and within all cities and towns, is operative only upon and within some cities and towns. Will it be contended that the act of March 6, 1883, was intended to apply *only* to San Francisco, and other cities or towns organized prior to the taking effect of the present constitution? Or that, after it was repealed as to corporations subsequently organized, it continued in force as to those organized previously?

At all events, the passage of the act of March 13, 1883, was clearly a legislative recognition that the matter of the construction and repair of streets, alleys, etc., constituted a proper part of the organized government of cities and towns.

4. But the act of *eighteen hundred and eighty-five* was an amendment of the act of March 13, 1883, or an entire revision and consequent repeal of those provisions of that act relating to "work upon streets, alleys," etc., within municipalities formed under the general law. If a general law at all, it was a general law because a law amending a general law for the incorporation, organization, and classification of cities and towns, passed in conformity with section 6, art. 11, Const. It was a substitution of one system of street work for another system. If operative at all, it made an end of the provisions of the general law of 1883, relating to street work. Even if there can be no repeal by implication under the present constitution,—and it has not been so

decided,—yet a statute which, to be of force, must be held to have done away with a former statute, cannot be sustained as operative, while at the same it is held not to amend, revise, or repeal the former statute because not passed in the manner or with the forms required by section 24, art. 4, Const. If the failure to comply with the forms of that section has any effect, its effect is to render the last statute invalid.

Considering the act of 1885 as an amendment or revision and repeal of the act of March 13, 1883, so far as relates to street work, it would be a strange result if, while the general law of March 13, 1883, could not be made operative within the city of San Francisco without the consent of the citizens, expressed in the manner provided in the section 6, art. 11, Const., the law amending and revising the general law became at once binding upon the city and citizens.

5. As we have seen, when, if ever, the city of San Francisco shall organize in pursuance of a charter framed and adopted in the manner prescribed in section 8, art. 11, Const., it will be a city organized after the adoption of the constitution, and will be "subject to and controlled by general laws." Art. 11, § 6. Now, the words "general laws" in the last clause of section 6, whether applied to cities organized before the constitution was adopted or organized afterwards, *must mean precisely the same thing*. Observe how carefully the constitution has guarded against legislative interference with any charter which shall be adopted in the manner provided in section 8. Such a charter (which by section 6 will undoubtedly "be subject to and controlled by general laws," whatever the phrase may mean) can only be amended "at intervals of not less than two years." Each amendment must be submitted to the local electors, and must be ratified "by at least three-fifths of the qualified voters." To become operative it must then be approved by a majority of all the members of the legislature "elected to each house."

Verily, if a new charter, which may be adopted for San Francisco by San Francisco can be amended out of existence by statutes passed in the legislature by a majority composed in no part of members representing San Francisco,—as it may be, if the present charter can be so amended,—the laborious efforts of the constitution makers to prohibit amendments except with the consent of three-fifths of the qualified electors of the city have been of very little avail. With all respect, such a result seems to me *reductio ad absurdum*.

6. The act of 1885, "to provide for work upon streets," etc., "in municipalities," if a general law in any sense, is a general law changing in essential particulars the governmental organization of the municipal corporation known as the city and county of San Francisco. "Cities and towns heretofore organized may become organized under such general laws [those commanded in the same section] whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." Const. art. 11, § 6. If anything is due to the strongest implication, the general laws under which municipal corporations may be formed cannot be made applicable to San Francisco without the consent of the citizens. They cannot be enforced *anywhere* except upon communities which shall first voluntarily subject themselves to them.

In *Desmond v. Dunn*, 55 Cal. 242, this court held that the charters of cities and towns created before the present constitution took effect remain in force in each case until a majority of the electors shall determine to become organized under general laws, or, in the case of San Francisco, to frame a charter for their own government.

7. But, it is asked, is the legislature deprived of all power to amend the corporate organization of a city? Must the people of a city created before the constitution of 1879 suffer under a bad or unfortunate provision in their charter until they organize under the general law, which itself may be inapplicable to their peculiar wants? The constitution provides for a classification of

cities and towns in proportion to population, and it is not to be supposed that the people of any one city or town containing the same population as others of its class are surrounded by such peculiar conditions as to require a different local government. The same question might be asked and the same difficulty urged as a reason for annulling the constitutional prohibition of special statutes creating municipal corporations. It was because it had appeared in the past that special acts amending a particular law creating a municipal corporation were very often *not* sought or desired by the tax-payers and others comprising a majority of the voters that the framers of the constitution prohibited amendments of charters formed before the adoption of that instrument. The constitution declares the public policy, "corporations for municipal purposes ought not to be created by special laws, but ought to be organized under general laws." To prevent confusion, however, and to consult so far the wishes of the people within the limits of corporations already formed, it continues such corporations until the citizens thereof shall choose to come in under the general laws, or, in the case of San Francisco, until a new charter shall be framed in the manner provided in section 8 of article 11. Ever since, if not before, the decision in *People v. Lynch*, 51 Cal. 15, attention has been drawn to the evils of special legislation affecting the government or people of a particular municipality, and it would certainly seem that the framers of the constitution of 1879, and the people who ratified it, intended to prevent all special legislative interference with existing charters, except with the consent of the citizens. This was sought to be accomplished by commanding general laws for the incorporation of cities and towns, just as the former constitution provided for general laws under which private corporations could be formed, and had prohibited special acts creating such. It was not intended that a special charter could be created for a particular municipality under the specious pretense of amending the charter previously created. It was undoubtedly supposed that wise and just legislators could perfect a general and uniform system which would secure an efficient local government to every municipality. If it be true that an amendment of a particular charter may render it satisfactory to the people of an existing city, this is no reason why the people of all other existing cities should be subject to a "general law" changing their charters in a manner which may *not* be satisfactory to them. The argument goes the whole length of demanding that special laws should be passed amending particular charters. It needs but a glance at the special acts for city and town charters passed before the adoption of the present constitution, and the widely different methods for street work—adapted in each case to population and supposed peculiar conditions—to see how violent is the presumption that the citizens of all demand a still different system of street work which disregards any "classification in proportion to population."

8. Whatever may be the meaning of the words "general laws," as used in the latter portion of section 6, art. 11, Const., I think it perfectly clear they do not mean laws which affect, alter, or amend the corporate organization of any city or town created before or after the constitution took effect. As to corporations organized under the general laws for municipal purposes, commanded in the first clause of the section, the expression, as applied to such, if meaning the same thing, would be a mere repetition; for the section has already provided that *such* general laws "may be altered, amended, or repealed." As to a corporate organization for San Francisco brought into existence in the manner laid down in section 8 of article 11, we have seen how prudently that section guards against alterations without the consent of the people. As to the corporations in existence when the constitution was adopted, the "general laws" applicable to them are the same kind of general laws to which corporations formed under general laws for municipal purposes, and any corporation organized in pursuance of section 8, are subject, etc., and by which they are controlled. And section 6 itself provides that corporations existing prior to

the constitution shall be subject to the general laws mentioned in the first part of that section (and, of course, to general laws amending such general laws) only with the consent of the people residing within the territorial limits of such corporations.

What are the general laws mentioned in the last clause of section 6? Cities are composed of citizens, and it seems to me hypercriticism to say that "general laws" which control cities, or to which they are subject, cannot include general laws of the state directly controlling, or to which are directly subject, the people living in a city; the more especially as it appears from the context and other portions of the constitution that the term was not intended to apply to laws which changed the powers or obligations of incorporated municipalities.

State laws have sometimes been said to be general when they apply to all of a class of individuals as distinguished from special laws applicable to an individual. I find it difficult to apprehend that a statute is general, in the sense mentioned, which is not a general statute under which cities may be organized, the alteration of which is reserved to the legislature by the constitution, but which changes the government of two or more cities organized under separate charters. However this may be, the word "general" is not alone employed to distinguish statutes binding on a class of persons from those binding on a single person. Statutes are not merely public or private, and a statute affecting the government of a single city is public. Statutes are general or *local*, having operation throughout the state, or in a particular place or places. The very autonomy of the cities would seem to emphasize the statement that laws operative in the cities alone are *local laws* as distinguished from laws operative everywhere within the territorial limits of the state, whether such local laws are enacted by the state legislature, or by the legislative body of the city within the powers conferred by its charter.

In view of the very extended powers conferred on the municipalities, and in harmony with the policy apparent throughout the instrument, the constitution leaves, as far as possible, the management of matters of local concern with local governments, but declares that the residents of cities must not be deemed to be beyond the control of general laws affecting them in common with all the people of the state. The people of San Francisco owe allegiance to the state, as well as obedience to ordinances within the legislative power granted the city, and they are subject to all general laws of the state. Such are laws relating to the organization of the superior courts, laws defining crimes and civil rights, regulating the mode of contracting,—perhaps all laws which confer rights or impose duties upon all the people, or, it may be, a portion of the people, of the state, but which are not local in that they apply only to the people within particular places less than the whole state.

It may be added that in a certain sense a municipal corporation—not the abstract entity, but the officers thereof—is subject to and controlled by general laws of the character referred to. The local legislature has no power to pass ordinances which conflict with the general statutes of the state, nor any power to pass an ordinance in conflict with the general unwritten law of the state, as an *unreasonable* ordinance, unless, at least, expressly authorized by its charter.

It may be that the foregoing enumeration of "general laws" operative everywhere within the boundaries of the state, as distinguished from laws local in their character because of force only within the cities, is imperfect or even inaccurate. I am only required, however, to say that the act of 1885 is not such a general law.

The question "What are not general laws?" (within the meaning of the last clause of section 6, art. 11, Const.) was fully answered by Mr. Justice SHARPSTEIN in *Staude v. Election Com'rs*, 61 Cal. 325, where that learned judge

said: "It is clear to my mind that, when the constitution declares that cities organized before its adoption shall be subject to and controlled by general laws, it means laws as to matters not specifically provided for in charters which existed at the date of the adoption of the constitution. Otherwise they would be subject to and controlled by general laws passed for the incorporation of cities and towns, without having first voted to organize under such laws; and that was the contention of plaintiff's attorney in *Desmond v. Dunn*, 55 Cal. 242."

SHARPSTEIN, J. I concur in the views expressed by Mr. Justice MCKINSTRY.

73 Cal. 125

LAMB v. RECLAMATION DIST. NO. 108. (No. 11,057.)

(*Supreme Court of California*. July 13, 1887.)

1. RIPARIAN RIGHTS—LEVEES—OVERFLOWS.

A municipal corporation organized and existing for the purpose of reclaiming swamp lands granted to the state of California has the right to erect a levee on the bank of the Sacramento river to protect such lands from overflow at times of high water, and is not liable in damages to an owner of land on the other side of the stream for an overflow caused by said levee.¹

2. SAME.

Whether the damming, caused by a levee, of a slough through which water flowed from the Sacramento river at times of high water, violates the law that one land-owner on "a water-course" cannot dam it so as to flood the land of his neighbor above, cannot be questioned in an action brought by the owner of land on the river two miles below said slough.

3. EMINENT DOMAIN—"PUBLIC USE"—OVERFLOW CAUSED BY LEVEE.

An overflow of lands on the Sacramento river, caused by a levee built on the other side of the stream, two miles above the lands flooded, when the overflow comes seven years after the erection of said levee, is not a taking for public use so as to entitle the owner to compensation therefor.

In bank. Appeal from superior court, Colusa county.

J. C. Ball and *A. L. Hart*, for appellants. *A. C. Adams*, *Jackson Hatch*, and *W. B. Treadwell*, for respondent.

MCFARLAND, J. This is an action to abate and remove as a public nuisance a levee erected by defendant along the west bank of the Sacramento river, and across a place on said bank called "Wilkins' Slough," and to recover damages for the overflowing of plaintiff's land on the other side of the river, about two miles below, alleged to have been caused by said levee. The case was submitted on certain parts of the pleadings taken as true. The court below gave judgment for defendant, and plaintiff appeals from the judgment.

The Sacramento river is a large navigable stream, having its sources near the boundary line between the states of Oregon and California, and running for several hundred miles through the northern and central parts of the latter state to the bay of San Francisco. In times of high water it frequently overflows its banks. A great deal of the adjoining land is lower than the banks of the stream; and at times of overflow the surplus water runs down to and over such land, where it remains until it evaporates, or later in the season, when the river is at a lower stage, runs back into the stream. The water at some places pours over the entire bank in continuous sheets for considerable distances; but more commonly finds its way out through the lower parts or depressions of the banks, which, of course, have gradually been worn down deeper and wider by the action of the water. These short depressions by which the water gets through the banks into the lower lands beyond are called "sloughs," and Wilkins' slough, mentioned in the complaint, is quite a large

¹ See *Montgomery v. Locke*, (Cal.) 11 Pac. Rep. 874, and note.

depression of that character, and affords means of escape, during overflows, for a considerable quantity of water. The lands thus overflowed, and for the protection of which respondent claims the right to maintain said levee, are a part of that large body of swamp and overflowed land acquired by California from the United States by virtue of the act of congress of September 28, 1850, generally known as the "Arkansas Act."

The respondent, Reclamation District No. 108, is a public corporation organized and existing under the laws of this state relating to swamp and overflowed lands. The district includes over 40,000 acres in the county of Yolo, and about 33,000 acres in the adjoining county of Colusa, all lying west of the Sacramento river. The district having been regularly and legally organized, and engineers employed by its trustees having performed their duties as required by law, the plan of its proposed work, with estimates of cost, expenses, etc., was duly adopted and reported to the boards of supervisors of said two counties on the twenty-eighth day of September, 1870. The plan was, in substance, by a continuous levee, wherever necessary, along and upon the west bank of the river from the Upper Sycamore slough to Knight's Landing, a distance of over 40 miles, and which, of course, included the filling of all depressions or sloughs, to prevent the water of the river from flowing over its banks and flooding the lands of the district. It mentioned by name the place called "Wilkins' Slough." The respondent thereafter commenced to construct its works in accordance with the said plan, and completed the same on the first day of December, 1872; and from that date it has continuously maintained its levee, except that in 1879 that portion of it which was across said Wilkins' slough was partly washed away, but was immediately—that is, in the next month—rebuilt to its original height. It is admitted that this levee, including that part of it constructed across Wilkins' slough, is necessary and indispensable to the protection of the lands of said district from overflow; and that, without such protection, the overflow would render said lands unfit for cultivation, and uninhabitable.

The complaint, taken as true, avers in substance that on December 22, 1879, plaintiff was the owner and in possession of a tract of land fronting on the opposite or east side of said Sacramento river; that on the twenty-third of said month he resided on said land with his family; that it was a safe and suitable dwelling-place, and valuable for agricultural purposes; and that, on or about the twenty-sixth of said month, he had prepared, cultivated, and seeded with wheat about 200 acres of said land, and that the remainder was used for alfalfa and grass. It then describes the said Wilkins' slough as situate about two miles above said land, and on the west side of the river, and avers that, when unobstructed, it divides the water in times of flood, and carries large quantities of it to the south-westward, away from the land of plaintiff, to a natural basin. Further averments are that on or about January 15, 1880, defendant completely obstructed said Wilkins' slough by placing a dam and levee across its head, and thus prevented any water from passing into or through the same, and that by reason of said obstruction, on or about the sixth day of April, 1880, the water did so accumulate in said Sacramento river as to overflow, and did overflow the easterly bank thereof, and did flood and inundate plaintiff's said land on said easterly bank, and did destroy his said growing wheat, grass, fences, etc., to his damage in the sum of \$5,000. It is further averred that defendant continues, and intends to maintain, said levee, and that in times of flood it will cause the easterly bank to be overflowed, and plaintiff's land to be damaged as aforesaid.

It does not appear when or from what source plaintiff got title to or possession of his land. It only appears that he was there in December, 1879, and that the alleged damage occurred in April, 1880, which was between seven and eight years after the erection of the levee.

The questions to be determined in the case are: Did respondent have the

right to construct the levee which it completed in 1872, notwithstanding the damage which was caused thereby, several years afterwards, to appellant's land, and has it the right to maintain said levee notwithstanding any damage which it may possibly or probably cause to said land hereafter, as apprehended by appellant and described in his complaint? It may be remarked that the conclusion that respondent had or has no such right does not follow from the mere fact of damage to appellant's land. The phrase "*damnum absque injuria*" is just as well recognized as a statement of a legal condition, as the maxim *sic utere*, etc., is as the statement of a limitation of rights to property. And the words "*damnum absque injuria*," include a direct declaration in terms of the proposition that there *may be* damage without legal injury. Therefore the reiteration of one or the other of these Latin phrases affords but little aid in the solution of any question. This is well expressed in the text of Wood's Law of Nuisances, (page 21,) as follows: "But, when no right has been violated, it cannot, by any process of reasoning, be established that there is a legal injury or damage. The instances of *damnum absque injuria* are very numerous, and are always injuries that result from a lawful act, for the law never recognizes an injury arising from a lawful act as imputing damages. * * * In giving force to the maxim *sic utere*, etc., the courts are always met by the right of parties to use their own property in every reasonable way, and neither justice nor public policy would tolerate the idea that a person should be made liable for damages resulting from a reasonable use of his property. Therefore, in determining whether or not an injury has been done amounting to a nuisance, it is necessary to balance the rights of the parties, in view of all the circumstances, and say whether or not the use of the property in the manner complained of is reasonable, and in accordance with the relative rights of the parties."

The real question in such cases is: Had the party sued the right to do the thing complained of? Respondent has, at least, as much right to maintain the levee as a natural person owning lands of a character similar to those of respondent's district would have; and its counsel bases its defense (1) upon the right of a natural person to protect his lands from overflow, upon the principle of self-defense, as held in *Rex v. Commissioners*, 8 Barn. & C. 355; and (2) upon its right as a public municipal corporation organized under the laws of the state, exercising the police powers of the state, and acting as a public instrumentality of the state in providing for the public welfare, and in complying with the conditions upon which the grant of swamp and overflowed lands was made to the state by the general government.

In *Rex v. Commissioners*, above noticed, the facts were these: The commissioners of the levels, for the purpose of protecting the property intrusted to their care against the inroads of the sea, erected certain groynes and other works which caused the water to flow with greater force against the lands of one Cosens, and to injure them, and to gradually wash a portion of them away. The lands of Cosens fronted on the sea-shore, and were adjoining and to the eastward of the levels on which the works of the commissioners were erected. The question was whether or not the commissioners could be compelled to pay for the damages done to the lands of Cosens, or to erect other works to prevent further injury to said lands. The court decided that the commissioners were not liable, and that Cosens would have to protect his own lands by works similar to those of the commissioners. Lord TENTERDEN, C. J., in delivering the opinion of the court, said, among other things, as follows: "But the sea is a *common enemy* to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any *individual proprietor*. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groyne or other reasonable defense, although it

may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. * * * I am therefore of opinion that the only safe rule to lay down is this: that *each* land-owner, *for himself*, or the commissioners acting for several land-owners, may erect such defenses for the land under their care as the necessity of the case requires, leaving the others in like manner to protect themselves against the common enemy." And BAYLEY, J., says: "I am entirely of the same opinion. It seems to me that every land-owner exposed to the inroads of the sea has the right to protect himself, and *is justified* in making and erecting such works as are necessary for that purpose. * * * If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must occur,—*damage* to himself, and a *wrong* committed by the other. That he has sustained damage is not of itself sufficient. Now here, Mr. Cosens may have sustained damage, but the commissioners have done no wrong. The *dictum* of Justice WILMOT was cited to show that when there is a right this court ought to find a remedy. But the right that Mr. Cosens and each land-owner has, is to *protect himself*,—not to be protected by his neighbors. To *that* right no injury has been done, nor can any wrongful act be charged against the commissioners."

Logically, this principle would seem to be applicable to the waters of large navigable American rivers subject to extensive overflows. And it has been thus made applicable in a number of adjudicated cases. *Hoard v. City of Des Moines*, 52 Iowa, 326, 17 N. W. Rep. 527; *Shelbyville & Brandywine Turnpike Co. v. Green*, 99 Ind. 205; *Cairo V. R. Co. v. Stevens*, 73 Ind. 283; *Dubose v. Levee Com'rs*, 11 La. Ann. 165; *Bass v. State*, 34 La. Ann. 494. But inquiry on this branch of the subject need not here be further prosecuted, because counsel for appellant have argued the case almost entirely upon the theory that respondent is a municipal corporation acting under the authority of the state; and that, therefore, although exercising the power of the state, it is bound, like the state, by the constitutional limitation that private property cannot be taken for public use without compensation. This view of the case rests upon the assumption that building the levee, and thereby subsequently causing the damage complained of, was done under the power of eminent domain; and that, therefore, appellant was entitled to compensation for the "taking" of his land. But, assuming the theory to be correct, the position is clearly untenable. In the first place, when respondent built the levee, it could not possibly have condemned appellant's land under the power of eminent domain. It could not have shown that it had any use for said land, or intended to use it, or even to damage it, or to interfere with it in any way; and then the subsequent damage which happened years afterwards, was not a "taking" within the meaning of the most extreme cases on that subject. It was in the extreme sense, indirect, remote, and consequential. There was no physical directness between the act and the damage. It cannot be claimed that the water which the levee prevented from going over and through the west bank of the river was the *very water* which afterwards flowed onto appellant's land. It was remote and indirect in point of place and distance; it took place two miles away, and on the opposite side of a large navigable river. It was indirect, remote, and consequential in point of time; it took place more than seven years after the act complained of. And there was nothing in the nature of a permanent use or occupation of the land; it was a mere temporary overflow, which occurred once in seven years, and it is impossible to know when, if ever, it will occur again, or with how small an effort appellant could make its recurrence improbable or impossible. It is therefore one of the plainest cases for the application of the well-established rule that the state is not liable for remote and consequential damages caused by the erection of public works. That rule has been held to go much further than it is neces-

sary to extend it here, in the cases of *Green v. Swift*, 47 Cal. 536, and *Green v. State*, ante, 610, (No. 11,169, opinion filed June 30, 1887,) which two cases are, we think, determinative of the case at bar in favor of respondent.

Under these views, it is unnecessary to discuss the distinction made by counsel for respondent between "eminent domain" and the "police powers" of a state. The right and duty of the state, acting for the public benefit and the general welfare, and by means of municipal corporations like respondent, to reclaim the swamps and overflowed land granted to it by the Arkansas act, we do not understand to be disputed. *Kimball v. Reclamation Fund Com'rs*, 45 Cal. 344; *Hagar v. Yolo Co.*, 47 Cal. 222; *People v. Reclamation District* 108, 53 Cal. 346; *Dean v. Davis*, 51 Cal. 406. And counsel for respondent argues that this right is exercised under the police powers of the state, and that, therefore, appellant would not have been entitled to compensation even if his property had been "taken." But, as the land of appellant was not taken, we need not follow the point here made by respondent. Under either view, respondent is not liable for the remote and indirect damage.

With respect to the matters involved in this case, it may be remarked that the Sacramento very closely resembles the Mississippi river, the difference being in magnitude, not in character. And it has been held in states bordering on that river that the state may not only control and levee its banks for the purpose of preventing the adjoining country from overflow, but may compel riparian owners to maintain such levees at their own expense. *New Orleans Drainage Co.'s Case*, 11 La. Ann. 370; *Bass v. State*, 34 La. Ann. 494; *Dubose v. Levee Com'rs*, 11 La. Ann. 165. And it is a matter of common knowledge that, since the settlement of California by Americans, it has been the custom of cities, towns, and private riparian owners along the Sacramento river to protect their lands from overflow by building levees on its banks. If the works of respondent can be declared a nuisance, then the levees in front of the cities of Colusa and Sacramento, which preserve millions worth of property, including the capitol buildings and grounds of the state, can be removed at the suit of any owner who will not protect himself, and who can show that the swell of the river is increased in times of flood by levees either above or below him, and the whole system of reclamation can be defeated.

Counsel for appellant contends that Wilkins' slough is within the legal definition of a "water-course," and argues for the application here of the doctrine that one land-owner on a water-course cannot dam it so as to flood the land of his neighbor above. But, in the first place, appellant is not a riparian owner upon Wilkins' slough. His land is two miles away, and divided from it by a large navigable river. He has no interest in whatever rights land-owners on Wilkins' slough, if there were any, might have as between themselves. In the second place, we do not think that Wilkins' slough, as between appellant and respondent at least, is to be treated as a water-course within the legal meaning of that word. It occasionally happens that a river, in its course from its source to its mouth, divides into two main, permanent channels, each carrying continuously a large part, if not a moiety, of its waters in all stages, and either uniting with the other at a lower point, or continuing to the sea, leaving a delta between the two. But there is nothing here resembling that condition. Wilkins' slough is not a channel or fork, continuously carrying a large part, or any part, of the waters of the Sacramento river. It carries no water at all except "in times of flood," and then the amount which it carries, when compared with the volume of water in the river, is insignificant. In fact, it has no original water of its own at all, but is simply a conduit by which occasionally some of the flood-water of the river escapes into the lower lands adjoining. This same office is performed by every other low place along the bank; and every other part of the levee could be removed as a nuisance if that part of it which is at Wilkins' slough can be so removed. Upon this point we cannot distinguish the case at bar from the

case of the *Shelbyville & Brandywine Turnpike Co. v. Green*, 99 Ind. 205, where it was held that plaintiff could protect his land from overflow of the Big Blue river by erecting a levee on its bank at a place where there was "a *depression* washed out across the lands of plaintiff," and where, "when there was a rise in said river, the water passed out over said lands of plaintiff," although it caused a greater overflow on the premises of defendant, to its damage.

Considering, therefore, all the facts and circumstances of this case, and confining our opinion to the case here made, we think that the works of respondent complained of by appellant do not constitute a nuisance, and that respondent is not legally liable for the incidental damage caused thereby, as above described.

Judgment affirmed.

SEARLS, C. J., concurred.

TEMPLE, J., (*concurring*.) I concur in the judgment and in the opinion, but I do not agree to the construction apparently placed upon the case of *Green v. Swift*, 47 Cal. 536, and upon the case of *Green v. State*, *ante*, 610, (recently decided.)

PATERSON, J., (*concurring*.) I concur in the judgment on the ground that the character, size, and operation of the slough which was obstructed cannot be satisfactorily determined from the pleadings upon which the cause was submitted and decided. Before a court of equity would be authorized in declaring the levees and dams of a reclamation district to be nuisances, and ordering them abated as such, something more should be shown than that the slough obstructed does at all times, when unobstructed, "divide the waters of the river *in times of flood*, and carry and conduct large volumes thereof to the south-westward, away from the lands of plaintiff to a *natural basin*." It is true, the complaint alleges that said slough was a natural water-course, but other allegations of the complaint and answer (which must be taken as true) leave that matter very doubtful and unsatisfactory.

The state and its grantees are charged with a great trust with respect to swamp and overflowed lands under the laws by which they are granted, and it is by no means clear that that trust can be executed if we apply strictly the common-law rules applicable to nuisances caused by the obstruction of natural water-courses. It may be necessary, under our peculiar conditions as to seasons, water-sheds, river systems, and swamp lands, to find a new definition for the term "natural water-course" if we are to apply old principles to the innumerable sloughs which are found in our overflowed districts, and which have well-defined banks and beds. There are channels in this state, not well defined in bank and bed, without water in them during certain months of the year, yet so important in operation during high water that to dam them would be disastrous to life and property, and there are sloughs running out from the rivers in the lowlands, with well-defined banks and beds, and with water running bank-full every month in the year, yet so unimportant in their operation that to close them would have no appreciable effect upon the river or its tributaries, except to improve the same for navigation, but so numerous in the overflowed districts that to restrain the obstruction of them simply because they are within the accepted definition of a natural water-course would in many instances prevent the reclamation of large and valuable tracts of land which the state and its grantors have undertaken and are in duty bound to reclaim. The dam and levee complained of were constructed in 1872, and have ever since been maintained. This action was commenced January 20, 1883, to procure an abatement of the levee and dam, and recover the sum of \$5,000 damages alleged to have been caused by the destruction of plaintiff's growing crops, fences, and other improvements, and it does not appear that any complaint was made prior to the last-named date.

If the slough is one which, considering the end to be accomplished by defendant and with due regard to the property rights of others, could not lawfully be obstructed, it may be fairly inferred that plaintiff would have discovered the fact, and proceeded to have the obstruction abated, long before the commencement of this action. The delay in bringing the suit adds to the uncertainty arising from the complaint and answer concerning the equity of plaintiff's prayer for the abatement of the levee and dam as a nuisance.

TERRITORY v. O'BRIEN.

(*Supreme Court of Montana. July 19, 1887.*)

1. CRIMINAL PRACTICE—APPEAL—INSTRUCTIONS—EXCEPTIONS—WAIVER.

In criminal actions an exception taken to an instruction to the jury must be reduced to writing, and filed with the clerk, before the case is submitted to the jury, or it will be held to be waived under Rev. St. Mont., criminal practice act, § 327, which provides that exceptions shall be taken in criminal cases as in civil cases, and Code Civil Proc. § 253, subd. 7, which provides that exceptions to instructions shall be reduced to writing, and filed before the cause is submitted, and Rev. St. Mont., criminal practice act, § 348, p. 333, which provides that the time for settling and signing the bill of exceptions does not apply to exceptions to instructions to the jury, which it is intended may be embodied in such bill if taken at the proper time.

2. SAME—BILL OF EXCEPTIONS—TIME FOR SETTLING—EXTENSION—STIPULATION.

Under the last-cited act, stipulations between counsel for the defense and the county attorney extending the time for settling and signing a bill of exceptions will not be recognized.

Appeal from district court, Deer Lodge county.

Indictment for murder. The opinion states the case.

Knowles & Forbis, for appellant. *Mr. Derfeld*, for respondent.

MCCONNELL, C. J. In this case the defendant was indicted for murder in the first degree, tried at the April term of the district court of Deer Lodge county, and convicted of murder in the second degree. His motion for a new trial was disallowed, and he has appealed in error to this court.

Upon the trial the defendant relied upon the plea of self-defense, and he assigns, as the ground upon which he relies for a new trial in this court, errors of law contained in instruction No. 11. It appears from the record that the jury was charged on the twenty-ninth of May, and returned their verdict on the thirtieth. There was no exception taken to the instruction now complained of at the time it was given to the jury so far as the record discloses. When it was presented to the court, he made the following indorsement on it, to-wit: "This exception, No. 11, presented to me for the first time for allowance and signature this ninth day of July, 1886, and after the adjournment of the court for the term." The question is whether an exception signed under these circumstances, can be considered. Section 327, p. 331, criminal practice act, provides that "on the trial of any indictment or prosecution for a criminal offense, exceptions to the decisions of the court may be made in the same cases and in the same manner as provided by law in civil cases; and bills of exceptions shall be settled, signed, and filed as allowed by law in civil cases." Section 253, subd. 7, p. 85, Code Civil Proc., provides that "if any party to the trial desires to except to any instructions given by the court, or to the refusal of the court to give any instruction asked for, or any modification thereof, he shall reduce such exception to writing, and file the same with the clerk, before the same is submitted to the jury." Then, upon the trial of an indictment, an exception to any instruction given by the court to the jury must be reduced to writing, and filed with the clerk before the cause is submitted to the jury. Can, then, an exception to an instruction be taken more than five weeks after the cause is submitted to the jury, and after the court has adjourned? We think not.

It is insisted that this statute is directory, and that the time may be extended at the discretion of the trial judge. Section 348, p. 333, criminal practice act, provides that "a bill containing the exceptions must be settled and signed by the judge, and filed with the clerk of the court, within ten days after the trial of the cause, unless further time be granted for good cause by the judge or one of the justices of the supreme court." It appears from the record that by stipulation between the county attorney and the defendant, on the twenty-ninth day of May, the defendant was given five days within which to prepare and file his bill of exceptions; and then, again, on June 10th, a stipulation was made by the county attorney to extend the time to July 2d; and then, again, the further time was stipulated for by the same parties to July 10th.

There is no provision of law clothing the county attorney with the power, for good cause, to extend the time prescribed by law for formulating the bill of exceptions. This is conferred upon the judge, or one of the justices of the supreme court. Construing these statutes together, we hold that any objection either party may have to any instruction given to the jury must be reduced to writing, and filed with the clerk, before the cause is submitted to the jury. The filing is, doubtless, for the purpose of bringing it to the notice of the court, who may thereby discover that the instruction is erroneous and modify it, so as to make it conform to the law. At any rate, the exception must be then and there taken, reduced to writing, and the attention of the court called to it, or the objection to the instruction will be considered as waived.

This court, in the case of *Randall v. Greenhood*, 3 Mont. 511, gave the same construction to this statute. The court, in construing section 253, Code Civil Proc., say that "the mere statement of the record that the court was asked to give certain designated instructions which were refused, and an exception taken, or that the plaintiff objected to the giving of certain instructions that were afterwards given, to the giving of which the party objecting excepted, without reducing such exception to writing, and filing the same with the clerk, is no compliance with this section of the Code." The court further say: "We cannot regard exceptions that have not been taken and saved in substantial compliance with this statute." *Territory v. McClin*, 1 Mont. 396; *Hall v. Park Ditch Co.*, 2 Mont. 498; *Gilmer v. Highley*, 3 Mont. 433. And the bill of exceptions must be formulated and signed within 10 days after the trial, unless for good cause the judge, or one of the justices of the supreme court, extends the time.

A practice that is so loose that it allows the parties to make their own stipulations, and extend the time at their pleasure, cannot be tolerated. It may be argued that the judge having signed the exception on the ninth of July is a ratification of the stipulation to allow until the tenth in which to make up the bill of exceptions. We do not think so. The very indorsement which he made upon it shows that the learned judge signed it under protest.

Besides, the right to have the 10 days after the trial within which to make up the bill of exceptions, and which may be extended at the discretion of the trial judge, or one of the justices of the supreme court for good cause, does not apply to an exception to an instruction given to the jury, but to the general bill of exceptions within which such exceptions, when properly taken, may be incorporated.

It follows, then, that instruction No. 11 was not objected to, so far as the record discloses, until after the case was submitted to the jury, and we cannot consider it. If there was any error in it, it was waived by the failure of the defendant to except to it at the proper time, and in the proper manner. Let the judgment of the court below be affirmed.

KELLEY v. CABLE CO.

(Supreme Court of Montana. July 21, 1887.)

1. TRIAL—INSTRUCTIONS—REQUEST FOR—SUFFICIENCY.

Where, on the trial of an action brought by an employe against his employer for damages for personal injuries, the only instruction given on the question of ordinary care and reasonable care or diligence was one asked for by the plaintiff, he cannot be heard to complain on appeal that the jury were not sufficiently instructed on that point.

2. SAME—CONFLICTING INSTRUCTIONS.

It is error to give to the jury conflicting instructions based upon different views of the law applicable to the case, without such instructions being harmonized by the judge.

3. MASTER AND SERVANT—NEGLIGENCE OF MASTER—INSTRUCTION—SUPERVISION.

In an action for damages brought by an employe against his employer, an instruction to the effect that if the employer employed, as fellow-servants with the employe, men of usual competency and prudence in their business, then defendant is not liable for their negligence, and the law does not require the defendant or his foreman to personally supervise such men, but that he has a right to rely upon their discharging their duties with proper care, is misleading, as suggesting that the employer might be justified in neglecting his duties of supervision.

4. NEGLIGENCE—INSTRUCTIONS—QUESTIONS IN ISSUE.

Where, in such a case, it is admitted, in an instruction asked by plaintiff, that the plaintiff is without fault or negligence on his part, it is error to admit an instruction asked for by defendant on the question of contributory negligence.

5. MASTER AND SERVANT—NEGLIGENCE OF FELLOW-SERVANT—FOREMAN.

Where, in such an action, the defendant admits that it was the duty of the foreman to see that certain blasting charges had been removed, and to warn plaintiff if they had not, it is error to instruct the jury that it was the duty of plaintiff's co-employees to remove the charges, and that, if the foreman undertook to do this, he acted as a fellow-servant of the plaintiff in doing it, and the defendant therefore was not responsible for his negligence in the matter.

Appeal from district court, Deer Lodge county.

Action to recover damages for personal injuries. The opinion states the facts.

Wm. Scallon and F. W. Cole, for appellant. *Hiram Knowles and W. W. Dixon*, for respondent.

MCLEARY, J. The plaintiff, William Kelley, brought this action against the defendant, the Cable Company, to recover damages in the sum of \$30,000 for personal injuries sustained by him while working as a carman in the defendant's mine. There was a trial by jury, and a verdict for the defendant, and, after motion for a new trial overruled, the plaintiff appeals to this court from the judgment, and from the order overruling the motion for a new trial. The following facts were admitted by the defendant, as appears from the record herein, to-wit: That, at the time stated in the complaint, the defendant was a corporation duly incorporated, and that it was working and managing the mining of the Cable mine, in Deer Lodge county, Montana; that on or about the nineteenth day of July, 1884, the plaintiff was employed by defendant, and in its service in said mine, as a common laborer, removing ores and dirt, filling the cars with the same, and running such cars, and that the plaintiff was then and there at work in said mine; and that the plaintiff, at the said time, was ordered by the defendant's foreman, then and there in charge of said mine, and under whose direction and control the plaintiff was bound to work, to go to work in a certain cross-cut in said mine at the work aforesaid; and that the plaintiff, in obedience to such orders, went to work as ordered to do, and while at work therein that he was injured by an explosion; and that said explosion occurred, and that plaintiff was injured, without any fault on his part; and that, previous to the explosion, the plaintiff did not know, and had no means of knowing, whether or not there were at said place charges not shot off, and could not have discovered the fact except by being informed thereof.

It appears from the evidence found in the record that it was the plaintiff's duty to shovel and load into the cars, within the time, the rock and *debris* blasted by the miners, and to transport the same to the mill and the dump; and, further, that the plaintiff worked on the night shift, and the miners who did the blasting worked on the day shift,—the plaintiff and others being required to remove, during the night, the ores, etc., which the miners had broken down and blasted during the day; and, further, that, while the plaintiff was at work during the night of the nineteenth of July, 1884, an explosion occurred in the cross-cut where he was working which resulted in the plaintiff's receiving very severe injuries, both of his eyes being blown out, and one ear being blown off, his head, face, and neck and chest lacerated,—thereby entirely destroying his sight and the hearing of one ear, causing him great and excruciating pain, and confining him to the hospital for several months, and rendering him forever incapable of working at his occupation. The record further discloses the following: That the plaintiff, under orders, went to work at 7 o'clock P. M., one hour after the miners on the day shift had quit work. The blast had been fired at about 5 o'clock in the afternoon. In accordance with directions, the plaintiff was working at the cross-cut, where he had been working the night before; and during the night, between 11 and 2 o'clock, while he was loosening rock and *debris* with his pick, the explosion took place, and he was hurled for eight or ten feet against a car, and was rendered senseless for some time, and injured as already stated. No warning had been given the plaintiff of any danger existing in the place where he was sent to work, from a "missed charge," or otherwise. On previous occasions he had been warned by the foreman to look out for "missed charges." The foreman, under instructions from the superintendent, had always made it his business to examine, in order to ascertain whether or not all the charges in the blasts had been fired, and, when any had missed, had been particularly careful to warn the plaintiff and others to look out for these missed charges.

It is a disputed question whether the explosion was caused by a charge of powder left in a hole unexploded, or by a piece of loose powder which had been accidentally dropped or otherwise misplaced among the rocks and *debris*. In one view of the evidence, it is possible that the jury may have regarded these injuries as the result of an unavoidable accident, arising from causes over which the defendant had no control, or from dangers which the defendant did not know of, and by the use of reasonable diligence could not have ascertained; and for that reason we do not feel disposed to say that this verdict was contrary to the evidence, or to disturb the judgment on that ground. On this question we are not required to express an opinion.

The admissions of the defendant entirely eliminate all questions of contributory negligence from this case. The defense is based on the theory that the explosion was an unavoidable accident, which could not have been foreseen or prevented by the exercise of ordinary care and prudence on the part of the Cable Company, or else was the result of the negligence of some one of the miners, fellow-servants of the plaintiff, or of the foreman while acting in the capacity of a miner and fellow-servant of the plaintiff. The evidence does not bear out the defense that the explosion was caused by the negligence of a fellow-servant. If it was caused by negligence at all, it was the negligence of the foreman, in his capacity as such, and was thus the negligence of the company whom he represented.

We are not called upon to review the instructions given by the court at the request of the plaintiff. If any one of them is erroneous, the appellant is not in a position to complain. But on a casual examination, as modified by the court, and given, they seem to embody the law of the case, and appear to have been correctly given.

Nor can the appellant complain of the fact that "the charge of the court nowhere defines or explains what is ordinary care, and reasonable care or dili-

gence, or the want of it." The only charge given on the subject was asked by the appellant, and he cannot complain of its insufficiency; but if he desired a correct definition given, of the terms referred to, he should have requested an instruction setting out such a definition.

It was not error in the court to modify instruction No. 16, asked by the plaintiff, so as to limit defendant's duty to "ordinary care and diligence," instead of "proper care and diligence," as stated in the instruction. It is true that the court might well have instructed the jury more fully in regard to ordinary care and diligence, and doubtless would have done so had it been so requested. We believe what was said by this court in a case decided at the last term is applicable to the facts of this case, and it may be quoted in this connection. Mr. Chief Justice WADE, in delivering the opinion of this court, in speaking of "*ordinary care*," uses the following language: "But this term is relative; and ordinary and reasonable care, which is after all the most that the law requires, means, when used in this connection, that degree of care which prudent men, *skilled in the particular business*, would be likely to exercise under the circumstances. The care must be proportionate to the danger. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger, and what would be ordinary care in a case of little danger would be much below this in case of great danger." *Diamond v. Northern Pac. R. Co.*, 6 Mont. 590, 13 Pac. Rep. 367.

The principal question presented by this appeal is whether the court erred in giving to the jury the instructions asked by the defendant, to which the plaintiff excepted. The instructions generally asked by the defendant, and given, are in many particulars contradictory to those given at the request of the plaintiff, and in this particular are erroneous. Conflicting instructions must nearly always mislead the jury, and are always good ground for reversal where they have done so. The instructions asked by the different parties to an action generally proceed upon entirely different theories of the law applicable to the case, and they should be so modified and harmonized as to present the law in its proper light, or altogether disregarded, and the case given to the jury on the general charge of the court alone.

The plaintiff in his complaint charges the defendant on account of negligence alleged to have been committed through the acts of the foreman and other agents, and the instructions given at his request proceed upon that theory; but the instructions given at the request of the defendant exclude altogether the idea of the defendant's liability for the negligence of any other agent than the foreman himself. The instructions asked by the plaintiff virtually exclude the defense of the negligence of a fellow-servant from the consideration of the jury; and this view of the matters at issue seems to be borne out by the evidence. Still, the instructions asked by the defendant, and given, repeatedly present the acts of a fellow-servant as a perfect defense to the plaintiff's case. Of course, if the evidence warranted it, the defendant should have been given the benefit of charges of this character; but then the plaintiff's instructions should have been modified accordingly.

The twelfth instruction asked by the defendant reads as follows, to-wit: "If the defendant in this case employed as fellow-servants with the plaintiff men of usual prudence and competency in their business, (and, in absence of proof to the contrary, it is presumed that the men defendant employed were such men,) then defendant was not liable to plaintiff for the negligence of such fellow-servants, and the law did not require that defendant or its foreman should personally supervise such men, or see that everything they did was carefully or properly done; but defendant had a right to rely upon the expectation that such men would discharge their duties with proper care and prudence, in a skillful manner." Even if the evidence warranted the defense of the negligence being that of a fellow-servant being submitted to the jury, this circumstance stops short of what should have been given to the jury in that connection. The employment of skillful, prudent and sober men discharges

the master from any responsibility for injuries caused by their neglect to their fellow-servant; but the master does not have the right, after employing such men, to impose upon them his own duties, and, without supervising them in any way, impute to their negligence any injuries his other servants may sustain, and thus escape responsibility. But such might reasonably be inferred from the charge. It seems that this instruction might readily have misled the jury to the prejudice of the appellant.

Instruction No. 10, given at the request of the defendant, presents as a defense the contributory negligence of the plaintiff. As we understand this case, it was admitted by the defendant that the plaintiff was injured without any fault or negligence on his part. At least, it is so stated in the eighth instruction asked by the plaintiff, and given; and, even if it were not so admitted, these two charges could not stand together, as they are contradictory; and to give them both was certainly erroneous.

The fourteenth instruction given at the request of the defendant reads as follows: "If the jury find from the evidence that it was the duty of those who were engaged in blasting in the defendant's mine, and that it is usually the duty of those engaged as laborers in blasting in mines, to determine whether the blasts put in by them have exploded, and that none of them have missed, then, if the foreman undertook to perform this duty, he was a fellow-servant of the plaintiff as to this matter, in determining whether these blasts had exploded, and none of them had missed, and the defendant was not responsible for any negligence he may have been guilty of in this matter." This instruction is not warranted by the evidence, even if it stated the law correctly. Both Savery, the superintendent, and Showers, the foreman, testified that it was the duty of Showers, as foreman, to be particularly careful to see that all the blasts had exploded, and to warn the plaintiff of any missed charges. What may have been the duty of those engaged in blasting in this mine, or what may have been the duty of those engaged as laborers in other mines, could not change the duty which this foreman was required to perform under the instructions of the superintendent; nor could such facts as these, proven or not, alter the responsibility which the defendant was under to the plaintiff for any negligence of itself or its foreman, whereby he may have been injured. It is not what may be the duty of laborers in this mine or others that is to measure the defendant's duty to the plaintiff. The law fixes that under the facts existing in the Cable mine. It is well settled that this foreman having the authority to employ and discharge the plaintiff, in fact having actually employed him and set him to work on many previous occasions, and on this very night,—under such circumstances the negligence of the foreman would be the negligence of the defendant corporation. This is really admitted to be the law and the fact by the counsel for respondent. *Spelman v. Fisher Iron Co.*, 56 Barb. 155. The *prima facie* presumption is that the defendant has discharged its duty to the plaintiff in this case. Hence this presumption must be overcome by proof of fault on the part of the defendant, by showing either that the foreman knew, or ought to have known, that the danger to which the plaintiff was exposed was extraordinary,—that is, that there was a charge of blasting powder in the mine, where he was sent to work, which had not been fired. *Wood, Mast. & S.* § 368. If the danger is such that the master, by the use of reasonable and ordinary care, as it is defined in the *Diamond Case*, heretofore quoted, might have known of it, his liability is the same as if he had known it actually. *Wood, Mast. & S.* §§ 345, 348, 898, and cases cited. And in regard to the ascertainment of the condition of this blast the plaintiff had a right to presume that the defendant had done its duty, and to act on that presumption in going to work in the cross-cut, where the blasts had been fired, as he was ordered. *Id.* § 356; *Gibbs v. Pacific R. Co.*, 46 Mo. 170, and cases cited; *Wonder v. Railroad Co.*, 32 Md. 411; *F. W. J. & S. R. Co. v. Gildersteere*, 33 Mich. 185. If the defendant or its foreman knew, or by the use of reasonable diligence might have known, of the existence of the danger from this unexploded blast, it was his bounden duty to convey such information to the plaintiff. *Barter v. Roberts*, 44 Cal. 190-193; *Spelman v. Fisher Iron Co.*, 56 Barb. 165. These are some of the more familiar principles of law on which this case should have been tried and presented to the jury in the court below. We cannot resist the conclusion that the plaintiff has been prejudiced by the manner in which this case went to the jury; and the importance of the case demands the utmost care in the application of the legal principles by which it should be governed. For the reason that the instructions given at the request of the plaintiff are inconsistent with those, or some of those, given at the request of the defendant, and that the instructions mentioned, given at the request of the defendant, are not supported by the evidence, nor declaratory of the law applicable to this case, the judgment and order overruling the motion for a new trial are reversed, and the cause remitted to be tried again.

TERRITORY v. MANTON.

(Supreme Court of Montana. July 29, 1887.)

1. MURDER—WHAT CONSTITUTES—EXPOSURE TO COLD.

An indictment charged, in substance, that the defendant was the husband of the deceased, and as such owed her the duty of protection; that she was weak, feeble, sick, and unable to walk; that defendant had the ability to take care of her, but that he left her exposed in the night-time to the cold and inclemency of the weather, refusing to provide her with clothing and shelter; that he did this feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, and that she, "languishing of such exposure, leaving, and of such neglecting, omitting, and refusing to provide clothing and shelter, * * * did die;" and that thus the defendant feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, did kill and murder her. Held, that it sufficiently charged the offense of murder in the second degree, under Rev. St. Mont. p. 358, § 18, defining murder as "the unlawful killing of a human being, with malice aforethought, either express or implied," and providing that "the unlawful killing may be effected by any of the various means by which death may be occasioned."

2. CRIMINAL PRACTICE—INSTRUCTIONS—DEGREES OF MURDER.

An instruction that, "if the jury have a reasonable doubt as to whether the defendant has been proved by the evidence guilty of murder in the first degree, they should find him guilty of murder in the second degree, if the jury find him guilty of murder," held not erroneous.

3. SAME.

But an instruction that "if the jury have a reasonable doubt, after considering the evidence, as to whether or not the defendant is guilty of murder in the second degree, they should find him guilty of manslaughter," is equivalent to directing a verdict in the alternative, and is manifest error, requiring a new trial, notwithstanding the fact that the jury found a verdict of murder in the second degree.

Appeal from district court, Deer Lodge county.

Indictment for murder. The opinion states the case.

Cole & Whitehill, for appellant. *Robinson & Stapleton*, for respondent.

MCCONNELL, C. J. The appellant in this case was tried at the April term, 1887, of the district court for Deer Lodge county, and convicted of murder in the second degree, and sentenced to 20 years' imprisonment. He moved in arrest of judgment and for a new trial, which motions were overruled, and he has appealed in error to this court. There are various specifications of error, many of which we do not deem it necessary to notice.

1. The motion to arrest the judgment was predicated upon the ground that the indictment does not show that any criminal offense at all was committed. The charging part of the indictment was as follows, to-wit: "The grand jury of the said county, duly drawn, impaneled, sworn, and charged to inquire into public offenses committed in the said county, upon their oaths do present and say that one Dennis Manton, late of the county of Deer Lodge, Montana territory, on or about the second day of March, A. D. 1887, was then and there, at the county of Deer Lodge and territory of Montana, the husband of one Susan E. Manton, and that it then and there became and was the duty of said Dennis Manton, as the husband of the said Susan E. Manton, to protect and defend her, the said Susan E. Manton, from the cold and inclemency of the weather, and he, the said Dennis Manton, then and there had the means to provide the same, and she, the said Susan E. Manton, was then and there weak, feeble, sick, and unable to walk, did then and there feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, leave the said Susan E. Manton in the open air, at night-time, and exposed to the cold and inclemency of the weather; and did then and there feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, wholly neglect, omit, and refuse to protect and defend the said Susan E. Manton from the cold and inclemency of the weather, or to procure or provide any clothing, covering, or shelter whatsoever for the said Susan E. Manton, and neglecting and leaving, and omitting and refusing, to protect and defend the said Susan

E. Manton from the cold and inclemency of the weather as aforesaid, and to provide and procure clothing, covering, and shelter for the body of the said Susan E. Manton, the said Susan E. Manton did then and there languish, and, then and there languishing of such exposure, leaving, and of such neglecting, omitting, and refusing to provide clothing and shelter, as aforesaid, did then and there die. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Dennis Manton, the said Susan E. Manton, in manner and form aforesaid, feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, did kill and murder."

This indictment charges, in substance, that the defendant was the husband of the deceased, and as such, owed the duty of protection; that she was weak, feeble, sick, and unable to walk; that he had the ability to take care of her, but that he left her exposed in the night-time to the cold and inclemency of the weather, refusing to provide her with clothing and shelter, and he did this feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, and that she, "languishing of such exposure, leaving, and of such neglecting, omitting, and refusing to provide clothing and shelter," did die, and that thus the defendant feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, did kill and murder her. The proximate means of her death were the cold and inclemency of the weather. These were allowed to do their work of destruction by the criminal negligence of the defendant to do the duty of protection, which he owed her as husband. The point is made by the counsel of defendant, that this indictment charges no crime known to the law; that a husband, having the ability to protect his wife, may stand passively by, and see her sick and weak and helpless, refuse to help her, and allow her to perish under the influence of the cold and inclemency of the weather; and this negligence was the result of malice, this refusal to help the product of a felonious, willful, premeditated purpose. There is no charge of an assault made; none that he exposed her to the inclemency of the weather; but he finds her exposed to the unpropitious elements, and he criminally leaves her there to die. If the defendant had, by his own acts, subjected her to the inclemency of the weather, there would be no doubt but that he would be guilty of murder if she had died from the exposure, and he had so subjected her unlawfully and with malice aforethought. But the question is, when he absolutely does nothing, when the very *gravamen* of the charge is his failure to do something, can he be guilty of murder or manslaughter either? She perishes of cold. It is the agent which causes death. He might have prevented it, but he wickedly refused, and lets her die. This is the question we have to consider.

Bishop, in his work on Criminal Law, (volume 2, § 689,) says, in relation to the degree of duty which renders one responsible for death in cases of neglect, that "the doctrine on this subject is that wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting it is guilty of a felonious homicide." In section 690, discussing the same subject, this learned author says: "If a man neglects to supply his legitimate child with suitable food and clothing, or suitably provide for his apprentice whom he is under legal obligation to maintain, and the child or apprentice dies of the neglect, he is guilty of a felonious homicide." The same author, speaking of the kinds of force by which life is taken, says that "whenever the volition, of whatever kind, put forth by one man, results in the death of another man, the former is to be charged with having committed the homicide." And it is immaterial "whether the action be of the mind or of the body; whether it operates solely or concurrently with other things; whether it was consented to by the person on whom it operated or not; whether it was an unlawful confinement, or the leaving a dependent person in a place of exposure, or any omission of duty which the law enjoins." Section 682.

Under this authority, the very volition of the defendant by which he was

led to refuse aid to his wife when the law imposed the duty upon him to protect her, is transferred to the violence of the elements, and he is made to use their forces, and is responsible for the death which they immediately caused. We find the indictment good as charging a felonious homicide; but what degree of felonious homicide still remains to be decided.

The same author above quoted, says: "Another illustration may be found in cases of the exposure or neglect of infants or other dependent persons. If the act is one of negligence, not clearly showing danger to the life, yet if death follows, the offense is only manslaughter; whereas, if the exposure or neglect is of a dangerous kind, it is murder. Ordinarily, if a husband should withhold necessities from his wife, and she dies, it will be only manslaughter, since this act is not so immediately dangerous to life as the other. Whether death caused by neglect is murder or manslaughter is made to depend on the nature and character of the neglect."

Rev. St. Mont. p. 358, § 18, provides that "Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." Tested by this definition, we think there is no doubt but that the indictment in this case charges murder. The death is charged to be the result of his felonious, willful, premeditated, and malicious conduct towards the deceased. If a man willfully abandons his wife to the destruction of the elements when he can save her, or criminally neglects to shelter her when he is able to do so, and leaves her to perish with cold, he is as much a murderer as if he had assaulted her with a deadly weapon, and inflicted upon her a mortal wound of which she died. The statute says: "The unlawful killing may be effected by any of the various means by which death may be occasioned." The jury having acquitted the prisoner of murder in the first degree, it is not necessary to inquire whether the indictment charges that degree of crime; but it charges that the acts which caused the death were done unlawfully, and with malice aforethought, and this makes, at least, murder in the second degree. *Territory v. McAndrews*, 3 Mont. 158; *Territory v. Stears*, 2 Mont. 326. And, the defendant having been convicted of murder in the second degree, the motion in arrest of judgment was properly overruled.

2. Another specification of error was the refusal of the court to give instruction No. 1 asked by counsel for the prisoner. Said instruction is as follows, to-wit: "You are instructed that, under the indictment and evidence in this case, you cannot convict the defendant of the crime of murder, and the only offense that you can convict the defendant of is manslaughter; and you cannot convict him of that unless you find from the evidence that the defendant unlawfully killed or caused the death of Susan E. Manton." The effect of this instruction was to direct the jury that they could not convict of any higher offense than manslaughter, when we have just seen that the indictment charges the offense of murder. This instruction was properly refused.

3. The next specification of error is the exception taken to the instructions given upon the request of the prosecution. There are 39 of them. Nos. 5, 6, 7, and 8 state the law on the subject of justifiable homicide, and, as abstract propositions of law, are correct, but wholly inapplicable to the facts of this case. The charge is that the defendant killed his wife by purposely and negligently allowing her to lie out on the ice during a February night, so that she perished of the cold, and there is not the slightest pretext in the evidence going to justify or excuse him, if he did it. If he could not help it, or did all in his power to prevent it, then there is no homicide, and no crime to be excused or justified.

Instructions Nos. 34 and 35 are as follows, to-wit: "(34) If the jury have a reasonable doubt as to whether the defendant has been proved by the evidence guilty of murder in the first degree, they should find him guilty of m..."

der in the second degree, if the jury find him guilty of murder. (35) If the jury have a reasonable doubt, after considering the evidence, as to whether or not the defendant is guilty of murder in the second degree, they should find him guilty of manslaughter." In the first of these instructions the jury are told, in substance, that if they find the defendant guilty of murder at all, and have a reasonable doubt as to whether he is guilty of murder in the first degree, they should convict of murder in the second degree. There is no error in this. But in the next instruction they are told, if they have a reasonable doubt whether the defendant is guilty of murder in the second degree or not, then they should convict of manslaughter. This is manifestly error. The effect of both instructions is to say to the jury: "You must find him guilty of one of the three degrees of felonious homicide. Try him first for murder. If you have a reasonable doubt whether he is guilty of either of these, then you should find him guilty of manslaughter." This error is so apparent that it must have been an inadvertence on the part of the learned judge who presided in the court below, made in the confusion of the trial when he had 50 instructions in his hands for consideration. The exceptions to the instructions given for the prosecution are not properly taken. They are too general. There is no doubt but that if an exception had been taken to instruction 35 by number, pointing out the error, it would have been immediately corrected. But as our attention was not called to these exceptions in the argument of the case, and as the error complained of is so material, we have decided the case upon its merits, rather than upon the insufficiency of the exceptions, as we might have done.

The 10 instructions given at the request of the defendant correctly and clearly state the law, so far as they go; but the instruction given in No. 35 precludes the jury from acquitting the prisoner upon any of the grounds stated in them. It is not a sufficient answer to this error that the jury were not influenced by it because they found the prisoner guilty of murder in the second degree, and did not come to the consideration of the question whether he was guilty of manslaughter. It is impossible to tell what influence this erroneous instruction had on the minds of the jury. It is enough to know that it is error, and might have influenced them to the prisoner's prejudice.

Let the case be reversed and remanded for a new trial.

2 Cal. Unrep. 780

HOUGHTON v. ALLEN. (No. 12,047.)^{*}

(Supreme Court of California. August 5, 1887.)

MORTGAGE—VALIDITY—MORTGAGEABLE INTEREST—CONTRACT FOR TITLE.

J. and R. entered into an agreement to sell A. certain lots, the consideration to be paid part in cash, and the balance in installments at one and two years. By the contract it was provided that, if A. failed to pay either installment when due, J. and R. would be released from performance on their part,—time being of the essence of the contract; but in such case it was the duty of J. and R. to sell the lots at auction to the highest bidder, and out of the money received to pay off the amount still due on the contract, and expenses. A. went into possession of the lots, built a house thereon, and occupied them for over a year. Some months before the first installment became due, A. mortgaged the lots to H. The mortgage was duly recorded. About five months after the execution of the mortgage, A. gave possession of the lots to D., and requested J. to make the deed for them to D., which he did. In an action by H. to foreclose his mortgage, *held*, that A. had a mortgageable interest in the lots, and that D. took them subject to the mortgage; J. and R., by conveying to him on A.'s request, having waived any breach of the contract.

Department 1. Appeal from superior court, San Francisco.

Beatty, Denson & Oatman, for appellants. *A. P. Catlin*, for respondents.

PATERSON, J. On August 22, 1870, Jackson and Rulofson, being the owners of lots 6, 7, and 8, in block 1, in the town of Davisville, executed and delivered to defendant, Allen, a contract agreeing to sell said lots to him for the sum of \$250, and to convey the same on the twenty-second day of August, 1872. The sum of \$50 was paid down, and the balance was to be paid in two installments of \$100 each,—one August 22, 1871, the other August 22, 1872. It was provided that, if Allen failed to make either of said payments, then the said parties of the first part should be wholly released from performance on their part; time being of the essence of the contract. "But in that case," the contract reads, "it shall be the duty of the parties of the first part to sell the above-described premises at public auction to the highest bidder for cash, and out of the moneys received from such sale to pay and discharge the amount remaining due upon this contract, and the expense of such sale, rendering the overplus, if any, to the said party of the second part, his executors or assigns." In default of payments, Allen was to peacefully surrender possession of the property, but until breach of the contract he was to occupy and enjoy the use of the premises. The agreement was not recorded until July 9, 1872; but immediately after the execution and delivery of the contract Allen went into possession of the property, placed a house thereon, and continued to occupy and enjoy the premises until on or about January 12, 1872. On April 6, 1871, Allen executed and delivered to plaintiff the mortgage referred to in the complaint, and which includes the said lots 6, 7, and 8. This mortgage was recorded April 7, 1871. Allen made no payment of the purchase price except the first one, \$50.

On or about the twelfth day of January, 1872, the defendant Allen surrendered the possession of the said lots 6, 7, and 8 to the defendant William Dresbach, and wrote a letter to the said J. P. Jackson, requesting him to convey the said property to William Dresbach instead of to him, (Allen;) and on the twelfth day of January, 1872, the said Jackson made, executed, and delivered to the said Dresbach a deed of said lots, which contained this recital: "The premises now herein conveyed being the same for which a bond for deed was heretofore given to Thomas Allen, and this conveyance is now made to said Dresbach at the instance and request of said Allen." This deed was recorded February 24, 1872. The debt that was secured by the mortgage of April 6, 1871, was never paid, and in due time the mortgagee (plaintiff herein) brought his suit to foreclose his mortgage, making Allen and Dresbach defendants. Allen suffered default, and Dresbach answered, averring

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^{*}Reversed in banc. See 16 Pac. 532, 75 Cal. 102.

that prior to April 6, 1871, the title to the lots in controversy was in John P. Jackson; that Jackson had deeded to him, and that he held a good title to the lots, free from and not subject to plaintiff's mortgage. The court concluded that said lots 6, 7, and 8 were not subject to the lien of the mortgage, and judgment was entered accordingly.

The interest held by Allen at the time he executed the mortgage to plaintiff was the subject of mortgage. Section 2947 of the Civil Code provides that "any interest in real property which is capable of being transferred may be mortgaged." and the interest of one who holds a contract or bond for title is within the rule of law thus declared. *Jones v. Lapham*, 15 Kan. 540; *Loughlin v. Braley*, 25 Kan. 147; *Crane v. Turner*, 67 N. Y. 487; *Smith v. Patten*, 12 W. Va. 541; 2 Story, Eq. Jur. § 1021.

Under the contract, Allen had been put in possession of the premises by the vendors. He had made one payment, built a house on the land, and at the time he executed the mortgage had at least four months' undisturbed possession before him. When he delivered possession, and requested his vendors to make the deed to Dresbach, he still held the undisturbed possession of the lots. The recitals in the deed from Jackson to Dresbach, and the possession of Allen which was delivered by him to the latter, were sufficient to put Dresbach upon inquiry, and to charge him with notice of the facts, notwithstanding the fact that the contract was not at that time of record. The transaction was, in effect, a sale by Allen and Jackson to Dresbach, with full notice of the contract and of Houghton's lien, and Dresbach thereafter stood in no better position to defeat the lien of plaintiff than Allen would if he had completed the purchase.

It is claimed by respondent that the mortgageable interest held by Allen was subject to be determined in the event of a breach; that this interest ceased upon failure to pay the installment due August 22, 1872; and that Allen's request to Jackson to convey to Dresbach was a waiver of his right to require a sale at auction. But so long as Jackson was satisfied to allow Allen to remain in possession without payment of the first installment, there was no breach of the contract and no determination of the interest held by Allen. So far as the record shows, there was no demand made upon Allen for the installment due August 22, 1871, or refusal on his part to pay. By acting upon Allen's request to convey to Dresbach, Jackson recognized the right of Allen to control the deed, and this, of itself, was a waiver of the forfeiture for non-payment. Under these circumstances, Jackson could not complain and the rights of Dresbach could not be enlarged over those of Jackson in consequence of the deed from the latter to the former. *Baker v. Bishop Hill Colony*, 45 Ill. 264.

We do not think that Allen could waive any right under the agreement, after the execution and delivery of the mortgage, which would operate to divest the mortgagee of his security. After pledging all the rights he held under the contract to Houghton as security for the payment of his obligation to him, he could not in equity destroy the effect of that security by a voluntary surrender or waiver which had neither consent nor consideration to support it. It may be admitted, as claimed by respondent, that, as between vendor and vendee, the vendor, after refusal by the vendee to complete the purchase, may sell and may recover possession; that the vendee, refusing to go on with his payments, after paying part, forfeits the payments made, and the vendor may bring ejectment or alienate; and also that time was of the essence of this contract. All these contentions may be conceded, yet the facts remain that the vendors here acquiesced in the continued possession of the property by the vendee, and recognized his rights under the contract to control the deed; that while rightfully in possession under contract for title, and before the lapse of time for payment of installments, he had mortgaged the premises to plaintiff, and that Dresbach knew or had notice of all these facts.

In speaking upon the question of the rights of parties similarly situated, but under a parol agreement to purchase, the New Jersey court of chancery said: "They (the purchasers by parol) did not pay the \$500, as was stipulated by the agreement, on the first of April. But in May they paid upward of \$900, and Allen (vendor) accepted and thereby waived all difficulty as to time. They had a right to a conveyance of the property upon their securing the balance of the purchase money according to the agreement. Can there be a doubt but that they might have assigned their benefit in this agreement to the complainants and placed them in their stead in their relationship to the property, and as to their right of conveyance from Allen? If such an assignment would have been valid, and could have been enforced in equity, I cannot see how the mortgage can be invalid. * * * They had a beneficial agreement, which, beyond all doubt, they had the right to assign. They meant to do this, and to carry out that intention executed the mortgage in question. This court will not permit them to defeat that intention, and defraud other parties upon the technical ground that there was no title or estate vested in them to mortgage. The equities of the complainants under the mortgage were that they had the right, if the Armitages (purchasers) refused to fulfill the agreement with Allen themselves, to assume his position, and redeem the property. Neither Allen nor the Armitages could defeat that right. If Allen had called upon them to carry out the agreement, and they had refused or neglected, he might then have disposed of the property free from their lien. But he could not covertly or without notice to them defeat their mortgage, or, rather, deprive them of their equities." *Sinclair v. Armitage*, 12 N. J. Eq. 177.

And so in this case, while a mortgage in this state is not an assignment, and while we do not think that the vendor or any one else was bound to notify the plaintiff, or call upon him to carry out the agreement, yet the parties, Jackson, Allen, and Dresbach, could not by an agreement among themselves deprive the plaintiff of his equities, among which was the right to have the property sold at auction to the highest bidder, in case of default in making payments, and, after payment of the balance due upon the contract, have the overplus, if any, applied to the satisfaction of the mortgage. Plaintiff had the right to assume that the contract would be carried out in all respects, and the purchaser, not being in default at the time of the execution and delivery of the mortgage, could not stipulate away this right, after receiving plaintiff's money (\$921.75) upon the faith and security of the contract.

Judgment reversed, with directions to the court below to modify the decree of foreclosure and sale so as to include said lots 6, 7, and 8, and to have the proceeds, or so much as may be necessary, applied to the satisfaction of plaintiff's mortgage.

We concur: MCKINSTRY, J.; TEMPLE, J.

WERMER v. McNULTY and others.

(*Supreme Court of Montana. July 19, 1887.*)

1. MINING—LOCATION OF CLAIM—NOTICE—AFFIDAVIT.

Under Rev. St. Mont. 6th Div. Gen. Laws, p. 590, § 873, providing that locators of mining claims shall, within 20 days after discovery, make and file for record an affidavit describing such claim in the manner prescribed by the United States laws, a party may make the declaration required by the statute upon information supplied by an agent and joint locator, and without having personally seen or discovered the lode, and may sign such agent's name with his own to the affidavit as joint locator.

2. SAME—DISCOVERY—INSTRUCTION.

In an action involving the title to a mining claim an instruction on the question of discovery as follows: "It is not necessary that the work by which the discovery vein or lead is discovered and made visible should be made by the locators. It

is sufficient if, at the time of the location, the vein or lead is exposed to view, and its existence shown by the locator, for these facts would be equivalent to discovery."—is correct if accompanied by other instructions fully setting forth the law on other points.

Appeal from district court, Silver Bow county.

Ejectment. The opinion states the case.

Thomas L. Napton, for appellant. Cole & Scallon, for respondent.

McCONNELL, C. J. This is an action of ejectment brought under section 2326, Rev. St. U. S., to contest the right of the defendants to a patent to a "certain tract and parcel of land and mining ground situated in the Summit Valley mining district, in Silver Bow county," Montana, called by the plaintiff the "Jennie Dell Lode Mining Claim," and by the defendants the "Beauty Quartz Lode Mining Claim." Upon the trial the plaintiff introduced a notice of location, duly verified by oath, and in all other respects complying with the provisions of the laws, both of the United States and of this territory, bearing date January 1, 1886, and the defendants likewise introduced a notice of location, which equally complied with such laws, but of a later date than that of the plaintiff.

It is conceded that this made a *prima facie* right of the plaintiff to recover in this action. But, at this stage of the trial, the defendants introduced the plaintiff as a witness, who testified as follows, to-wit: "I reside in Butte City, M. T., and have resided in Walkerville for four years, and put in several summers in prospecting. I signed and made affidavit to the location notice of the Jennie Dell lode location, the property I brought suit to recover in this action. I swore to the affidavit, on information and belief, on the first day of January, 1886. This information I got from Hutchinson and Batram. I signed the name of Hutchinson to the notice of location. He told me about it on the first of January, 1886. I was first on this ground in February or March, 1886,—some time after I had sworn to the notice of location. I was on that ground years ago. This is the only notice of the location of the Jennie Dell lode mining claim, and the only one we base our claim upon to the ground in dispute in this cause. Hutchinson never swore to the affidavit, nor signed it. I signed his name. My own name and Hutchinson's were on the notice as locators. We were both locators, and Hutchinson was my agent." Upon the introduction of this evidence, the defendants, by their attorneys, "moved the court to strike from the testimony in the case the said notice of location of the Jennie Dell lode mining claim, for the reason that it was never sworn to by the discoverer or discoverers of said claim, or any one authorized by them, or the laws of Montana territory, in reference to making and filing a declaratory statement, in giving a notice of location, as provided by law." This motion was disallowed, to which defendants excepted. There were verdict and judgment for plaintiff, and the appellants bring the case here, because of the alleged error above set forth, and because of alleged error in the instructions given to the jury. The appeal is taken alone on the judgment roll.

Rev. St. Mont. 5th Div. Gen. Laws, p. 590, § 873, provide that "any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, shall within twenty days thereafter make and file for record, in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof, in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner prescribed by the laws of the United States." The evidence of Wermer shows that Hutchinson and he were joint locators of the Jennie Dell lode; and it may be fairly inferred from his statement that Hutchinson discovered it as his agent; that it was located in the names of both of them; that Hutchinson informed him of said discovery on the first day of January, 1886, and thereupon he (Wer-

mer) made out the declaratory statement thereof in writing, describing such claim in the manner provided by the laws of the United States, and affixed to it the proper affidavit, signing his own name and that of Hutchinson to it, swearing to it himself upon the information furnished by Hutchinson and one Batram.

It is insisted by counsel for appellant that this oath is void, for the reason that the party making it did not himself see or view the ground until two or three months after making the oath; that the oath required by the statute must be made at least by a discoverer who knows the facts sworn to of his own knowledge, and not made upon information and belief; and that this statute, being for the acquisition of title, should be strictly construed. We do not assent to this proposition, but hold that the respondent could lawfully make the affidavit under the facts of this case. Hutchinson and respondent both made the location. They were tenants in common in the claim. Each was the agent of the other in all matters pertaining to their joint interests. Hutchinson discovered the claim, in the strict literal sense of that word, by personally viewing the lode or lead of precious metal. He informed respondent of the discovery, and was his agent in making it. The location was made in their joint names; and, under these circumstances, the respondent might well make the oath to the declaratory statement upon information and belief. The statute provides simply for an oath in writing. It does not say that it shall be made upon the personal knowledge of the affiant. It is not usual to require such strictness, unless the statute prescribing the oath expressly requires it. The object of recording the declaratory statement is to give the public notice that a location has been made; and the object of requiring an oath was to prevent fraud, by subjecting the locator to the penalties of perjury if he swore falsely and corruptly. If the affiant in such cases swears falsely and corruptly, he will be as much amenable to the penalties of the law denounced against perjury as if he had made the oath upon his own alleged personal knowledge; and the mere fact that the oath is absolute in form, when in fact it was made upon information and belief, does not invalidate it. 12 Myer, Fed. Dec. § 1047.

In the case of *Gore v. McBrayer*, 18 Cal. 582, the court say: "As the title comes from appropriation made in accordance with the mining rules and customs, and as it is not necessary that a party should personally act in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation, it would seem that such acts as these are valid to give title to the claimant." In this case, McBrayer and Gore made a parol agreement that the latter should go on a prospecting tour, and all the mineral land he might discover should be the property of both, with others who were parties to the agreement. McBrayer discovered a mine, and duly staked it, and put up a notice in his own name and Gore, with others. Afterwards he took down this notice, and put up another, but left out the name of Gore. The court held Gore entitled to his interest in the mine; in other words, that the discovery and location may be made by an agent. The eyes of the agent are in law the eyes of the principal.

We further observe that the act of congress does not require that the notice of location should be verified by oath. Section 2324, Rev. St. U. S. This is an additional burden imposed upon the locator of a mining claim by the territorial legislature. The original act, creating the territorial government, provides that the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States; but no law shall be passed interfering with the primary disposal of the soil. Rev. St. U. S. § 1851. It is not necessary for us in this case to inquire whether the territorial legislature went beyond its constitutional authority in imposing these additional burdens upon locators of mining claims; but, if it did not, the closeness with which it trenched upon such au-

thority may well be considered as a persuasive reason why the courts should so construe them that they shall not be more burdensome than can be reasonably helped.

2. It is urged that the court erred in the instructions given to the jury, and we are referred to instruction No. 2 as particularly erroneous. It is as follows, to-wit: "It is not necessary that the work by which the vein or lead was discovered and made visible should be made by the locators. It is sufficient if, at the time of location, the vein or lead is exposed to view, and its existence known by the locator; for these facts would be equivalent to a discovery." This instruction is said to be erroneous, because the statute requires, as a prerequisite to recordation, one well-defined wall rock. This very instruction had already been given to the jury, in an instruction which undertook to give, and did give, all the requirements of the law necessary to a valid location of a mining claim; and the instruction criticised was given specially to define what was necessary to constitute a discovery of a mine.

This court, in the case of *Kennon v. Gilmer*, 5 Mont. 257, 5 Pac. Rep. 847, say: "The instructions to the jury must be taken as a whole, and must not contradict or be inconsistent with each other. There is no such thing as a plaintiff's or defendant's instruction. The instructions proceed from the court, and ought to cover the whole case as made in the testimony. It is not expected that all of the law can be given in one instruction, and so the instructions must be considered as a whole; and if, when so considered, they cover the entire case, and no more, and make a harmonious whole, not inapplicable or inconsistent with each other, that is sufficient." And we may add that the jury will be presumed to have read all the instructions, and given each one due consideration.

Let the judgment below be affirmed, with costs.

OWSLEY v. WARFIELD and another.

(*Supreme Court of Montana.* July 22, 1887.)

APPEAL—RECORDS—INDEX OF TRANSCRIPT.

In Montana, if the transcript on appeal, whether printed or in writing, does not comply with supreme court rule 5, requiring an alphabetical index of its contents, specifying the page of each separate paper, order, or proceeding, and with rule 7, requiring each paper to be separately inserted, the appeal will be dismissed, with costs.

Appeal from district court, Silver Bow county.

Robinson & Stapleton, for appellants. *Cole & McBride*, for respondent.

MCLEARY, J. The transcript in this case is printed in the form of a neat pamphlet; with pages about the size of those in the Montana Reports. This practice is commendable, and is especially permitted by rule 7 of the supreme court. But the printing of the transcript does not dispense with other requirements prescribed by the rules in relation to the manner in which it shall be prepared. Rule 4 prescribes the method of preparing the transcript when not printed, and all of these requirements should be complied with. Rule 5 requires the transcript to contain an alphabetical index of its contents, specifying the page of each separate paper, order, or proceeding. Rule 7 provides that each paper shall be separately inserted.

In the transcript herein filed no index is contained or appended; nor is the case even properly entitled, there being nothing to show which party is appellant and which respondent. The papers and orders are run together, without any indication where one ends and the other begins. It is impossible to say whether the proceedings are chronologically arranged or not, so confused and mixed do they appear. Several pages are repeated, without any shadow of an excuse for so doing. It seems that one bill of exceptions, containing vari-

ous rulings and objections, is inserted, though it was never signed by the judge of the court, and then the same bill of exceptions, presumably with corrections, is signed by the judge, and inserted also, although it would have been next to impossible to discover this had it not been for the suggestion in respondent's brief. Rule 9 provides that transcripts which fail to comply with the rules shall not be filed by the clerk; but, as this one was printed in very neat typography, doubtless the clerk did not subject it to a very critical examination. Repeated threats have been made by this court to enforce these rules, and perhaps long indulgence and forbearance have induced persons to believe that the rule was to be invoked merely *in terrorem*. But the time has come to begin the enforcement of these rules in earnest.

For non-compliance with the rules of this court, this appeal is dismissed, with costs to be taxed against the appellants.

TERRITORY v. JASPER and another.

(Supreme Court of Montana. July 13, 1887.)

FORNICATION—EVIDENCE AS TO BEING UNMARRIED.

Upon trial of an indictment for fornication, under section 146, Crim. Laws Mont., (division 4, Rev. St. 1879,) providing that "if any unmarried man shall live and cohabit with an unmarried woman," etc., it is sufficient for the prosecution to show that at the time of the alleged offense the parties were not intermarried. It is not necessary to go further, and show that they were not married to some other person. *Territory v. Whitcomb*, 1 Mont. 359, distinguished.

Appeal from district court, Yellow Stone county.

S. H. Wilde, for appellants. *Mr. McGinnis*, for respondents.

GALBRAITH, J. This is an appeal from an order sustaining a motion to dismiss the prosecution, for the reason that the appellant had failed to establish by proof a material allegation of the indictment. The indictment alleged that the respondents were guilty of the offense of fornication, in violation of section 146, Crim. Laws, (division 4, Rev. St. 1879.) This section, among other things, provides that, "if any unmarried man shall live and cohabit with an unmarried woman," it shall be a misdemeanor. The allegation of the indictment was that, at the time and place mentioned therein, Leslie E. Jasper, "an unmarried man, and Ellen Sims, an unmarried woman, on divers days, times, and occasions, at and before the time last aforesaid, did willfully and unlawfully bed, cohabit, and live together, and have carnal knowledge of each other, without then and there being married, and did then and there commit fornication."

The testimony in the record discloses, and the motion substantially admits, that the respondents were not intermarried, but it insists still further that the prosecution must show that they were not married to some other person. It is true that where parties are living and cohabiting together in an open and notorious manner, in the absence of any testimony to show that they were not married to each other, the presumption is that they are living together lawfully. But where the proof is that they are not married to each other, and yet are living together, to hold that the prosecution must prove further they are not guilty of another public offense, viz., adultery, by showing that they are not married to any other person, is presuming that they are guilty of adultery. It is requiring that the prosecution shall prove a negative, viz., that they are not committing adultery. When the proof has established the fact that the parties are living together unlawfully, not being married to each other, as in this case, this by itself makes out the crime of fornication. The presumption, in the absence of proof of marriage, is that persons are single and unmarried. Marriage must be proved, not presumed. Therefore, when the only evidence is that the persons prosecuted are living

together unlawfully, and there is no proof of marriage, this presumption attaches, and the offense is fornication. To require the prosecution to prove marriage of either of the parties to any other person is to exact proof of a negative, which would be often impossible. The means of such proof are almost wholly in the power of the party accused. Such a requirement would virtually annul the above law, so far as it relates to unmarried persons, and defeat the legislative will.

This view of the case does not necessarily conflict with that of this court in *Territory v. Whitcomb*, 1 Mont. 359. In that case the decision of the court was based upon the failure of the prosecution to show that the defendants were not married to each other. But in that case the judge rendering the opinion of the court used the following language: "Even the married condition of either of the parties would change the nature of the crime; so that the married or unmarried condition of these defendants, or either of them, was a most material inquiry upon the trial, and the absence of any proof upon the subject renders a conviction legally impossible." It is evident that this language may have easily misled the court below in sustaining this motion. But in so far as this language may be construed to mean that where parties are shown to be living together unlawfully, and not married to each other, the prosecution must introduce evidence proving, or tending to prove, that they, or either of them, are not married to another person or persons, is erroneous.

The action of the court in sustaining the motion to dismiss is reversed, with costs.

HARTMAN, Probate Judge of Gallatin Co., as Trustee of the Town-Site of Cooke, *v.* SMITH and others.

(*Supreme Court of Montana.* July 18, 1887.)

1. PUBLIC LANDS—MINING LANDS—MILL-SITE—TOWN-SITE—PATENTS.

In 1882, defendants located on the public domain a mill-site of five acres as appurtenant to a certain quartz lode mining claim, the land being non-mineral and non-contiguous to said lode, and there being no question as to the regularity of such location, under the provisions of section 2337, Rev. St. U. S. Upon this mill-site they erected a cabin, which they used for storing tools, and as an ore-house for the ore taken from the mine. In 1884, plaintiff, as trustee, filed application for a survey and patent of a town-site, and included therein the mill-site of defendants, received his receipt from the land-office, and proceeded to dispose of lots. In 1885, defendants applied for a patent for their lode, including the mill-site. Plaintiff thereupon brought suit to determine his rights in such site. *Held*, that the use and occupation of the mill-site by the defendants was of a character sufficient to bring it within the provisions of section 2337, Rev. St. U. S., regarding the use and occupation of such land "for mining or milling purposes," and that they were entitled to a patent therefor.

2. SAME—DECISIONS OF LAND COMMISSIONER.

In controversies of this character, the decision of the land commissioner is not binding on the court.

3. SAME—TOWN-SITE LAW.

Rev. St. U. S. § 2392, in relation to town-sites, which provides that "no title shall be acquired under the foregoing provisions of this chapter to any mine, * * * or to any valid mining claim or possession," applies also to a mill-site included in the application for a patent for a lode.

Appeal from district court, Gallatin county.

Henry N. Blake and *C. S. Hartman*, for appellants. *Geo. F. Shelton*, for respondents.

GALBRAITH, J. This is an action to determine an adverse claim to certain real estate. The property in controversy is claimed by the appellant as a town-site, and by the respondents as non-mineral land, not contiguous to a vein or lode, and claimed to be used for the mining purposes of such vein or

lode, and included in the application of the patent therefor, under section 2337, Rev. St. U. S.

The facts in the case are as follows: In April, 1882, the defendants, and those under whom they claim, located on the public domain a mill-site of five acres, as appurtenant to a certain quartz lode mining claim, called the "Bull of the Woods Lode." The land located as a mill-site was at that time unoccupied and unappropriated public land, non-mineral in its character, and non-contiguous to said vein or lode. The locators were each and all of them citizens of the United States, over 21 years of age, and the location of said mill-site was made in the manner required by law; it being conceded by the agreed statement of facts that there is no question as to the regularity of all the proceedings in the location and appropriation of said mill-site by the defendants. The defendants have used this mill-site for mining purposes, as appurtenant to said lode; having erected a cabin thereon, and used the same for storing tools, and as an ore-house for the ore taken from said mine. In the month of August, 1884, the plaintiff, as trustee, filed his application for a survey and patent of the town-site of Cooke, and included therein the mill-site of these defendants, and received his receipt from the land-office, and proceeded to dispose of lots in said town-site in the manner provided by law. On the fifteenth day of May, 1885, the defendants applied for a patent for said lode, and included in their application the mill-site as appurtenant thereto. The plaintiff filed his adverse claim to that portion of their application which included the mill-site, and brought this suit to determine his rights to said mill-site, under the town-site patent. No claim is made by the plaintiff as to the regularity of the mill-site location by the defendants, or that there is any question as to the prior appropriation, use, and occupation by them, or that there has been any failure on their part to properly represent their mine and mill-site, from year to year, as required by law.

And the only question for the determination of this court is whether the use and occupation of this mill-site by the defendants has been such an occupation as will give them a right to hold the same against subsequent entry thereof for town-site purposes by the probate judge. That this is the only question for our determination is admitted by both parties to this action.

The action was tried by the court sitting without a jury, a jury trial having been waived, and upon an agreed statement of facts. This statement, under our system of practice, had the effect of a special verdict or finding of facts, and properly belongs to the judgment roll. Division 1, Rev. St. 1879, §§ 270, 294. This statement, among others, contains the following facts: "That the said Smith built a log cabin thereon in April, 1882, and put a roof on the cabin in 1883; that said cabin was 18 feet long, 16 feet wide, and ten feet high; that shovels, picks, drills, powder, tools, and small quantities of ore from said Bull of the Woods quartz lode mining claim have been stored in said cabin by defendants, and that no other improvements have been made on said mill-site by defendants;" also, "that the said mill-site is non-mineral land, and not contiguous to the said Bull of the Woods quartz lode mining claim, but about two and one-half miles distant therefrom." Upon these facts, the court came to the following conclusion, and made the same a part of its judgment: "That said mill-site is non-mineral land, is not contiguous to the vein or lode of the Bull of the Woods mining claim above described, and has been used by the defendants herein, and still is so used by them, as the owners of the Bull of the Woods quartz lode mining claim, for mining purposes, in connection with said mine, and as appurtenant thereto."

Was this conclusion, in so far as it relates to the use of the mill-site for mining purposes, in connection with the quartz lode mining claim, correct and warranted by the facts? Section 2337, Rev. St. U. S., which authorizes the acquisition of title to tracts of land not contiguous to veins or lodes, reads as follows:

“Where non-mineral land, not contiguous to the vein or lode, is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements, as to the survey and notice, as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.”

It will be observed that this law specifies two cases in which a patent to a mill-site may be obtained, viz.: “(1) Where non-mineral land, not contiguous to the vein or lode, is used or occupied by the proprietors of such vein or lode for mining or milling purposes. (2) The owner of a quartz-mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill-site.” The owner of a quartz-mill or reduction works may therefore obtain title from the government for the mill-site on which it is built; and the owner of a quartz lode mining claim may obtain title to a mill-site on non-mineral land not contiguous to the mining claim for either mining or milling purposes. It seems to us plain that this is the only proper construction to be placed upon the statute. But, if it can be rendered clearer from the context, any other construction would appear to be inconsistent with that portion of the law which provides that only \$500 worth of work need be done upon a mining claim in order to obtain a patent therefor. But the section under consideration provides that the mill-site may be patented with the mine. It does not appear to us that \$500 worth of improvements or development is sufficient to warrant the building of a mill or reduction works in ordinary cases. It is a fact of which we think this court should take notice, that in the case of the great majority of quartz lode mining claims a much greater and more expensive development is necessary, in order to warrant the erection of quartz-mills or reduction works. Even if there could be any doubt in relation to the language of the statute, its construction, in view of the subject-matter, should be reasonable. In the case of the owner of a quartz lode mining claim, the purpose mentioned in the statute is in the alternative, viz., “mining or milling purposes.” It may be appropriated by such owner for either purpose, and, if for either, such use will be sufficient. The statute does not mention any particular kind of mining purpose for which it shall be used; and therefore, if used in good faith for any mining purpose at all, in connection with the quartz lode mining claim, such use would be within the meaning of the statute. It is certainly not intended that it shall be used for such work as is done upon the mine itself; for the land must be non-mineral, and not adjacent to the mining claim.

We cannot say, under this statute, what shall be the extent of the use,—whether much or little,—or the particular character of the use. The phrase “mining purposes” is very comprehensive, and may include any reasonable use for mining purposes which the quartz lode mining claim may require for its proper working and development. This may be very little, or it may be a great deal. The locator of a quartz lode mining claim is required to do only a hundred dollars’ worth of work each year, until he obtains a patent therefor. But if he does only this amount, and uses the mill-site in connection therewith, is not this the use of the mill-site for a mining purpose, in connection with the mine? Who shall prescribe what shall be the kind and extent of the use under this statute, so long as it is used in good faith, in connection with the mining claim, for a mining purpose?

The use to which the mill-site was subjected, although limited in extent, was, so far as appears from the record, in good faith, and for mining purposes,

in connection with the quartz lode mining claim. We think that all that the law requires in such a case as the one at bar is the reasonable use and occupation of the non-adjacent tract for mining purposes, in connection with the mining claim. This appears to have been the kind of use and occupation of the land in question. In a controversy of this kind the decision of the land commissioner is not binding upon this court. This would be inconsistent with the act of congress in relation to proceedings in such cases in courts of competent jurisdiction, which provides that the patent shall issue for the claims, or such portions thereof as the applicant shall appear, from the decision of the court, to possess.

The validity of the mining location is admitted, and it is not claimed that it has been abandoned or forfeited. The preliminary requirements of the statute, as to survey and notice, as to the mill-site, have been complied with. It is non-contiguous to the mining claim. The mill-site is therefore properly appurtenant to the quartz lode mining claim.

The location of the town-site was made subsequent to that of the mill-site and mining claim. The act of congress relative to town-sites provides that "no title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim, or possession held under existing laws." Rev. St. U. S. § 2392. The above section 2337 of the statute, by requiring the mill-site to be included in the application for a patent for the vein or lode, and that the same preliminary steps, as to the survey and notice, shall be had, as are applicable to veins or lodes, and that it shall be paid for at the same rate per acre as the mining claim, and may be patented with the vein or lode to which it is appurtenant, recognizes the mill-site as a mining possession. The location of the mill-site, perfected according to law, like that of a quartz lode mining claim, operates as a grant by the United States of the present and exclusive possession of all the surface ground included within its limits. Having been used for mining purposes, in connection with the mine, it has not been abandoned or forfeited. It is therefore comprehended within the above section 2392, and is reserved from sale.

The patent for the town-site, in so far as it included the mill-site, is therefore void, and the patent therefor should be issued in connection with that for the mining claim.

The judgment is affirmed, with costs.

BROWNELL v. MCCORMICK.

(*Supreme Court of Montana.* July 18, 1887.)

1. FRAUDULENT CONVEYANCES—EVIDENCE—DECLARATIONS AND ACTS OF OWNERSHIP.

In an action against a constable for attaching, as the property of D. & R., certain horses leased by them from M., and which M. afterwards sold to plaintiff, and other horses bought by plaintiff, and intrusted to the possession of D. & R., with authority to sell them for plaintiff, the defendant set up that there was no delivery of the property under any sale to plaintiff, that plaintiff's claim was founded on a transfer made in fraud of the creditors of D. & R., and that plaintiff permitted D. & R. to hold the property as their own, and to obtain credit on the faith of it. There being no testimony showing that D. & R. did in fact own the property, or that plaintiff had any knowledge that they claimed such ownership or authorized such claim, or that the credit was based on such claim, *held* error to admit evidence of declarations and acts of ownership made by D. & R. to third persons.

2. SAME—INSTRUCTIONS NOT SUPPORTED BY EVIDENCE.

In the absence of evidence showing that the property had been "covered up" or concealed to hinder and defraud the creditors of D. & R., *held* error for the court, at the request of defendant, to instruct the jury that, if the property had been covered up, they should find for the defendant.

3. SAME—INSTRUCTIONS—ATTACHMENT OF UNDIVIDED INTEREST.

An instruction to the jury to find for the defendant in case "D. & R. had an undivided interest in the property at the time of the levy," *held* erroneous, as there

was no evidence that D. & R. had any such interest in the property, and as the seizure under attachment of an undivided interest in property of a stranger is *pro tanto* a trespass.

4. APPEAL—BRIEFS—RIDICULING COURT BELOW.

A brief on appeal which contains language casting reproach and ridicule on the court below will not be tolerated by this court.

5. APPEAL—TRANSCRIPT—RULE.

When a transcript on appeal is not prepared in accordance with rule 4 of the supreme court, the court will be warranted in refusing to consider it, although in this case the defect is overlooked.

Appeal from district court, Meagher county.

J. H. Shober, J. W. Kinsley, and Sanders, Cullen & Sanders, for appellant. *Wade, Toole & Wallace*, for respondent.

GALBRAITH, J. The transcript in this case is not prepared in accordance with the requirements of the rule. See Rules Sup. Ct. No. 4. We would therefore be warranted in refusing to consider it. The errors of law are, however, so apparent that the consideration of doing substantial justice prevails upon us to overlook this defect in this case. But, as we have had occasion to call attention to the disregard of this rule upon a former occasion, we may never again be so indulgent. *Alder Gulch Con. Min. Co. v. Hayes*, 6 Mont. 31, 9 Pac. Rep. 581.

This is an appeal from an order overruling a motion to set aside the verdict and judgment. The action was one of claim and delivery, brought to recover the possession of certain horses, or their value. It appears from the record that the defendant, as the acting constable of Diamond township, Meagher county, seized the above property, by virtue of certain writs of attachment, issued out of the justice's court of said township, in several separate actions, against the firm of Dalton & Radbourn, as the property of Dalton & Radbourn.

The firm of Dalton & Radbourn had leased of one Cheney Moulton certain ranches and horses in the county of Meagher, and among the animals so owned by Moulton, and leased to them, were the two mares mentioned in plaintiff's complaint. On February 5, 1885, Mr. Moulton sold his Montana ranches and stock to the plaintiff in this case, and executed a bill of sale therefor, and thereafter that firm continued to hold the same under their lease, but as tenants of plaintiff. The three stallions mentioned in the complaint were purchased by the plaintiff, April 25, 1886, at Bloomington, Illinois, of one George W. Stubblefield, and were shipped out to Montana immediately, and placed in possession of Messrs. Dalton & Radbourn, on plaintiff's ranch, with authority to sell them for plaintiff if they had an opportunity to do so. All of the property remained in the possession of Dalton & Radbourn, as lessees of plaintiff, up to about the first day of August, 1886; at which time the plaintiff, having previously given the notice mentioned in the lease, terminated the same, and took possession himself of all his property. On the seventh day of August following, the defendant, as constable, seized the horses mentioned in the complaint, under his writs of attachment against Dalton & Radbourn, and took them out of the possession of the plaintiff. The defendant, in justification, pleads his writs of attachment and executions subsequently issued in the cases, and levied upon the property in question. He also pleads specially that there was no delivery of the property under any sale made to the plaintiff; that plaintiff's claim to the property was founded on a transfer fraudulently made to hinder, delay, and defraud the creditors of Dalton & Radbourn. The defendant also pleads, by way of estoppel, that plaintiff knowingly permitted Dalton & Radbourn to hold, possess, and use said property as their own, and that the credit obtained by them was extended in good faith, upon the belief, upon the part of their creditors, that it was their property, and that the attaching creditors would not have extended said credit but for the asserted ownership of said property by Dalton & Radbourn, with

the knowledge and consent of plaintiff. Plaintiff replied, taking issue on all new matter set up in the answer. The cause was tried to a jury, and, a verdict having been found in favor of defendant, judgment was entered in his favor, and against the plaintiff, for costs. Only one of the parties filed a brief in this case, who was the appellant.

Upon an examination of the record, it is evident that this verdict is not supported by the evidence, but rather that it is against the evidence. But no specification of this character is made, and therefore we cannot reverse the judgment upon this ground. But there are errors specified which will enable us to do substantial justice. The court admitted, as evidence to the jury on the part of the respondent, that Dalton & Radbourn had exhibited to certain persons a certificate of sale and pedigree of "Premier," one of the horses, and also declarations of ownership of the horses made by them, and that they had exercised the same acts of ownership over them as if they had been their own. Upon the conclusion of the testimony, the appellant moved to strike out this portion thereof, which was refused. This refusal is specified as one of the errors. There was no testimony that Dalton & Radbourn did in fact own the stock attached. Upon the question of ownership, the appellant had presented by his testimony a strong *prima facie* case. There was no evidence that the attaching creditors gave credit for the claims upon which they had brought their suits to the firm of Dalton & Radbourn, nor that Dalton & Radbourn claimed to be the owners of the attached property, nor that the appellant had any knowledge of such claim, or authorized them to make such claim. They never held themselves out as the owners of the property, or were authorized by the appellant so to do. The refusal to strike out their testimony was an error which was prejudicial to the appellant, as the testimony may have misled the jury.

Errors are also alleged to the refusal of the court to give certain instructions requested by the appellant, and to the giving of certain instructions asked by the respondent. The consideration of two of these will be sufficient. The court gave the following, requested by the respondent: "If this property has been covered up, or any part of it has been covered up, to hinder, delay, or defraud the creditors of Dalton & Radbourn, you will find for the defendant as to the property so covered up." There was no evidence showing, or tending to show, that any of the property in question was "covered up" or concealed with intent to hinder, delay, or defraud the creditors of Dalton & Radbourn. This instruction was not, therefore, applicable to or warranted by the evidence, and was manifestly misleading to the jury, and prejudicial to the appellant.

Instruction No. 4 was as follows: "If Dalton & Radbourn had an undivided interest in the property in question at the time of the levy, you will find for the defendant." There was no evidence indicating that Dalton & Radbourn had any interest in the property attached. It was not, therefore, based upon any evidence in the case, and misleading to the jury. It is also not the law. The officer can only seize on the attachment or sell on the execution such interest in property as the debtor has therein. Also where property which is sought to be attached, belonging wholly to the debtor, is in the lawful possession of another, proceedings must be had by serving upon such other person a copy of the writ, and the notice required in section 186, div. 1, Rev. St. 1879; in other words, by garnishment. But where the officer, under attachment, seizes an undivided interest in property of a stranger, he is, *pro tanto*, a trespasser.

In presenting this case to this court, there has been conduct which we must severely condemn. The brief of the respondent contains language attempting to cast reproach upon the proceedings of the court below, and seeking to make it the object of contemptuous wit and ridicule. Argument is the principal purpose of the brief, and this kind of wit and ridicule is not argument. The

use of slang phrases and ridiculous language, especially when directed to the proceedings of the court, should have no place in a brief. No character of persons can have a deeper interest in preserving the dignity of the bench, or maintaining the courtesies of our honorable profession, than the members of the bar, and they should act accordingly. This is one of the avowed purposes for which bar associations are formed, and one of the objects to which their efforts are directed. The language of the brief in this case is reprehensible, as being in violation of the conduct and courtesy due from the bar to the bench, and will not be tolerated.

For the foregoing reasons the judgment should be reversed.

The judgment is reversed and the cause remanded for a new trial.

FRANK v. MURRAY.

(*Supreme Court of Montana. July 18, 1887.*)

1. EVIDENCE—COMPETENCY—HEARSAY.

In an action upon a verbal contract, the testimony of plaintiff as to what his clerk told him defendant had said to him, (the clerk,) in orally making the promise sued upon, is competent, and is not hearsay.

2. STATUTE OF FRAUDS—SALE OF CHATTELS—VERBAL PROMISE.

A verbal promise by defendant to plaintiff that if plaintiff would buy certain property, and transfer the same to a third party, defendant would pay him \$500, is not within the Montana statute of frauds, (Rev. St. Mont. p. 436, div. 5,) providing that every contract for sale of goods, chattels, or things in action, for the price of \$200 or over, shall be void unless in writing, or unless there is a delivery of a portion of the goods, or a payment of a portion of the purchase money.

3. PLEADING—COMPLAINT—ALLEGATION OF DEMAND.

In an action on a verbal contract, statement in the complaint that, "at various times before the commencement of this suit, plaintiff demanded of said defendant said sum," is a sufficient allegation of demand, and it is not necessary to allege the time and place of demand.

4. CONTRACT—PERFORMANCE—WHAT IS.

In an action on a verbal contract, evidence that defendant told plaintiff that if he would bid in certain property on which he (plaintiff) had a mortgage, and transfer it to a third party, he (defendant) would pay him \$500, and that plaintiff bid in the property at \$600, and then sold it to such third party for \$1,000, is sufficient to warrant a verdict for plaintiff.

Appeal from district court, Silver Bow county.

Action on a verbal contract. The facts appear in the opinion.

W. W. Dixon, for appellant. *Robinson & Stapleton*, for respondent.

MCLEARY, J. This action was brought by Frank against Murray on a verbal contract, and on a trial before a jury a verdict was rendered in favor of the plaintiff and a motion for a new trial was overruled; and from this judgment and ruling the defendant appealed.

The evidence shows that the defendant went to the store of the plaintiff, and left with a clerk, for him, the following message: "Tell Frank that if he will buy the Green Room property in, and let Osborne have it, I will pay him five hundred dollars when I return on Saturday." Frank had a chattel mortgage on the property for \$900 or \$1,000. Osborne wished to purchase it at the sheriff's sale, but was not able to do so. He went with defendant, Murray, to Frank's store, when this message was left for the plaintiff. Next day, at the sheriff's sale, Frank, the mortgagee, bought the property at a bid of \$600, and sold it to Osborne for \$1,000; taking his note and a chattel mortgage on the property for \$500, and relying on Murray's verbal agreement for the \$500 which he had agreed to pay. Murray refused to pay, and hence this action was begun.

1. The first error assigned is as to the admission of the testimony of the witness Frank, to testify what Twohy (the clerk with whom the message was

left) told him that Murray had said. This specification of error was not noticed in the brief or oral argument of counsel, and may be considered as abandoned. The testimony was certainly competent, and does not fall within the rules in regard to hearsay testimony.

2. The next alleged error is the overruling of the defendant's demurrer to the complaint. The grounds of the demurrer were that the complaint showed that this was a verbal contract, and that it was within the statute of frauds, being a contract for the sale of goods for a greater price than \$200; and that the complaint does not allege the time and place of the alleged demand upon the appellant for payment.

First. Is the contract within the statute of frauds? Our statute reads as follows: "Every contract for the sale of any goods, chattels, or things in action, for the price of two hundred dollars or over, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or (2) unless they shall accept or receive a part of such goods, or the evidences, or some of them, of such things in action; (3) or unless the buyer shall at the time pay some part of the purchase money." Rev. St. Mont. p. 436, § 167, div. 5.

This was not a contract for the sale of goods. The property did not belong to Frank at the time of the contract, and he did not pretend to make a sale of it. Murray wished Frank to become the purchaser of these goods at the sheriff's sale, and so to arrange matters as to make Osborne the owner. It does not appear what object Murray had in bringing about these events. But it clearly appears from the evidence that Frank accepted the verbal proposition contained in the message left for him by the appellant, and did the very acts for which Murray offered to pay him the \$500. It matters not that among other things was included a sale or transfer of property by plaintiff to a third person. This fact does not bring the transaction within the meaning of the statute. This ground of demurrer is not well taken.

Second. The demand is sufficiently alleged in the complaint, which says "that, at various times before the commencement of this suit, plaintiff demanded of said defendant said sum of five hundred dollars." The time and place of the demand, as in case of commercial paper, is not necessary to be alleged.

3. The verdict of the jury is sustained by the evidence. The verbal contract fairly meant that defendant agreed that plaintiff might bid in the property at the sale at any price he pleased, and then sell it to Osborne at any price which Osborne was willing to pay, and secure himself as might be agreed upon, and that thereupon the defendant would pay him (plaintiff) \$500. To make this verbal contract mean anything else, words would have to be inserted which the evidence does not warrant. As to any conflict in the evidence, we regard that as settled by the verdict of the jury, and must adopt that view of the evidence which accords with the verdict.

4. The instructions given by the court to the jury fairly and plainly set out the law governing this case as presented in the evidence, and there was no error in giving them. The view taken by the defendant's counsel of the evidence, and on which he bases his objection to these instructions, was not adopted by the jury in exercising their privilege of weighing the testimony; but in any event, when there is a conflict, the verdict and judgment would not be disturbed. And, in like manner, the charges, being applicable to the testimony in the view of it which we regard as correct, will not be held erroneous.

There being no error in the judgment, and the motion for a new trial having been correctly overruled, this judgment is affirmed, with costs.

MURRAY v. CITY OF BUTTE.

(Supreme Court of Montana. July 21, 1887.)

HIGHWAY—DEDICATION BY STATUTE—PUBLIC LANDS—ACCEPTANCE.

In an action of ejectment, brought against the city of Butte, Montana, by the owner of a mining claim, in respect of certain streets running across his claim, the plaintiff produced in evidence a United States patent for mineral land, including the land in controversy, also the application for the patent, including the notice of location, and certain conveyances from the patentees to himself. The plaintiff then rested, whereupon the defendant disclaimed all title to the fee-simple of the land, and claimed an easement of right of way only, in support of which it offered evidence tending to show that the streets in question had been used as public highways prior to the location of the claim, which was refused. *Held*, that the evidence should have been admitted, for the reason that Rev. St. U. S. § 2477, providing that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted," was the grant of an easement by the government, of which the court would take judicial notice, and proof of its acceptance by public user, prior to the location, would establish the fact of an easement in defendant, valid against the government and its subsequent grantees; nor was the easement affected by the fact that the defendant had not adversed the application for the patent.

Appeal from district court, Silver Bow county.

Ejectment. The opinion states the case.

L. J. Hamilton and *Thomas L. Napton*, for appellant. *W. W. Dixon*, for respondent.

BACH, J. This is an action of ejectment, brought by the plaintiff to recover the possession of certain real estate situated in Silver Bow county. The property sought to be recovered is comprised in the streets of the city of Butte. The defense interposed was that the defendant claimed, and claimed only, an easement,—a right of way over the property described in the complaint. Judgment was granted in favor of plaintiff. Upon the trial the plaintiff introduced in evidence a United States patent for mineral land, which includes the premises in question; also the application for patent, including the notice of location, dated April 16, 1875, and recorded April 22, 1875, and certain conveyances from the patentees to the plaintiff. Plaintiff then rested; thereupon the defendant disclaimed any title whatever to the fee-simple estate in the ground in controversy. One of the original locators of the mining claim was then called as a witness for the defendant; and counsel offered to prove by this witness that, "when the witness located this ground, there were public streets and highways." It appears from the questions that these streets and highways were those the right to the possession of which is the subject of this controversy. Upon objection the offer was refused, and exception was taken to the ruling of the court. Upon the examination of this witness, and prior to this offer, the witness was asked if Broadway, Park, and Granite streets did not exist at the time of location of the mining claim. Upon objection, the question was disallowed, and exception was taken to the ruling of the court.

Were these rulings of the court erroneous? We think that they were. Section 2477, Rev. St. U. S., reads as follows: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This law is a grant to the public of an easement for the purpose therein mentioned; and it has been decided by this court that such a law is "the highest evidence of title." See *Northern Pac. R. Co. v. Majors*, 5 Mont. 111, 2 Pac. Rep. 322.

The law, then, was a grant of an easement for a public use.

In the case of *City of Cincinnati v. White's Lessees*, 6 Pet. 431, and 10 Curt. Dec. 179, is a leading case upon the question of dedication of land for public use. It is there held: "There is no particular form of ceremony necessary in the dedication of land to public use. All that is required is the as-

sent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation." See, also, *Smith v. Town of Flora*, 64 Ill. 93.

The offer to prove, and the question asked by defendant's counsel, above referred to, were an attempt to prove the actual acceptance by the public of the easement granted, by proving actual user and occupation, prior to the location of the mining claim, and for the purposes intended within the grant. But it is claimed by counsel for respondent that the evidence sought to be introduced was immaterial, because the appellant waived its right by failing to adverse the application of respondent for a United States patent; and respondent relies upon the cases heretofore decided by this court, known as the *Smoke-House Cases*, and reported in 6 Mont. 397, 12 Pac. Rep. 858. Those cases followed the rule announced by the supreme court of the United States in *Deffebach v. Hawke*, 115 U. S. 392, 6 Sup. Ct. Rep. 95, and they (as far as is herein concerned) decide that the location of a mine is the inception of a title, and that the patent, when issued, relates back to the location, and conveys to the patentee all the interest that the government had at the time of the location; and they further decide that any person seeking to derive title from the United States, the inception of whose title is subsequent to the filing of the location, must adverse the application for mineral patent. It is further decided by those cases that a grant by the United States conveys all the interest that the United States has at the time of the grant, and no greater interest. The rule in all cases is that a grantor cannot, as against his prior grantees, convey more than such grantor has at the time of the conveyance. In other words, where A. grants certain property to B., B. is not deprived of such property by reason of a subsequent grant from A. to C. The United States in this respect differs from no other grantor; and the United States cannot, by patent, convey to any grantee a greater right than it has at the time of such grant. If the rule was otherwise, every patentee of a mining claim would have to adverse every subsequent application for a patent to the same claim, which would result in endless litigation. We think the true rule of law is that, where a person holds a valid grant from the government, he need not concern himself about any subsequent attempt by the government to convey the same property to another person; and the *Smoke-House Cases*, and the case of *Deffebach v. Hawke*, above cited, are authorities on this point. As the learned judge says in the case last cited: "The land had then ceased to be the subject of sale by the government. It was no longer its property." So in the case at bar. Section 2477 was a grant by the government of an easement, and defendant sought to prove an acceptance prior to the location upon which the patent was based. If such an acceptance of the grant of the easement could have been established, it would have been valid against the government, and therefore valid against the subsequent grantees of the government, who must take the land in question, subject to any easement which was valid against the government at the time of the location.

It is further insisted upon by the respondent that the answer contains no allegation in support of which the offer and question which we have considered were competent. The grant of the easement sought to be established is a law of congress, and need not be pleaded specially, as this court takes judicial notice thereof. As to the allegation of acceptance by the public as to Park and Main streets, the answer asserts that those streets "have been public highways ever since the year 1866, and have ever since said date been duly and legally recognized as such, and have ever since been used by the public as such." We think that this is a sufficient pleading of dedication, at least as to those streets.

The error is properly before this court for review. It was a material error; and the judgment, and the order denying a motion for a new trial, are reversed, and the case is remanded for new trial.

FORVER and another v. BOARD OF COUNTY COM'RS OF CHOTEAU CO.

(*Supreme Court of Montana. July 21, 1887.*)

COUNTIES—LIABILITIES—COUNTY COURTS—MILEAGE OF JUSTICE.

Rev. St. Mont. 1879, div. 5, § 602, providing "that, whenever a court is appointed by the supreme court to be held in any county, it shall be the duty of the board of county commissioners of such county to pay to the chief justice or associate justice mileage at the rate of twenty cents a mile in going and returning to and from the place where the court is held, as his expenses incurred for and on account of travel incurred for the benefit of said county," is not affected by Laws Mont. 1885, p. 71, providing that "county officers, jurors, witnesses, and all other parties that may be entitled to the mileage from the several counties in the territory shall be entitled to collect mileage at the rate of fifteen cents per mile, and no more."

Appeal from district court, Choteau county.

S. H. McIntyre, Co. Atty., for appellant. *Horace R. Buck*, for respondent.

GALBRAITH, J. At the June term of the board of county commissioners of Choteau county for 1886, respondent presented to it for allowance the account of Hon. DECIUS S. WADE for mileage as judge of the district court of said county, for traveling from Helena to Fort Benton to attend the term of said court for April, 1886. The board only allowed this claim at the rate of 15 cents per mile. From this action of the board an appeal was taken to the district court, which sustained the appeal, and ordered judgment for the respondent for the difference of the mileage between 20 cents and 15 cents per mile. From this judgment the board took this appeal.

The laws under which these decisions were made, so far as necessary to be stated for construction by the court, are as follows: "That whenever a court is appointed by the supreme court, * * * to be held in any county, * * * it shall be the duty of the board of county commissioners of such county to pay to the chief justice or associate justice, so holding said term, mileage, at the rate of twenty cents per mile, in going from his residence to the place where the court is held, and returning therefrom, as his expenses incurred for and on account of travel incurred for the benefit of said county. * * *" Section 602, div. 5, Rev. St. 1879. And "county officers, jurors, witnesses, and all other parties that may be entitled to mileage from the several counties in the territory, shall be entitled to collect mileage at the rate of fifteen cents per mile for the distance actually traveled, and no more." "All acts, and parts of acts, in conflict with the provisions of this act, be, and the same are hereby, repealed." Laws 1885, p. 71.

It is both a common-law and statutory rule of construction of statutes that the intention of the legislature must be discovered, and, if possible, pursued. The intention of the legislature in the passage of these acts must be the primary object of our inquiry. Upon an examination of this statute of the territory, providing for the payment of mileage by a county, besides those above mentioned, and prior to the date of the last-mentioned act, when a prolonged stay is contemplated at the place to and from which the mileage is to be paid, we find that in all such cases a *per diem* is allowed in addition to the mileage; but no such provision is made in the statute allowing mileage to the judges, either by the way of a *per diem* or otherwise. The holding of a term of court necessarily requires some period of time for attention to and completion of the business. This may be a long or short period, as the necessities of the case require. For this purpose, expenses are necessarily incurred by the judge; and it is for these expenses, and not alone for the expenses of travel, that this act provides. The act providing for mileage to be paid to the judges allows the mileage, not only for the actual travel and its attendant expenses, but also for expenses incurred for the benefit of the county, which plainly includes, not only the travel, but also the expenses of living, and all other expenses which the judge is necessarily put to while holding his court. Certainly, the

expenses reasonably incurred by the judge while holding court are just as necessary and as much for the benefit of the county as the expenses of travel. The act plainly contemplates that this is the purpose. It is as if the act read thus: "It shall be the duty of the board * * * to pay * * * mileage, at the rate of twenty cents per mile, in going from his residence to the place where said court is held, and returning therefrom, as his expenses incurred" for the benefit of such county, "and on account of travel incurred for the benefit of such county." This is more than what is usually signified by the term mileage, which means "an allowance for traveling, as so much by the mile."

In the act of 1885, *supra*, the law-making power refers only to mileage proper,—that is, to mileage as it is usually defined; but the act allowing mileage to the judges makes its own definition of the term, and includes in its signification, not only allowances for traveling, as so much by the mile, but also reasonable expenses while holding court. The statutes, therefore, in relation to which it is claimed that the latter repeals the former, refer to two different things,—two different subjects-matter. Effect should always be given, if possible, to the legislative will; and unless one statute plainly repeals another, either by express enactment or by implication, the latter should be allowed to stand. We think, therefore, that the statute of 1885 is only intended to apply to those cases where previous statutes had authorized the payment of mileage in the usual and common acceptance, and not to the statute providing for the payment of mileage to the judges, which places upon this term its own more comprehensive and widely different signification. This view of the subject answers the argument of the appellant that the act of the legislative assembly, giving mileage to the judges, is affected by the foregoing act of 1885, for the reason that this legislation was had on account of the reduced rates of travel, by reason of the introduction of railroads into the territory.

In the view we have taken of the former statute, the amount is not excessive. More than mere mileage proper, as we have seen, is plainly intended by this statute. In our view the statutes are not inconsistent or repugnant. We are therefore of the opinion that it was not the intention of the legislative assembly, by enacting the law of 1885, to repeal the law allowing mileage to the judges.

The judgment is affirmed, with costs.

FORD v. GREGSON and others.

(*Supreme Court of Montana. July 21, 1887.*)

CONTRACT—PUBLIC POLICY—RESTRAINT OF TRADE—COMPROMISE OF LITIGATION.

A contract by which the owners of several water-rights in a certain stream agree with each other, under a penalty of \$10,000, "agreed and liquidated damages," not to sell to certain parties, or any other person or persons who may be now or hereafter endeavoring to obtain the possession of the said water-rights, and not to make any settlement or compromise with such parties, except by the written consent of the others, no limit of time being set, is void as against public policy, being analogous to a contract in restraint of trade, and also as imposing a restraint and condition upon compromises or settlements of litigation and disputes, which are favored by the law.

Appeal from district court, Silver Bow county.

Action for breach of contract. The opinion states the case.

Knowles & Forbes and *Sharp & Nepton*, for appellant. *W. W. Dixon*, for respondent.

McCONNELL, O. J. This is an action for the breach of a written contract, brought by the appellant against the respondents, in the district court of Silver Bow county. Defendants demurred to the amended complaint of the plaintiff, and the demurrer was sustained by the court. There was judgment dismissing the plaintiff's suit, and taxing him with the costs, from which he ap-

pealed to this court. Said appeal is based on the judgment roll and errors in law.

The contract sued on is as follows, to-wit:

"This agreement, made and entered into by and between William Hinkleman, Eli Gregson, Alexander Henninger, George Kessler, Thomas Ford, of Silver Bow county, Montana Territory, witnesseth that the said parties hereto do hereby covenant, promise, and agree, to and with each other, in substance as follows, to-wit:

"Whereas, the above-named parties are the rightful owners and in the possession of certain water-rights in and on German gulch, and its tributaries, in said Silver Bow county, and also of certain placer mining land, in the same gulch, which is worked with the water above mentioned; and whereas, certain parties have endeavored, and now are endeavoring, to take from the said parties hereto, by wrong and unlawful means, and appropriating to their own use, a portion of the water hereinabove mentioned, which will be greatly to the damage of the said parties: Now, therefore, these presents witnesseth that the said parties hereto do hereby covenant, promise, and agree to and with each other that they, or either or any of them, will not sell said water-right, or their interest in the same, except by and with the written consent of all of the above-named parties hereto; and without such written consent neither of said parties will make any sale to, or settlement or compromise with, said parties above referred to, or any other person or persons, who may be now or hereafter endeavoring to obtain the possession of the said water-rights; and, the better to enforce and compel the faithful performance of the stipulations aforesaid, the said parties hereto do hereby acknowledge themselves, and each of them, held and firmly bound unto each other, in the penal sum of ten thousand dollars, lawful money of the United States, as agreed and liquidated damages, for the payment of which, well and truly to be made, they severally bind themselves, their heirs and legal representatives, firmly by these presents; conditioned, however, that they severally comply with and hold inviolate the stipulations herein contained.

"It is further understood and agreed that the said parties hereto will join together, and make common cause, if in defense of their common and several interests, in any contest or action at law, which may arise in reference to the said water and water-rights, and placer mining ground, hereinabove referred to, and that, of any and all expenses necessarily incurred in protecting their said water-rights, whether by action at law or otherwise, the said Thomas Ford agrees to and will pay the one-half, and the other parties, to-wit, William Hinkleman, Eli Gregson, Alex. Henninger, and George Kessler, will pay the other half: provided, however, that, in case a sale be made of said water and water-rights, then the said Thomas Ford shall have and receive the one-half of the money received in payment therefor, and the other contracting parties shall receive and have the remaining one-half of the money received therefor. The said placer ground hereinabove referred to is better described and designated in the survey and plot filed with the application for patent as lot No. 44, in township No. 4 north, of range No 10 west.

"In witness whereof the said parties hereto have set their hands and seals this twenty-first day of August, A. D. 1884.

[Signed]

"WILLIAM HINKLEMAN.

"ELI GREGSON.

"ALEX. HENNINGER.

"GEORGE KESSLER.

"THOMAS FORD."

Agreement duly verified before Caleb Irvine, notary public, on the twenty-first day of August, 1884.

The demurrer is as follows, to-wit:

"Now come the above-named defendants, and demur to the complaints of plaintiff herein, filed April 15, 1885, and for causes of demurrer state:

"(1) That said amended complaint does not state facts sufficient to constitute a cause of action.

"(2) Said amended complaint shows upon its face that the alleged contract, upon which this action is brought, was and is contrary to public policy, and void in law, in so far as it attempts to restrain or to impose a condition upon the alienation of the property therein mentioned, or of any interest therein, or the settlement or the compromise of any controversy or litigation in reference thereto; and it is for the breach of the covenants not to sell or settle or compromise that this action is brought.

"(3) Said amended complaint is ambiguous, unintelligible, and uncertain, in that the allegations of the contract in said complaint do not correspond with, but differ from and contradict, the contract, as set out by copy and made part of the complaint, in that (1) the said amended complaint, in the first clause thereof, alleges certain considerations and objects and intentions in regard to said contract, and in entering into the same, none of which are expressed in the contract as set out by copy, but are inconsistent with said contract, and the terms thereof. (2) Said amended complaint alleges that by said contract the said parties thereto 'covenanted, promised, and agreed to and with each other that they, or either of them, without the written consent of the other parties to said contract, would not sell, compromise with, or settle with the parties referred to in said contract, or any other person or persons who were then or hereafter endeavoring to obtain possession of said water or water-rights,' whereas the copy of the contract set out provides that the parties thereto 'covenant, promise, and agree, to and with each other, that they, or either or any of them, will not sell said water-right, or their interest in the same, except by and with the written consent of all the parties; and that, without such written consent, neither of said parties will make any sale to, or settlement or compromise with, said parties above referred to, or any other person or persons who may be now or hereafter endeavoring to obtain the possession of said water and water-rights.' (3) Said amended complaint is in many other respects ambiguous, unintelligible, and uncertain.

"Wherefore defendants ask judgment that this action be dismissed, and for their costs.

[Signed]

"W. W. DIXON, Attorney for Defendants."

In order to ascertain whether this contract is obnoxious to the above objections, we will briefly summarize its provisions: (1) The parties to said contract are the owners and in possession of certain water-rights in and on German gulch and its tributaries, and also of certain placer mining land in the same gulch. (2) There were certain parties averred in the amended complaint to be Williams and Smith, but not named in the contract, who had endeavored, and were then endeavoring, unlawfully to deprive them of a portion of the water to which they were entitled. (3) They mutually covenant among themselves that no one should sell to said parties, or to any one else, his interest in said water-right, except by the written consent of all the others, and that no one should make any compromise or settlement with said parties, or any one else, without the written consent of all the others. (4) They bind themselves in the penal sum of \$10,000, each one to the other, as agreed and liquidated damages, conditioned that they severally comply with and hold inviolate the stipulations therein contained. (5) They obligate themselves, their heirs and legal representatives, to pay this penal sum, if the stipulations of the contract should be broken. (6) They enter into a compact with one another, to make common cause in any contest or action at law, in reference to said water and water-right, and placer mining ground, and apportion the expenses of such law suit, and the money that might arise from any sale made of such water-rights.

It is alleged in the complaint that all parties to this contract except Ford violated it by compromising with Williams and Smith, and selling to them

their several interests in said water and placer mining ground, without first having obtained his written consent. Hence he sues for the penal sum of \$10,000 as liquidated damages.

The contract sued on at least is void on two grounds:

First. It prohibits the owner of the water-right from selling it to any one, without the consent in writing of his four associates. By the terms of the contract, each appears to be the owner of a water-right in German gulch and its tributaries, and he binds himself under the penalty of \$10,000, as "agreed and liquidated damages," not to sell to certain parties, "or any other person or persons, who may be now or hereafter endeavoring to obtain the possession of the said water-rights." Each binds himself, his heirs and legal representatives, in said penal sum of \$10,000, to comply with said agreement not to sell at all, except by the written consent of the others. If any one of them, or his legal representative, should refuse to give his consent in writing, it would tie up the sale of the water-rights of the others forever. Such a contract is certainly against public policy. And especially is this the case in a country like this, in which water is necessary for so many industrial pursuits. This is analogous to contracts which are in restraint of trade. They are against public policy, and void. In general, covenants which are contrary to public policy are void. *Bier v. Dozier*, 24 Grat. 1.

A covenant in restraint of trade generally will not be supported, although founded on a good consideration. *Callahan v. Donnelly*, 45 Cal. 152; *Mater v. Homan*, 4 Daly, 168; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64. It is true that a covenant not to trade in a particular place, and for a particular time, is good. *Perkins v. Clay*, 54 N. H. 518; *Pierce v. Fuller*, 8 Mass. 225.

The counsel for the plaintiff insists that "the portion of the contract that might be contrary to public policy, or in restraint of trade, is mere surplusage, and can be treated as such by the court in its construction thereof." He seeks to have the court strike from the contract the provisions which prohibit the sale of the property to any one whatever, and thus limit the prohibition to the sale to Williams and Smith, and to strike from the contract the parts which bind the heirs and legal representatives of the parties, and thus limit the restraining part of the contract to the lives of the parties themselves. These are substantial parts of the contract, put into it by the parties themselves, and create an unlimited prohibition upon the sale of the property involved, upon a contingency that may never happen. The court does not make contracts, but interprets them as it finds them.

Second. This contract is void upon another ground. It imposes a restraint and condition upon compromises or settlements of litigation and disputes which are favored by law. "The courts being established to conserve the law, good morals and the due order of society cannot lend their aid to parties conspiring to impede these objects." Bish. Cont. § 59. "To settle or avoid litigation are objects of value." Bish. Cont. § 57.

This contract binds each one of the parties thereto not to make any "settlement or compromise with said parties," (meaning Williams and Smith,) or any other person or persons who may be now or hereafter endeavoring to obtain the possession of the said water-rights, without the written consent of the other parties,—a contingency that may never happen. And, having thus fortified themselves against the peaceful settlement of an anticipated lawsuit, they prepare for war, by entering into a solemn compact that they "will join together, and make common cause, in defense of their common and several interests, in any contest or action at law which may arise in reference to the said water and water-rights and placer mining ground." Such a contract is obviously against public policy.

Counsel for the appellant cites the case of *Hoffman v. Vallejo*, 45 Cal. 564, as authority for the position that a contract is not void for the reason that "no settlement or compromise of the matter aforesaid shall be made without the

consent of the parties of the second part, in writing." But the principle there settled is not applicable to the facts of this case. In that case a contract existed between the parties as to land, which made the plaintiff the equitable owner of a half interest therein. Hence the other party might well be bound not to compromise or settle without violating any rule of public policy. But in the case at bar the interests which the parties attempt to pool are separate and distinct, and the effect of the contract is to bind each party not to settle his lawsuit without the written consent of the others, who may have similar suits, or suits involving similar interests. The law is a peacemaker, and will not recognize any contract which will not leave any litigant free to compromise and settle his suit, if he chooses so to do.

It is not necessary to notice the other grounds of demurrer, as those already passed upon are decisive of the case.

Let the judgment of the court below be affirmed, with costs.

DAVIDSON and others v. CLARK and others.

(*Supreme Court of Montana. July 22, 1887.*)

WRITS—SERVICE ON AGENT—JURISDICTION.

Where, in a civil action, the case is not one which falls within the exceptions specified in Rev. St. Mont. pp. 52, 53, § 72, providing that a summons shall be served by delivering a copy thereof to the defendant personally, and where the record itself shows that no service was had upon the defendant personally, but only upon his agent, the court trying the case is without jurisdiction of the person of the defendant, and any judgment rendered against him is a nullity.

Appeal from district court, Gallatin county

Andrew F. Burleigh, for appellant. *George Haldorn*, for respondent.

MCLEARY, J. The case was tried in the district court, before Hon. JOHN COBURN, associate justice of the supreme court, presiding.

This is an appeal from the judgment rendered in the court below, and comes up on the judgment roll. It appears from the record that there was no service upon Herman Clark, or any of the defendants in this case. The only evidence of any attempt at service of summons is contained in the return of the sheriff, wherein he states that he personally served the same on Joseph J. McBride, he being the agent of the defendants named in the summons.

The statutes of Montana require that the summons shall be served by delivering a copy of the summons to the defendant personally, except in certain specified cases, among which the present is not included. Rev. St. Mont. pp. 52, 53, § 72. Where the record itself shows that no service of the summons was had upon the defendant, as is required by the statute law, the court is without jurisdiction of the person of the defendant, and the judgment is a nullity. *Freem. Judgm. § 125; Clark v Thompson*, 47 Ill. 27; *Hahn v. Kelly*, 34 Cal. 402 *et seq.*

Hence the judgment in this case must be reversed, and the cause remanded, with costs.

BLESSING v. SIAS.

(*Supreme Court of Montana. July 22, 1887.*)

1. APPEAL—RECORD—STRIKING OUT STATEMENT.

Where, in a civil action, the record on appeal shows that no motion for a new trial was made, and that no appeal was taken within 60 days of the rendition of the judgment, and the statement alleges as error the insufficiency of the evidence to support the findings, such statement will be stricken out of the record.

2. SAME—REVIEW—JUDGMENT ROLL—EVIDENCE.

Where an appeal from a judgment has not been taken within the time limited by Rev. St. Mont. p. 120, § 408, providing that "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed

on an appeal from the judgment, unless the appeal is taken within 60 days after the rendition of the judgment," and the court is precluded from reviewing the evidence, and confined to the judgment roll, in which, under Rev. St. Mont. § 294, p. 95, the findings are embodied, evidence introduced on the trial, and improperly incorporated in the findings, will be disregarded.

Appeal from district court, Lewis and Clarke county.

Action upon promissory note. The opinion states the case.

Chumasero & McCutcheon, for appellant. *Toole & Wallace*, for respondent.

MCLEARY, J. This was a suit brought on a promissory note for \$2,719, less \$1,000 credit. The note was made on the thirteenth day of October, 1884, due in one year, and payable to Arthur W. Sias by Newkirk Bros. On the twenty-fourth of March, 1885, prior to maturity, Sias transferred and indorsed the note to Blessing. The note being unpaid, on twenty-seventh March, 1886, Blessing filed his suit against Newkirk Bros., and also against Sias, as indorser. In order to avoid his neglect of presentment and notice of non-payment, the plaintiff alleges a waiver thereof by Sias, by means of a letter written to him (Blessing) by Sias. Whether or not the letter by its terms, amounted to a waiver of presentment and notice of non-payment, is the question involved in this cause here presented.

But we are met at the outset of this investigation by a preliminary question, in the shape of a motion to strike from the record all contained therein, except the judgment roll; that is to say, the statement on motion for a new trial. It is apparent from the record that no motion for a new trial was ever made in this case, and it is contended that the error alleged in the statement consists in the insufficiency of the evidence to support the findings, and, as the appeal was not taken until more than 60 days after the judgment, this statement should be stricken from the record as surplusage. "This court cannot review any question of fact, if there is no appeal from an order granting or refusing a motion for a new trial. The facts stated in the findings of the court must be regarded as true; and we cannot consider on this appeal the insufficiency of the evidence to support the findings." *Alport v. Kelly*, 2 Mont. 344, 345; *Chumasero v. Vial*, 3 Mont. 379; *Twell v. Twell*, 6 Mont. 19, 20, 9 Pac. Rep. 537; *Alder Gulch Con. Min. Co. v. Hayes*, 6 Mont. 32, 9 Pac. Rep. 581; *Porter v. Clark*, 6 Mont. 247, 11 Pac. Rep. 638. On these authorities this motion must be sustained, and the statement stricken from the record.

We have, then, before us, the appeal from the judgment and the record containing the judgment roll alone. And it is laid down in our statute "an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." Rev. St. Mont. p. 120, § 408. Then the appellant is precluded from objecting to this judgment because it is not supported by the evidence; this appeal not having been taken until nearly six months after the rendition of the judgment.

Under the statute the judgment roll in this case is constituted of the summons, pleadings, findings of the court, exceptions, and a copy of the judgment. Rev. St. Mont. § 294, p. 95. The findings of the court should contain a concise statement of the several facts found by the court from the evidence, in accordance with the issues raised in the pleadings; but the findings should not incorporate within themselves the evidence, either verbal or written, which has been introduced on the trial. Only the ultimate facts should be stated in the findings. Then, although the letter, which it is claimed by respondent constitutes the waiver of presentment and notice, is found incorporated in the findings of the court, it properly has no place therein. It cannot be regarded as a constituent part of the judgment roll; and the judgment roll alone is before us for review.

Then, from the pleadings, findings proper, and the judgment, we can find no error in the judgment of the court below, and it is therefore affirmed with costs.

ZIMMERMAN v. ZIMMERMAN.

(Supreme Court of Montana. July 23, 1887.)

1. COURTS—TERRITORIAL—POWERS—CHANCERY JURISDICTION.

Under Rev. St. U. S. §§ 1888, 1910, vesting in the circuit and district courts of the territories named therein the same jurisdiction as is exercised by the circuit and district courts of the United States, the district courts of Montana territory are vested with "all the chancery powers which formerly belonged to chancery in England."

2. DIVORCE—ALIMONY PENDENTE LITE—CONTEMPT—STRIKING OUT ANSWER.

The action of divorce being a chancery proceeding, under Rev. St. Mont. 1879, div. 5, § 508, the district court has power to punish a contempt of court in refusing to pay alimony awarded by it, by striking the defendant's answer from the record, in a case in which the defendant, being absent from the territory, punishment for contempt cannot be otherwise inflicted.

3. SAME—MODIFICATION OF ORDER.

Where, in divorce proceedings, the district court has punished the disobedience to an order for alimony *pendente lite* of the defendant, residing out of the territory, by striking out his answer, and, on application of defendant's counsel, has overruled the order striking out the answer, and has modified the order for alimony, the court is justified, on such modified order being disobeyed, in again ordering the answer to be stricken out, and referring the case as on a default, and the defendant cannot be heard to complain that he had no notice of the modified order.

Appeal from district court, Gallatin county.

Action for divorce and alimony. The opinion states the case.

Luce & Armstrong, for appellant. *Savage & Elder*, for respondent.

GALBRAITH, J. This was an action for divorce and alimony. At the time the respondent filed her complaint, viz., twenty-sixth March, 1886, she also filed her petition to the court for alimony *pendente lite*. After the pleadings were all filed in the action, viz., upon the twenty-sixth of April, 1886, the order for alimony *pendente lite*, as prayed for, was made. This order provided, further, that if the alimony was not paid, the appellant's answer should be stricken from the files, and himself proceeded against in the manner provided by law for the enforcement of the order. On the fourth of October, 1886, a motion to strike the answer of the appellant from the files was made, for that he had not complied with the order of the court requiring payment of the alimony. It appears that the above order of the court, allowing alimony, was served upon the appellant on the twenty-sixth day of May, 1886, at Elks county, Nevada. On the fifth day of October, 1886, a motion was made to vacate and set aside the order allowing alimony pending the action. On the ninth of October following, the court overruled the motion to strike the answer of the appellant from the files, and modified the former order allowing alimony *pendente lite*. On the eleventh of December, 1886, the court, upon affidavit that the modified order had been disobeyed, ordered the answer of the appellant stricken from the files. Thereafter the court ordered the cause to be referred as in the case of default, and, upon the report of the referee, ordered a decree of divorce and permanent alimony. From this decree this appeal is taken, and the only error complained of is the action of the court in striking from the files the appellant's answer.

The first question for our consideration is, did the district court have the power to make this order striking the appellant's answer from the files for disobedience to its mandates? If so, was the order properly made, under the peculiar circumstances of this case? It is admitted that this order was made as a punishment for contempt in disobeying the order of the court in relation to the payment of alimony. It is claimed by the appellant that as our stat-

utes have provided for the punishment of contempt, this is a limitation upon the power formerly exercised in such cases, upon the principle, we presume, of the maxim, *expressio unius, exclusio alterius*; and we are referred to the case of *Galland v. Galland*, 44 Cal. 475, as sustaining this doctrine. Upon an examination of this case, we find that the portion of the opinion relied upon to uphold this view is *obiter dictum*. The court, after referring to the punishment provided by the statutes of California for contempt, uses this language: "This is a limitation upon the power formerly exercised by the courts for contempt, but whether courts in this state can exercise power in this respect in cases not named in the statute, or otherwise than it has provided, we are not called upon in this case to consider."

Upon the other hand, it is contended that the court is not limited to the punishment for contempt provided by the statute in case of disobedience to its orders; that it has control of its own proceedings, and can refuse the benefit of them to a party in contempt. In the case of *Walker v. Walker*, 59 How. Pr. 476, which was an action in divorce, the answer of the defendant was stricken out, upon his default being shown to comply with an order *nisi* of the court that he pay alimony within five days. This order was appealed to the general term, where it was affirmed, and from thence taken to the court of appeals. In this case it was "considered by the defendant," and impliedly held by the court, "that the supreme court, on its equity side, has all the power and authority that formerly existed in chancery in England, and was continuously exercised by it." The same concessions must be made in the case at bar.

Our organic act provides that "the supreme court and the district courts, respectively, of every territory, shall possess chancery as well as common-law jurisdiction." "Each of the district courts in the territories, mentioned in the preceding section, shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States." Sections 1686, 1910, Rev. St. U. S. By virtue of the foregoing act of congress, the district courts of this territory are vested with all the chancery powers which formerly belonged to chancery in England. In the case last referred to, FOLGER, J., in rendering the opinion, after referring to numerous authorities, both American and English, says: "We are brought to the conclusion that there has long been exerted, by the court of chancery in England, the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the courts of chancery of this country." "It is always in the power of the defendant, in a case like that in hand, to apply to the court, and show that the order was irregularly made, or for leave to purge himself of the contempt, and be let in again to make his defense;" referring to *Brinkley v. Brinkley*, 47 N. Y. 40. In this latter case, which was one for limited divorce, the same judge says: "The special term having made the order, and the defendant having, on service thereof, neglected to comply with it, he has been disobedient of the court, and in contempt of it. The court has power to punish him therefor. This might be fine, or imprisonment, or both. But it was not limited to this mode of enforcing its orders. Inasmuch as, after the commencement of the action, he had gone out of the jurisdiction, it would not have availed to have ordered him fined and committed. But it had control over its own proceedings, and could refuse to the defendant the benefit of them, when asked as a favor, until he purged himself of the contempt."

In *Peel v. Peel*, 50 Iowa, 522, the court below had stricken the answer of the defendant from the files, for the reason that he had failed to pay the money specified in the order for alimony, and refused afterwards to allow the defendant to show cause why he had not obeyed the order, and thus purge himself of contempt. For this refusal the decree of the court was reversed.

But in this case the court, by BECK, C. J., uses this language: "While we are not prepared to hold that a defendant in a divorce case, failing or refusing to obey an order for payment of alimony, may in no case be lawfully visited with punishment, by striking his answer, the authority should be exerted only in extreme cases, when other punishment cannot be inflicted, or will not enforce obedience."

In the case at bar, by reason of the absence of the appellant, other punishment could not be inflicted than that to which the court resorted, or obedience be compelled thereby. It will be observed that in Iowa the statute provides that the punishment for contempt may be by fine or imprisonment. See, also, *McClung v. McClung*, 40 Mich. 493; *McCrea v. McCrea*, 58 How. Pr. 220. In this territory the action of divorce is made, by express statute, a chancery proceeding. Section 508, div. 5, Rev. St. 1879.

We are of the opinion, therefore, that in such a case as the one at bar, the defendant being out of its jurisdiction, the court has power to refuse to hear a defendant who is in contempt of its authority, as in the case of *Walker v. Walker*, *supra*, to strike his answer from the files.

As to the second inquiry, which is as to whether or not the appellant was in default, and whether the proof thereof is sufficient, this case is in many respects similar to the case of *Walker v. Walker*, *supra*. In this case the appellant resided without the jurisdiction of the court, while in that case the defendant, upon the making of the order of alimony, left the state. But there is in this respect no difference in principle. The parties in both cases were, at the time the order should have been obeyed, both beyond the jurisdiction of the court.

In the case last cited, the order *nisi* for alimony, as it was at first issued, was disobeyed, and in this case the disobedience was to such a modified order. But this, we hold, makes no material difference. It is contended that the court did not have jurisdiction in the matter of contempt, because he had no notice of the order modifying the first order for alimony. But this order was made upon his own application, through the interposition of counsel to vacate the order for alimony, and after hearing thereon. He had been duly served with the first order, and he cannot be heard to complain that he had no notice of the modification thereof, made in consequence of his own motion, after a hearing in which he appeared by counsel, and in his favor. He does not attempt to purge himself of the contempt, but, remaining in person beyond the jurisdiction of the court, asks its favor, while he defies its mandates. We think, therefore, that the court had power, upon disobedience of the order *nisi*, to strike the appellant's answer from the files, and that it was properly exercised, under the circumstances of this case.

The decree and the orders appealed from are affirmed, with costs.

SECOND NAT. BANK OF HELENA v. KLEINSCHMIDT and others.

(Supreme Court of Montana. July 23, 1887.)

1. JUDGMENT—BY DEFAULT—CONSENT.

Where, in an action on a promissory note, certain defendants appear, but fail to answer, and default is entered against them by consent, but the co-defendants answer, alleging that they are accommodation makers only, to which answer a replication is filed by plaintiff traversing it, and trial of the issue so formed is waived by such defendants, who also consent to a default being entered, the court commits no error in entering judgment for the amount claimed against all the defendants.

2. SAME—EXECUTION.

In such case a motion by the defendants who answered for issue of execution against the property of the other defendants first, is properly denied.

Appeal from district court, Lewis and Clarke county.

Action upon a promissory note. The opinion states the case.

Carter & Clayberg, for respondent. *Toole & Wallace*, for appellants.

MCLEARY, J. This action was brought on the thirtieth day of September, 1886, by the respondent against the defendants, to recover judgment on a certain promissory note, dated May 14, 1884, for the principal sum of \$5,500, and interest. Personal service was had upon all the defendants in the case. On the nineteenth day of November, 1886, Reinhold H. Kleinschmidt and Louis Hillebrecht filed their answer to the complaint, to which a replication was filed by plaintiff on the twenty-second day of November, 1886. Black-foot Horse & Cattle Company, Carl Kleinschmidt, and Albert Kleinschmidt, entered their appearance by their attorneys, but failed to answer within the time limited by law; whereupon their default was duly entered in open court, by and with the consent of their attorneys. On the eighth of December, 1886, the case came regularly on for trial upon the complaint, the answer of Reinhold H. Kleinschmidt, and Louis Hillebrecht, and the replication filed thereto by plaintiff. The defendants Reinhold H. Kleinschmidt and Louis Hillebrecht, by their attorneys in open court, waived a trial of the issue thus formed, and consented that their default might also be entered. The court below entered judgment for the amount due on the note, on the eighth day of December, 1886, in the sum of \$6,917.61, and \$11.65 costs of suit.

On the twenty-fourth of December, 1886, the defendants Reinhold H. Kleinschmidt and Louis Hillebrecht moved the court to direct and order that an execution be first issued against the property of the other defendants named in the action, which the court overruled, and to which they then and there excepted.

The transcript in the case presents but two questions, to-wit: (1) Was the judgment authorized? (2) Was the motion of appellants, for issue of execution against the property of the other defendants, properly denied?

We will examine these questions in the order in which they are stated in the brief of the appellants.

1. We find, upon an examination of the transcript, that the appealing defendants were copartners, doing business in the city of Helena, and were the makers of the notes sued upon. They claimed in their answer that they were accommodation makers only, and undertook to set up facts which, if true, might possibly have modified the judgment as against them, but the plaintiff filed a replication against this answer, in which it denied all the material allegations of the answer, and alleged facts which would show, beyond cavil or question, the right of plaintiff to recover a judgment against the appellants. This formed a distinct and fair issue for trial between the appellants and plaintiff. This issue came on for trial, whereupon the appellants refused to proceed, but waived a trial, and consented that their default might be taken. This was done. As already shown, the default of all the other defendants had been entered by consent, so that when the appellants waived their right of trial, and consented to default, there was nothing to try, and the court could do nothing but enter judgment for the amount claimed by plaintiff against all the defendants. In this there was no error committed.

2. As to the denial of the motion. There is nothing in the record to show on what the motion was based. We suppose it to have been based on the allegation set out in the defendants' allegations. But these allegations were denied by the plaintiff in his replication, and were not supported by any proof whatsoever; and, furthermore, the record shows that the appellants waived a trial, and consented that their default be entered. This left no issue of any kind whatever to be tried, and was a virtual confession of all the allegations in the complaint. The recitals in the judgment, which in this case must be taken as correct, show that this was, in effect, a judgment by consent. There is nothing in this record to support the motion made by these defendants below, and it was properly denied.

No brief is filed for the appellant, and, indeed, there does not appear sufficient irregularity in the record on which to make even a show of contest.

From an inspection of the record, and a careful consideration of all the facts and circumstances of this case we consider this a proper case for the enforcement of rule 23. Damages for delay are therefore awarded against the appellants in the sum of \$100, and the judgment is affirmed, with costs.

QUIRK v. CLARK and another.

Supreme Court of Montana. July 29, 1887.)

PLEADING—EXHIBITS—CURING DEFECT.

Whether or not a contract upon which action is brought is not well pleaded by annexing a copy thereof to the complaint, and marking it as an exhibit, and referring to it in the complaint as a part thereof, at any rate such a defect, if any, in the complaint, is cured, if the complaint has not been demurred to on that ground, and defendant has answered, and findings have been rendered on reference, provided the contract and complaint together show a cause of action.

Appeal from district court, Yellowstone county.

Andrew F. Burleigh, for appellant. *Sanders, Cullen & Sanders*, for respondents.

GALBRAITH, J. This is an appeal from the judgment roll. The appellants claim that the complaint does not support the judgment; and this is the only question for our consideration.

The action is based upon a written contract, made by one McCarthy with the appellants, the interest in which, after the performance by him of his part of said contract, was assigned to the respondent. The action was brought to recover a balance due on said contract to the respondent, by virtue of said assignment. The appellants did not demur to the complaint, but answered on the merits. The case was referred, and, on the referee's making his report, judgment was ordered thereon for the respondent. The objection that the complaint does not support the judgment is made for the first time in this court, and for the reason that the written contract of McCarthy with the appellants is not set forth in the body of the complaint, either by way of allegation of the substance thereof, or to its legal effect, or *in hac verba*, but by a copy attached to the complaint, and marked as an exhibit. The complaint refers to the exhibit in this language: "Plaintiff further alleges, upon information and belief, that on or about the sixth day of July, 1882, at Billings aforesaid, one Timothy H. McCarthy entered into an agreement in writing with the defendants, as such copartners, under their firm name, a copy of which agreement is hereto annexed, and marked 'Exhibit A,' and is made and forms a part of this complaint. For further particulars of the contents thereof, reference is hereby made to the same." The objection that the complaint does not support the judgment may be made in this court for the first time. *Territory v. Virginia Road Co.*, 2 Mont. 106; *Parker v. Bond*, 5 Mont. 12, 1 Pac. Rep. 209; *Anderson v. Hulme*, 5 Mont. 295, 5 Pac. Rep. 865.

Upon the question whether or not the contract is properly set forth, by attaching a copy of it to the complaint as an exhibit, and making it a part thereof, the authorities are divided. The decisions of the supreme court of California have held both ways on this subject.

In the case of the *City of Los Angeles v. Signoret*, 50 Cal. 298, the objection was taken by demurrer in the court below. In an opinion "by the court," it was held: "Several matters of substance are lacking in the averment found in the complaint, which are sought to be supplied only by reference to the recitals found in an exhibit to the complaint, and to which exhibit, for all particular allegations therein contained, reference is hereby made," etc. "This is not sufficient pleading."

In *Stoddard v. Treadwell*, 26 Cal. 294, there was a demurrer to the complaint "on the ground that it disclosed no cause of action, and on the further

ground that it was ambiguous, unintelligible, and uncertain." This was overruled. In delivering the opinion of the court, SHAFER, J., said: "But we do not consider the objections taken to the first and second counts in argument to be well founded. It has been already stated that those counts are based, respectively, upon the written contract, annexed to and made a part of the complaint. The complaint not only sets out the contract *in hæc verba*, but contains a statement of its legal effect, according to the views of the pleader. And it is insisted that the consideration upon which the promises of the defendants, for breaches of which the counts respectively proceed, has been misapprehended. Should all this be conceded, still the erroneous version of the pleader may be rejected as surplusage, for the true relations of the different parts of the contract to each other are disclosed by the contract itself. A contract may be declared on according to its legal effect, or *in hæc verba*. If the former mode should be adopted, then the defendant may, by the rule of the common law, in a proper case, crave oyer of the instrument; and if it appear that its provisions have been misstated, he might set out the contract *in hæc verba*, and demur on the ground of variance. But where a plaintiff himself sets forth the contract in the terms in which it is written, and then proceeds by averment to put a false construction upon the terms, the allegations, as repugnant to the terms, should be regarded as surplusage, to be struck out on motion. *Utile per inutile non vitiatur*. 1 Chit. Pl. 232."

This language holds, as plainly by implication as if it stated in direct terms, that the written contract may be attached to the pleadings as an exhibit, and itself referred to for the construction of its terms as a part thereof. See *Hallock v. Jaudin*, 34 Cal. 167; *Murdock v. Brooks*, 38 Cal. 596. 2 Estee, Pl. & Pr. (3d Ed.) § 3140, is referred to as sustaining the position of the appellant. This is as follows: "Matters of substance, which are necessary to be alleged in a complaint, cannot be left out, and the defect supplied by reference to an exhibit attached to and made a part of the complaint." On the other hand, *Moak, Van Santv.* Pl. (3d Ed.) pp. 181-195, referring to *Fairbanks v. Bloomfield*, 2 Duer, 353, contains the following: "And generally, under the Code, it is the safest course, where the action is founded on an instrument in writing, to annex a copy, and refer to it as a part of the complaint."

We can see no valid reason why it is not as good pleading when the instrument in writing upon which the action is founded is attached to the complaint as an exhibit, and made and referred to as a part thereof, as when it is set forth in the body of the complaint *in hæc verba*. But we are not necessarily called upon to determine this question here.

There was no demurrer to the complaint in the court below, but an answer was filed, and there was no denial of the contract set forth as an exhibit; and, while there is no direct admission in the answer that the exhibit is the contract which is the foundation of the action, yet it is admitted that McCarthy was the subcontractor of the said appellants. They admit, also, that there was a certain sum, less than that claimed in the complaint, due to McCarthy as contractor, but deny his alleged assignment thereof to the respondent. Although it may be defectively pleaded, and the method of setting it forth as an exhibit to the complaint may be the subject of demurrer, in the court below, (which we do not here maintain,) yet the contract is before us, not denied; and the above alleged defect is made the subject of objection here for the first time. We are of the opinion that this judgment ought not to be reversed on account of the mere technicality, presented for the first time in this court, that the contract is not pleaded as to its legal effect, or set forth in the body of the complaint *in hæc verba*.

In *Crawford v. Satterfield*, 27 Ohio St. 421, ASHBURN, J., delivering the opinion of the court, says: "The petition in this case, though not artistically framed, is not defective in facts, and comes within the principles of former rulings of the supreme court. In the case of *Bethel v. Woodworth*, 11 Ohio

St. 393, it was held 'that a defective statement in the petition of the cause of action is not a cause for reversal of the judgment, if the facts stated in the petition, when well stated, constitute a cause of action.' SUTLIFF, J., in the opinion, says: 'The sufficiency of the matters stated in the petition were not called in question in the court (common pleas) by demurrer; nor was the court, by motion, asked to require it reformed or improved in its structure. The assignment of its insufficiency, after the judgment, can only, therefore, be sustained upon the ground that the facts contained in the petition, even if well stated, constitute no cause of action.' To the same effect is the case of *Erwin v. Shaffer*, 9 Ohio St. 43. In our opinion, the petition in this action does contain facts sufficient, if properly stated, to make a good petition and substantial cause of action."

This, we think, is the condition of the case at bar. It is not denied that the contract set forth as an exhibit, if pleaded as to its legal effect, or set forth in the facts of the complaint *in hæc verba*, that then complaint would support the judgment.

In *Lincoln v. Iron Co.*, 103 U. S. 412, Mr. Justice BRADLEY, delivering the opinion of the court says: "It is the rule of the common law that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured, (1 Wms. Saund. 228;) or, as it has been tersely put, a verdict cures a defective statement of a title or cause of action, but not the statement of a defective title or cause of action, (Id. 228c, note.)"

We think, with the above facts before us, that it is too late to raise this technical question here for the first time, after a full determination of the case in the court below, without objection. We think the complaint is good after the finding by the referee, which stands in the place of a verdict of a jury. The judgment is affirmed, with costs.

TERRITORY v. DOYLE.

(*Supreme Court of Montana. July 29, 1887.*)

1. LARCENY—EVIDENCE—BILL OF SALE.

On an indictment for larceny of mules, a bill of sale found in the possession of the accused, and claimed by the prosecution to be a forgery, is admissible in evidence, although the brands mentioned therein do not exactly correspond with those on the mules, and the vendee named therein is another party than the accused.

2. SAME—EVIDENCE TO SUPPORT CONVICTION.

On trial of such indictment, evidence that the owner of the mules had turned them loose on the range, that they were missing, and he never saw them again till delivered to him by the constable, where they were taken eighty-five miles from his ranch, that he had not sold them, and was still the owner, and the evidence of a constable that he found the mules in defendant's possession in the mountains, at a great distance from their range, and evidence that defendant had lately been there and was traveling out of the territory, and had a forged bill of sale in his possession, —is sufficient to support a verdict of guilty.

3. CRIMINAL PRACTICE—JURY—TAKING ACCOUNT-BOOK TO JURY-ROOM.

In criminal cases there is no statute in Montana against the jury taking with them, on retiring, an account-book belonging to the accused, and, in the absence of any statute forbidding it, the matter is in the discretion of the trial judge.

Appeal from Fourth district, Custer county.

A. F. Burleigh and *Jas. H. Garlock*, for appellant. *Geo. R. Milburn, Co.* Atty., and *A. H. O'Connor*, for respondent.

MCLEARY, J. The appellant in this case was convicted of the larceny of two mules, and sentenced to seven years' confinement in the territorial prison. The errors complained of will be examined *seriatim*.

It is alleged as an error that the court admitted in evidence a certain bill of sale, found on the defendant when he was arrested. There was no error in admitting this bill of sale in evidence. The defendant had it in his possession, and it described the stolen mules which he was driving. The fact that the brands did not exactly correspond, and that the vendee in the bill of sale was one Murphy, and not defendant, was properly left to the jury, with the other evidence tending to prove it to be a forgery; and whether it was or was not in the handwriting of the defendant, and whether or not he claimed any right to the mules thereunder, were circumstances for the consideration of the jury.

If the witness Bell, who testified in regard to the bill of sale, was not the person who made the bill of sale, or was supposed to be the maker, or if any other person named Bell made it, such matters could have been proven by the defendant; and these circumstances would have been properly submitted to the jury with the other evidence.

2. It is alleged as an error that the court permitted the jury to take with them, in their retirement, an account-book and the bill of sale found in defendant's possession when he was arrested. It is argued that in civil cases jurors are not allowed to take with them account-books in their retirement, and that the same rule applies in criminal cases. We are not aware of any statute applying this rule to criminal trials; and, in the absence of any statute forbidding such a practice, it remains within the discretion of the trial court, subject only to be reviewed on a manifest abuse thereof. Such a statute could not, from the nature of the case, apply to a criminal case. Besides, the book was not an account-book properly so called, but a mere memorandum book, containing a diary and a table of distances between certain points.

3. It is complained that there is no proof that a larceny had been committed in this case at all. After reading the testimony, it is hard to see how this objection can be maintained with so much apparent earnestness. The testimony of Kelly is plain and unequivocal that he turned these mules loose on the range, in Wolf mountains, west of Tongue river, and that they were missing from the range, and that he never saw them again till they were delivered to him by the constable in Miles City, 85 miles from his range on Tongue river; that he never sold these mules, and was still the owner. The constable, Russell, testified that he found the mules in the possession of defendant, at a great distance from their range, in the Wolf mountains. No juryman of reasonable intelligence could doubt that a theft had been committed.

4. It is further claimed by the appellant that the evidence is not sufficient to support the verdict. That the recent possession of stolen property is not of itself sufficient to justify a conviction of the possessor as a thief, is a principle very well settled, and the court so charged the jury. But other circumstances nearly always surround the transaction to throw light upon the possession. And it is so in this case. The distance that the defendant was from the range on Tongue river, his having lately traveled from that country, and his making his way towards Deadwood, out of the territory, in the dead of winter, his having a forged bill of sale in his possession, and the unsatisfactory story that he told on the witness stand, are all circumstances sufficient to justify the jury in finding a verdict of guilty. Besides, the witness and all the evidence were before the trial court, and that court not only refused a new trial, but inflicted much above the minimum penalty. We cannot, from the record, find anything which would justify us in reversing the decision of that court, which seems to us to have been properly exercised.

There being no error in the judgment, nor in the order refusing a new trial, they are both accordingly affirmed.

73 Cal. 200

SAN JOAQUIN VAL. BANK v. BOURS. (No. 11,631.)

(Supreme Court of California. August 18, 1887.)

HARMLESS ERROR—EXCLUSION OF TESTIMONY—OTHER PROOF OF FACT.

In an action by a banking corporation against its cashier, seeking to hold him liable for making an improper loan, the exclusion of a question put by defendant to a witness, as to a custom or practice prevailing in another banking-house, held not prejudicial error, when defendant was himself allowed to testify fully as to the custom.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Action by a banking corporation against its cashier, to recover \$2,474.99, and interest, which it was claimed had been loaned by defendant to an irresponsible person, without security, and had not been repaid.

J. H. Budd, for appellant. W. L. Dudley and J. B. Hall, for respondent.

FOOTE, C. A decision in this case was heretofore made by this court, and the opinion then filed is to be found in 65 Cal. 249, 3 Pac. Rep. 864.

A comparison of the record as it then stood, and of the one now under consideration, shows that there is no question now presented for determination which was not then brought to its attention, and passed upon by this court, except those which will hereafter be noticed. It is evident, therefore, that the law of this case, save with reference to the new points now advanced, has been settled. "Defendant was rightly held liable by the court below for the amount of the De Blainville indebtedness." 65 Cal. and 3 Pac. Rep., *supra*.

The sole ground for the reversal and the awarding of a new trial then was that a part of the judgment against the defendant was for an alleged overdraft, for and on account of his salary as cashier, for which reason the judgment was held to be erroneous. This ground for a reversal does not now appear. The errors of law claimed to have been made by the trial court, which were not alleged to have been committed when the case was here before, are:

First. That an objection on the part of the plaintiff was sustained to this question: "And all the way through, while that house was doing a banking business, there were cash tags, as you call them, from a few hundred dollars to eight or nine thousand dollars?" This question referred to a general custom or practice which had prevailed in the banking-house of Bours & Co., an institution other than the plaintiff. And the defendant was allowed to testify fully as to the custom, so that no damage was done him in any event; in fact, the appellant's brief seems to assume that such a custom was fully proved, both as to Bours & Co. and plaintiff.

Second. It is further contended that one or more of the findings are unwarranted, either because of there being no evidence to support them, or because the count or counts of the complaint upon which such findings were made were abandoned by the plaintiff. All the findings are either sustained by sufficient evidence pertinent to such of the issues made by the pleadings as were not abandoned, or they were based upon a count the allegations of which were not denied by the answer.

There is no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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73 Cal. 191

REYNOLDS v. LINCOLN and others. (No. 11,667.)*(Supreme Court of California. August 18, 1887.)***EJECTMENT—INSTRUCTIONS—LIMITATIONS.**

In an action of ejectment, where defendants claimed under the statute of limitations, *held*, that there was no error of which plaintiffs could complain in instructions to the jury telling them, in effect, that plaintiffs were entitled to prevail upon the strength of their paper title, unless the defendants went into possession under a tax deed claiming title, and maintained such possession under claim of title openly, notoriously, and visibly, as against the whole world, for a sufficient length of time prior to the date when the act of 1878, amendatory of Code Civil Proc. Cal. § 325 took effect, to render the bar of the statute of limitations effectual; that there was no conflict in the instructions, and, there being a conflict in the evidence on the issues raised, a refusal to grant a new trial, after verdict for defendants, was not error.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

Action of ejectment, in which defendants set up, among other defenses, the statutes of limitations.

W. H. Beatty and John Reynolds, for appellant. *A. C. Freeman*, and *J. H. McKune*, for respondents.

FOOTE, C. This is an action of ejectment brought to obtain the possession of certain land lying in the county of Sacramento. The defendants had judgment rendered in their favor, and from an order denying the plaintiff a new trial he has appealed. Taking all the instructions emanating from the court, at the instance of the respective counsel and of its own motion, and giving them an unstrained interpretation, we think that they were correct. The jury were, in effect, told, *inter alia*, that the plaintiff's paper title should enable him to recover in the action, unless they were satisfied from the evidence that the defendants in good faith went into possession of the premises sued for, claiming title thereto under a tax deed, and by their adverse possession, and that said possession, under such claim or right, had been maintained openly, notoriously, and visibly as against the whole world, including the plaintiff's claim of title, for a sufficient length of time, and in such manner, prior to the date when the act of 1878, amendatory of section 325, Code Civil Proc., took effect, as to render the bar of the statute of limitations effectual. Upon a conflict of evidence as to those matters of fact, submitted to them for determination, the jury found a verdict for the defendants, and the court below, upon motion, one of the grounds of which was the insufficiency of the evidence to justify the verdict, refused to grant a new trial, and in so doing showed, as we think, no abuse of the discretion in such matters with which it is invested.

We perceive no conflict in the instructions, no disobedience by the jury in applying the facts to the law as given them by the court, nor any other prejudicial error in the record, and the order should be affirmed.

We concur: **BELCHER, C. C.; HAYNE, C.**

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

73 Cal. 190

FARIS and another v. LAMPSON and another. (No. 11,892.)*(Supreme Court of California. August 18, 1887.)***APPEAL—FAILURE TO ARGUE—AFFIRMANCE.**

On appeal, where no oral argument is had, and the appellant fails to file any points or authorities, thus omitting to point out the errors of which he complains, the judgment will be affirmed without an examination of the record.

Commissioners' decision. Department 1.

Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.
Wesley K. Boucher, for appellants. *J. A. Louttit*, for respondents.

FOOTE, C. In this case no oral argument was had, nor did the appellants file any points or authorities; and, having thus omitted to point out the errors of which they complain, the judgment should be affirmed without an examination of the record. *Mokelumne H. C. M. Co. v. Woodbury*, 10 Cal. 188; *Edmonson v. Alameda Co.*, 24 Cal. 350; *Holm v. Roach*, 25 Cal. 37; *Hickinbotham v. Monroe*, 28 Cal. 489; *Brewster v. Johnson*, 51 Cal. 222; *Estate of Montgomery*, 59 Cal. 583.

We concur: **BELOHER, C. C.; HAYNE, C.**

BY THE COURT. For the reasons given in the foregoing opinion, judgment affirmed.

2 Cal. Unrep. 735

HAMMEL v. STONE. (No. 12,045.)

(*Supreme Court of California.* August 15, 1887.)

APPEAL—ORDER GRANTING NEW TRIAL—INTENDMENT.

On appeal from an order granting a new trial, made by a judge other than the one who presided at the trial of the cause, on the ground that the evidence was not sufficient to support one of the findings of fact, every intendment prevails in favor of the correctness of such order, and such intendment must be overcome by an affirmative showing of error, and an abuse of that sound legal discretion which the lower court was called upon to exercise in relation to the matter, in order to justify a reversal of such order by the appellate court.

Commissioners' decision. Department 2.

Appeal from superior court, Santa Barbara county; D. P. HATCH, Judge.
Wells, Van Dyke & Lee, for appellant. *B. F. Thomas*, for respondent.

FOOTE, C. This is an appeal from an order granting a new trial, made by a judge other than the one who presided at the trial of the cause. The order was made upon the ground that the record did not show sufficient evidence to support one of the findings of facts. Every intendment prevails in favor of the correctness of such an order, made in the manner above specified, and such intendments must be overcome by an affirmative showing of error. *Blum v. Sunol*, 63 Cal. 341. It is the well-settled rule of this court that unless the court below is shown to have abused that sound, legal discretion which it is called upon to exercise in relation to such a matter, its order in the premises will not be disturbed. *Savage v. Sweeney*, 63 Cal. 340; *Brockenridge v. Crocker*, 68 Cal. 403, 404, 9 Pac. Rep. 426, and cases there cited.

We perceive no abuse of that discretion in the present instance, and the order should be affirmed.

We concur: **BELCHER, C. C.; HAYNE, C.**

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

73 Cal. 304

SMITH v. CITY OF STOCKTON. (No. 12,077.)

(*Supreme Court of California.* August 18, 1887.)

NEW TRIAL—STATEMENT ON MOTION—TIME OF ALLOWANCE.

Where a statement, on motion for a new trial, has not been certified to by the trial judge as settled, the statutory limit of six months provided by Code Civil Cal. Rep. 12-15 P.—49

Proc. Cal. § 473, does not apply to it; and where the motion is to incorporate into the statement a specification of particulars, wherein the evidence is alleged to be insufficient to support the verdict, it may properly be allowed within any reasonable time, in the discretion of the judge, provided the proposed statement contains the evidence which it is contended did not support the verdict.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Frank H. Smith and Joseph H. Budd, for appellant. *Louttit, Woods & Levinsky*, for respondent.

FOOTE, C. This is an appeal from an order made after final judgment, allowing the plaintiff to amend his statement on motion for a new trial. It will be perceived that, when the motion was made to incorporate in the proposed statement a specification of particulars wherein the evidence was alleged to be insufficient to sustain the verdict of the jury, the certificate of the judge who tried the cause, that said statement had been settled, had not been attached thereto, and that said statement had never been settled or certified to at all. Hence the proceeding, which the plaintiff was seeking to have amended, had not been taken or completed in a legal sense, so as to be susceptible of having applied to it the statutory limit of six months, under section 473 of the Code of Civil Procedure. Hayne, *New Trials*, § 160, p. 479. The statement, as proposed, contained the evidence which it was contended did not sustain the verdict, therefore the specification of the particulars of its insufficiency for that purpose might properly be made. *Id.* p. 477. There was no preparation of a new statement. It was an attempt to complete that which would have otherwise been invalid, and before the statutory period of limitation of six months had begun to run; and that was allowable under the section of the Code of Civil Procedure, *supra*, if done within a reasonable time, to be determined by a proper legal discretion, which we think was duly exercised by the trial court, considering all the circumstances surrounding the matter under discussion. The order should therefore be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

2 Cal. Unrep. 786

GOODWIN v. BURNEY. (No. 12,091.)

(Supreme Court of California. August 18, 1887.)

NEW TRIAL—EJECTMENT—CONFLICT OF EVIDENCE

Where, in an action of ejectment, there is a decided conflict as to the facts going to show plaintiff's legal possession prior to defendant's entry, and as to the character of defendant's entry, an order refusing a new trial will be affirmed on appeal.

Commissioners' decision. Department 2.

Appeal from superior court, Plumas county; G. G. CLOUGH, Judge.

J. D. Goodwin and D. W. Jenks, for appellant. *E. T. Hogan*, for respondent.

FOOTE, C. This was an action of ejectment for a tract of land. As to the facts given in evidence going to show the plaintiff's legal possession of the premises in dispute, prior to the defendant's entry thereupon, and as to those relative to the character of the defendant's entry whether or not it was in good faith, and under a claim of right adverse to that of the plaintiff, there is a decided conflict, for which reason the order refusing a new trial should be affirmed.

75 Cal. 293

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

In re Estate of CARPENTER, Deceased. (No. 12,103.)

(*Supreme Court of California. August 18, 1887.*)

APPEAL—WHEN IT LIES—ORDER APPOINTING SPECIAL ADMINISTRATOR.

Code Civil Proc. Cal. § 963, subd. 3, providing for an appeal "From a judgment or order, granting, refusing, or revoking letters testamentary or of administration or of guardianship," is intended to refer to orders appointing general administrators, and does not affect Code Civil Proc. Cal. § 1413, providing that no appeal will be allowed from an order appointing a special administrator.¹

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Carter, Smith & Keniston and S. D. Woods, for appellant. J. C. Campbell, for respondent.

FOOTE, C. This is an appeal from an order appointing a special administrator. We are of opinion that from such an order no appeal lies. Subdivision 3, § 963, Code Civil Proc., referring to certain appealable matters, reads thus: "From a judgment or order granting, refusing, or revoking letters testamentary, or of administration, or of guardianship." Section 1413, Code Civil Proc., is as follows: "In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment." In order, if possible, to harmonize the two sections of the Code so that both may prove effective, it would seem as if the legislative mind, in passing the first section, was directed towards orders appointing general administrators, and did not have in view such orders as regards special administrators, and that the last section was enacted for the purpose of supplying a rule of action in the appointment of such administrators as those last mentioned. It is presumable that this court, in delivering the opinion in the case of the *Estate of Crozier*, 65 Cal. 333, 4 Pac. Rep. 109, did not have under consideration the exact question which is here involved, and did not intend thereby to pass upon it, having there no cause to determine the force and effect of the two sections of the Code, *supra*, taken together.

It follows that the appeal should be dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the appeal is dismissed.

2 Cal. Unrep. 787

HOGAN, Assignee, v. SANDERS. (No. 11,825.)

(*Supreme Court of California. August 22, 1887.*)

APPEAL—ORDER GRANTING NEW TRIAL.

On an appeal from an order granting a new trial on the ground of insufficiency of the evidence to support the finding, where there is a conflict of evidence on material points, the order will not be set aside.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

¹Respecting the appealability of orders in probate proceedings, see *Stuttmeister v. Superior Court*, ante, 35, and note.

Louttit, Woods & Levinsky, for appellant. *J. C. Campbell*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondent.

McFARLAND, J. This is an action by the assignee of *Emma F. Sanders* and *W. W. Cowell*, insolvents, to compel defendant to convey to plaintiffs certain lots of land, upon the averment that they were conveyed to defendant by said *Emma F. Sanders* without consideration, and for the purpose of defrauding creditors, etc. Defendant claimed that he had furnished the purchase money to buy said lots; that the deed was made to said *Emma*, (who was his daughter,) to hold for him in trust, as she transacted most of his business for him; and that she afterwards conveyed the lots to him at his request, because she was about to be married. The case was tried by the court without a jury, and judgment was rendered for the defendant. Afterwards, however, on motion of plaintiff, a new trial was granted and defendant appealed from the order granting the new trial.

One of the grounds of the motion for a new trial was the insufficiency of the evidence to support the findings and decision. While we cannot see clearly why the learned judge of the court below granted the motion, still as there was a conflict of evidence on material points, we would not be justified in interfering with his discretion.

Order affirmed.

We concur: **SHARPSTEIN, J.:** **THORNTON, J.**

73 Cal. 166

WISE and others v. BURTON and others. (No. 11,780)

(*Supreme Court of California.* August 1, 1887.)

1. APPEAL—ASSIGNMENT OF ERRORS—SUFFICIENCY.

In an assignment of errors the specifications of the insufficiency of the evidence need not be more specific than the findings of the court.

2. SURVEYS—SEPARATE SURVEYS—COMMON LINE—PRESUMPTION.

Where, in an action of ejectment, the question being the boundary line between two ranches, there having been two surveys, starting from points directly opposite, the distances between the calls, the monuments, and length of the lines run being exactly the same, the presumption will be conclusive that both surveys are of the same line, and that it is the true boundary line.

3. SAME—MONUMENTS—HOUSE.

When in the field-notes of a survey, reference is made to "a house," and the same is marked on the map of the survey, the house becomes a monument of such survey, as much as a witness-tree.

Department 2. Appeal from superior court, Santa Barbara county.

Ejectment. Judgment for plaintiffs. The defendants appeal.

R. B. Canfield, for appellants. *W. C. Stratton*, for respondents.

THORNTON, J. This is an appeal from an order denying a new trial in an action of ejectment in which the main question is the location of the boundary line between two *ranchos*, *Jesus Maria* and *La Purissima*. The line in controversy is a part of the east line of the former ranch, and the west line of the latter. Both parties claimed under patents from the United States,—that of the *Jesus Maria* dated seventh of September, 1871; and that of the *Purissima*, twelfth of October, 1882. The court must have found that the evidence showed the western boundary of the *Purissima* was on a line further west than that contended for by the defendant. (appellant here.)

The cause was tried by the court, and it is urged that the evidence is insufficient to justify the decision. The findings of the court were of the most general character, viz.: That the plaintiffs were, at a day anterior to the commencement of the action, owners and seized in fee and possessed of the land in suit, and that defendant had wrongfully, etc., ejected them from such pos-

session. The specifications of the insufficiency of the evidence to justify the decision are also general. But they are aimed at the findings. They assert that the evidence is insufficient to show that the plaintiffs or either of them was the owner, etc., or that defendant ever ejected the plaintiffs, etc., from the land; following the findings. And it is said on behalf of plaintiffs (respondents here) that the specifications are insufficient, inasmuch as they do not state the particulars in which the evidence is insufficient. But as the findings are general, and the specifications follow them, we think they should be held sufficient. This conclusion is sustained by the ruling of this court in *Morris v. De Celis*, 51 Cal. 60, and *Du Brutz v. Jessup*, 54 Cal. 118. Though some of the cases subsequently decided are not in accordance with those above cited, still they have not been overruled, and are still authority here. Counsel, however, by following *Eddelbuttel v. Durrell*, 55 Cal. 277, would obviate all difficulty on this point, and be secured in having their cases considered. See, also, *Kelly v. Mack*, 49 Cal. 523, and *Doherty v. Enterprise M. Co.*, 50 Cal. 187.

The respondent states in his point that it is admitted that the patent of the Purissima, under which the plaintiffs claim, includes the land in dispute. He does not point out the admission, and after careful examination we are unable to find it in the record. It would be strange if the counsel adversary to plaintiffs had made such an admission, as it involved the very matter in dispute, and on which the defendants' case turned. We find no such admission; but we find from the field-notes and maps of the official surveys of the *ranchos* named, that, just where the land in dispute is located, the line between the two *ranchos* is a line common to both; that the entire west line of the Purissima is common with a portion of the east line of the Jesus Maria. That the two *ranchos* are coterminous from station 24 to station 26 of the Purissima there can be no doubt.

We insert here, side by side, the field-notes of both surveys as to those lines.

PURISSIMA RANCHO.

"22. Thence north forty-two degrees forty-five minutes west, at fourteen chains and fifty links intersects line between ranges thirty-four and thirty-five west, township seven north, of the San Bernardino base and meridian, twenty-eight chains and forty-three links south of corner to sections thirteen, eighteen, nineteen, and twenty-four; twenty-seven chains thirty-five links to elder tree six inches in diameter standing on edge of mesa near bluff bank of river, and marked L. No. 23, Station 23; thence north fifty-four degrees forty-five minutes west, thirteen chains and forty links to elder post in mound marked L. No. 24 Station; thence along the eastern boundary of the *Rancho* Jesus Maria, as patented on corrected line 24 north, forty-three degrees east, up the valley of the Santa Lucia at forty-eight chains and sixty links, leaves the valley and ascends hills, course north-east and south-west, seventy-one chains and ten links, to elder post in

JESUS MARIA RANCHO.

"2. S. 26 $\frac{1}{2}$ ° E. Over chemical hills at 72 chains to San Antonio creek, 20 lks. wide, course west at 79.15 chains. Intersected east boundary of township 8 north, of range 35 west, 10 chs. 15 lks. south of the corner to sections 1, 6, 7, and 12, at which point I set a charred post and raise mound of earth with trench and pits, 301 chains set post No. 3, on a hill near a place called San Antonio, with a mound of rocks, as instructed. Station.

"3. S. 24° E. at 94 chains leave the hills and enter the valley of Santa Lucia, and continue down the valley 135 chains. Mark as No. 4 a live oak 28 in diameter, as instructed. Station.

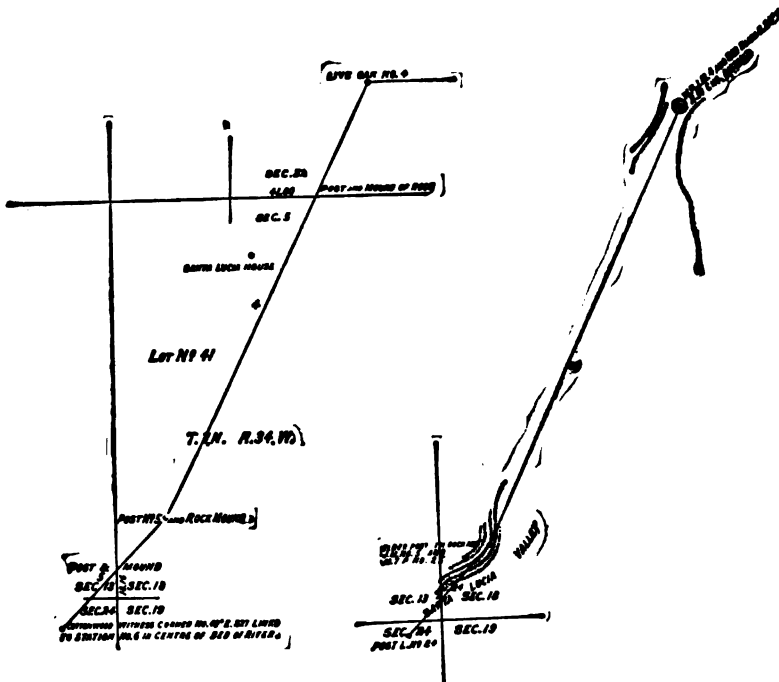
"4. S. 25 $\frac{1}{2}$ ° W. Down the valley of Santa Lucia at 74.13 chains intersected the south boundary of T. 8, N. R. 34 W. 41.00 chs. east of corner to sections 5, 6, 31, and 32, and set post, and raised a mound of rocks, at place of intersection at 115 chains the Santa Lucia house bears west distant about

rock mound on side hill, facing north-east for corner No. 5, of the *Rancho Jesus Maria*, and marked M. L. P. No. 25 for corner station 25; thence north twenty-five degrees forty-five minutes east, two hundred and eighty-seven chains, to post on top of chemical hill on south-east side of Santa Lucia valley, from which a live oak post in mound and pits marked W. P. J. M. No. 4 and P. 26 for witness post to corner 26, bearing north twenty-four degrees west, eleven chains and fifty links distant, and from which a live oak tree bears south twenty-one degrees thirty minutes west, sixty-three links distant station."

20 chains 287 chains, set a post No. 5, and raised a mound of rocks, as instructed. Station.

"5. S. 43° W. At 41 chains intersected the west boundary T. 7 north, R. 34 west, 1,816 chains north of the corner to sections 13, 18, 19, and 24, and set a post, and raised a mound, with charcoal deposit trench and pits, as instructed, 90 chains to the right bank of La Purissima in Santa Ynez river, 92 chains, to a point in the middle of the river bed, station. This not being a suitable place to establish a corner, I mark a cottonwood tree for witness corner, which bears N. 43° E., distant 227 links from true corner."

There follow here traced copies of the lines referred to, taken from the maps. The one on the right is the line of the *Jesus Maria*, the other that of the *Purissima*.



The field-notes above given as to each ranch commence with the course ending at the point of beginning of the disputed line, and the course preceding that.

The *Purissima's* west line reaches the *Jesus Maria's* east line at Station 24. From that point it runs to Station 25,—a distance of nearly half a mile, (71

chains, 10 links.) It will be observed that the survey of the former (Purissima) is made going in a course north-east and south-west; that of the latter (Jesus Maria) in the opposite direction. The angle with the meridian at which those lines are run is the same. North 43° east in Purissima, and south 43° west in the Jesus Maria. The words and figures are reversed for the reason, above given, that the surveyors were doing the work in opposite directions. The same is true of the next line from Station 25 to Station 26 on the Purissima. The angle on line going north on both *ranchos* is the same. In former (Purissima) is north $25^{\circ} 45'$ east; in latter (Jesus Maria) south $25^{\circ} 45'$ west,—figures denoting angle reversed as above. The length of the line between these stations is 287 links. The north part of this line on the Jesus Maria is 287 links in length; the end of course 24 is Station 25. This course 24, before it reaches Station 25, has been running 71 chains, 10 links on the Jesus Maria as patented. It ends at a post on a rock mound, as above stated, on a side hill for corner No. 5 of Jesus Maria. Can there be any doubt that here is the Station 5 of the Jesus Maria, and that the line from 25 to 26 in the Purissima, and from 5 to 4 in the Jesus Maria, commences at the same point, runs at the same angle, and are of the same length, 287 chains? The conclusion is irresistible that the line between the above points is the same, and that the west line of the Purissima and the east line of the Jesus Maria are the same.

There is one controlling monument in the field-notes of the Jesus Maria survey. This is the Santa Lucia house. The existence of this house is testified to by the witness Harris, called by plaintiffs, and by Jesse, Lewis, and Cooper, called by defendant. The field-notes of the Jesus Maria show that the survey was made in 1859; and Lewis, who assisted in making it, says that it was then occupied by Burton. It is stated in the field-notes of the Jesus Maria that this house is west of the line of that ranch, and distant from it about twenty chains. This house is a monument, as a witness tree is a monument. The map and the objects on it are to be regarded. See *Vanos v. Fore*, 24 Cal. 435; *Serrano v. Rawson*, 47 Cal. 55; *Black v. Sprague*, 54 Cal. 266; *McIver's Lessee v. Walker*, 9 Cranch, 173; *Chapman v. Polack*, 11 Pac. Rep. 764. It is a *witness-house* called for in the field-notes, and delineated on the map and field-notes, which are in the patent, constituting a part of it.

Nor is there any testimony which is contradictory to the views above presented. The testimony of the witness Harris is based on a view of the matter in dispute entirely theoretical and arbitrary, and outside of the facts in the case established by documents made contemporaneously with the surveys of both *ranchos*, and which cannot be gainsaid.

The surveyor (Norway) who make the survey of the Purissima must have run the common line, and found it correct, or he must have adopted it from the survey of the Jesus Maria made by Norris. In either case it is binding on the plaintiffs, who claim under the patent of the Purissima, into which this survey went, as shown by the map; and in either case the correctness of this common line, as disclosed by the maps and field-notes of the Jesus Maria, is acknowledged. The plaintiffs, then, are bound by this common line described in the Jesus Maria field-notes, as running about 20 chains east of the Santa Lucia house. The existence of the house at the time of survey of the Jesus Maria is established, as well as at the time of the trial, is spoken of in the testimony as the ranch-house of the Jesus Maria, and shown to have been occupied for several years. Its location is shown on the map. The survey of the Purissima was, under these circumstances, accepted with this call for the house, and its distance from the common line. We think the word "about," under these circumstances, should not lessen this distance of twenty chains, and that the distance of the house should be fixed at twenty chains, regarding the house as a monument. The fact that the application of a graduated scale to the map shows the distance of this house from the line to be twenty chains

confirms the propriety of disregarding the word "about." This application of the scale is allowable and proper, for the reason that the surveys are official, and made accurately on a scale of forty chains to the inch. It should also be borne in mind in this connection that the survey of the Purissima as to this common line, is subsequent to that of the Jesus Maria, and based on it. Then running a line due east from the house a distance of twenty chains, and then a line through the point so reached in the course designated on both maps, will fix the common line correctly. The plaintiffs can recover nothing west of this line.

It may be added here that the application of the graduated scale to both maps, which were made on the same scale, will show the distance of the corner of the sections 31, 32, 5, 6, township 8 N., range 34 W., from the common line, to be on the Jesus Maria map forty chains, and on that of the Purissima forty-four chains,—four chains further east than shown on the first mentioned map.

In the field-notes of the Jesus Maria it is stated that the eastern line of the *rancho*, so-called, intersects the south boundary of township 8 N., range 34 W., forty-one chains east of corner to sections 5, 6, 31, and 32, where a post was set and a mound of rocks raised. The above are delineated on the Jesus Maria map. The point of intersection is stated to be 74.13 chains from corner No. 4 of the survey. The above calls are all delineated on the map. As to this, Harris says: "I did not find the corner to sections 5, 6, 31, and 32. I found the first half-mile corner to the east of that point; and ran thence west 47 chains 10 links; thence north-easterly on ranch boundary, 76 chains and 48 links, to come to my corner No. 4 up to the post I set. The intersection of the Purissima line, as I ran it, with the township line, occurs 32 chains 90 links east of the corner to sections 5, 6, 31, and 32." While the corner of these sections could not be found by Harris, he did fix it at 32.90 chains west of the Purissima line. When he did fix it, he only ran 32.90 chains east. According to the testimony, he looked for and found the first half-mile corner to the east of the sections' corner, then ran west from that point 47.10 chains; thence ran north-easterly *on the ranch boundary* 76.48 chains, to come to corner No. 4, to the post he set.

Certainly a line drawn from a point 47.10 chains north of the corner of these sections would not be on the ranch boundary. The boundary lay east of this corner, not west. Still he was 47.10 chains west of the point, and then from that point obtained by westing, by going away from the ranch boundary, he says he ran north-easterly on the ranch boundary to his corner No. 4. The reference here is to corner No. 4 of the Jesus Maria. This was the only corner No. 4 he had referred to. It is not surprising that the real corner No. 4 was not found, and how a line starting from the point he says he did, would run north-easterly along the ranch boundary, passes comprehension.

Harris also speaks of corner No. 4 of the Jesus Maria and No. 28 of the Purissima as the same. In this the maps show that he is in error. According to them, No. 4 of the former corresponds to No. 26 of the latter. Harris' survey was made in disregard of the calls of the Jesus Maria plat and field-notes, which, as the line he was seeking to fix was a line common to both *ranchos*, he should have regarded. And especially should this have been done, when the survey of the Purissima was subsequent to that of the Jesus Maria, as the line in dispute was based on it.

Thompson's testimony relates to a part of the line of the Jesus Maria not in dispute here. The testimony of the other witnesses are clearly against the findings.

The findings of the court below are not sustained by the evidence as to any land west of the common line as herein laid down, and on that ground the order must be reversed. As to the evidence in relation to general repute on

the subject of the boundary of the Jesus Maria, which was ruled out in the view taken herein, it is unnecessary to pass on it, and therefore we notice it no further. As to the other points urged there is no error. But for the reasons above given the order denying a new trial is reversed, and the cause is remanded, with directions to the court below to set aside the judgment, and order a new trial, and that such new trial may be had in accordance with views herein expressed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

LOW v. BURTON. (No. 11,804.)
(Supreme Court of California. August 1, 1887.)

Department 2.

By THE COURT. Appeal from order denying a new trial. This case, as regards the points of contention, is the same as *Wise v. Burton*, (No. 11,780.) *ante*, 678, and on the authority of that case the order denying a new trial is reversed, and the cause remanded, with directions to the court below to set aside the judgment and order a new trial, and that such new trial be had in accordance with the opinion in case No. 11,780, above referred to. So ordered.

LOW v. BURTON. (No. 11,804½.)
(Supreme Court of California. August 1, 1887.)

Department 2.

By THE COURT. Appeal from the judgment on the judgment roll alone. There is no error, and the judgment is affirmed. So ordered.

73 Cal. 174

WISE and others v. BURTON and others. (No. 11,780½.)
(Supreme Court of California. August 1, 1887.)

ENJOINMENT—ALLOWANCE FOR IMPROVEMENTS—APPEAL—FINDINGS.

In an action to recover land a judgment for the plaintiff will not be reversed on the ground that the court below has not found upon an issue in relation to improvements on the land claimed as a set-off to damages for withholding the property, where the only evidence as to such improvements on the record is that there was a house upon the land, but there is no evidence as to its value, or to show that it was put there as an improvement in good faith, as required by Code Civil Proc. Cal. § 741, providing that the value of such improvements may be allowed as a set-off to damages when made by a defendant in good faith.

Department 2. Appeal from superior court, Santa Barbara county.

A. B. Canfield and *A. Packard*, for appellants. *W. C. Stratton*, for respondents.

THORNTON, J. This is an appeal from the judgment in the same case, No. 11,780, which last is an appeal from an order denying a new trial.

There is but one point, which is that the court did not find on an issue made by the answer in relation to improvements on the land to be allowed as a set-off to damages for withholding the property for which judgment is rendered. The value of such improvements may be allowed as a set-off to damages when made by a defendant, or those under whom he claims in good faith, holding under color of title adversely to the claim of plaintiff. Code Civil Proc. § 741. It is not averred by defendant that such improvements were made *in good faith*, and there is no evidence in the record that any such improvements were made. In the record in case No. 11,780, which is an appeal from an order denying a new trial in this cause, there is evidence that there was a house on the land for which the judgment was rendered, but there is no testimony showing that the house was such that it should be

regarded as a permanent improvement, or of its value. Confining the consideration of the case to the record presented here on this appeal from the judgment, in which the defense is not well pleaded, and there is no evidence either of improvements or their value, we would not hold that the court erred in not finding on the issue. This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue.

Granted that we could look into the record in the other case where all the evidence in the case is set forth, but in which there was also a lack of evidence, still we would not reverse because the court had failed to find on the issue mentioned. The court could not judicially know the state and condition of the house, whether it constituted an improvement of the character required by the statute, nor could it judicially know its value. The case would still be one of want of evidence, and in this state of the case the judgment should not, on the contention put forth, be reversed.

As far as regards this appeal, no error appears, and therefore the judgment must stand affirmed. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

78 Cal. 196

HILTON and others v. YOUNG. (12,110.)

(Supreme Court of California. August 16, 1887.)

VENDOR AND VENDEE—EXECUTORY CONTRACT—RIGHTS OF PURCHASERS.

A purchaser of land, while part of the price remained unpaid, and before the legal title had been conveyed to him, conveyed a portion of the land to A. After the purchaser's death, all the right, title, and interest of his estate in and to the land was sold, under order of the probate court, to B., who had notice of A.'s claim, but who paid to the original vendor the balance due on the purchase price, and obtained a deed to the whole land to himself. In a suit by B. against A. to quiet title, in which A. filed a cross-bill, *held*, that B. took title subject to the equitable rights of A. in the part of the land conveyed to him, and that A., although not entitled to a decree declaring B. to have no right, title, or interest in such part, was entitled to a conveyance of such part from B.; but this, only on condition that A. pay to B. a ratable proportion of the sum paid by the latter to get the title to the whole.

Commissioners' decision. Department 1.

Appeal from superior court, Butte county; LEON D. FREER, Judge.
Gray & Sexton, for appellants. *Hundley & Gall*, for respondent.

HAYNE, C. This is an action to quiet title. One Vanderhoof had a contract with the Central Pacific Railroad Company for the purchase of certain land. He paid 20 per cent. of the price, and the interest on the balance for one year. While the legal title remained in the company, "for a valuable consideration, he granted and conveyed in fee-simple to the defendant, Mary M. Young, a part of said lands, the same being the premises in dispute in this action." This deed transferred to the defendant the right of Vanderhoof to a conveyance from the company of the tract in controversy, and to that extent operated as an assignment of the contract. Shortly after making this deed Vanderhoof died, and, his estate being insolvent, "all the right, title, and interest of said estate in and to said lands mentioned in said contract," was sold, under the order of the probate court, to the plaintiff Hilton. This sale did not transfer to Hilton any sort of interest in or right to the premises in controversy, for Vanderhoof had previously parted with all his right as to that portion of the land, and the probate sale only purported to be of the right, title, and interest which the estate had. In this condition of affairs, Hilton and his co-plaintiff went to the railroad company, and paying the balance of the purchase money, obtained a deed of all the land covered by the contract, including the defendant's tract. They did this with full knowledge and notice of the rights of the defendant. As a matter of course, so far as the tract

in dispute is concerned, they took only the legal title, with a trust in favor of the defendant, and their claim to the beneficial ownership of that tract is as destitute of foundation in law as it is in conscience.

The court below denied the plaintiffs' application for relief, and, upon the cross-complaint of defendant, decreed that they had not "any right, title, or interest in or to said tract of land," and that the title of the defendant be quieted as against the plaintiffs, and those claiming under them. This was going further than the facts found warranted. The legal title was in the plaintiffs. It could not have passed to the defendant as an after-acquired title; for neither the defendant's grantor, nor his estate, ever acquired the title. The legal title being in the plaintiffs, they could not be said not to have "any right, title, or interest." Upon the facts found, all that could properly have been done was to have decreed that the plaintiffs convey to the defendant. As a condition of this relief, the defendant should be required to do equity; and we think it is equity that she should pay a ratable proportion of what the plaintiffs paid to get the title.

The fact that the plaintiffs took the title from the railroad company with notice of the equitable rights of defendant, subjected them to all the duties resting upon the company. In the language of Story, (1 Eq. Jur. § 896,) "If a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place, and is bound to do the same acts, which the person who contracted, and whom he represents, would be bound to do." But he is not ordinarily bound to do any other or further acts. Now, the company was bound to convey only upon payment of the balance due to it upon the contract. The defendant could not have got a deed from it without paying at least what was due for her portion of the land; and it would seem that, in order to get the deed from the successor in interest of the company, she must make the same payment.

Nor is there anything in the position of the parties before the making of the deed from the company which would change this result. The conveyance of the land from Vanderhoof to the defendant "in fee-simple" doubtless operated as an assignment of a portion of the contract, with an undertaking on his part to pay what remained due to the company. As between them, the obligation to pay the company was on Vanderhoof. But the fact that the plaintiffs had notice of this obligation on the part of Vanderhoof does not make them liable to meet it, any more than it would make them liable to meet his other obligations; for the defendant's portion was separate and distinct from the plaintiffs' portion, and as to the defendant's portion the plaintiffs do not, and could not, claim through Vanderhoof. The case, therefore, stands thus: The defendant got an assignment of a part of a contract to convey land; the plaintiffs got an assignment of the remaining part. But the owner of the land was not compelled to split up his contract by making separate deeds. And, as must be presumed from the findings, the plaintiffs, in order to get a deed to any portion, were compelled to pay the balance due upon defendant's part as well as upon their own. This having been done, we think the defendant cannot have the assistance of a court of equity to obtain the legal title from the plaintiffs, except upon condition of paying to them what they paid on her behalf. See *Tompkins v. Sprout*, 55 Cal. 81.

We therefore advise that the judgment be reversed, and the cause remanded with directions to the court below to enter a decree that the plaintiffs execute and deliver to the defendant a deed of the land in controversy, upon payment by defendant within a reasonable time, to be fixed by the court, of a ratable proportion (according to the number of acres) of the balance of the purchase money paid by plaintiffs to the railroad company; the plaintiffs to recover their costs of appeal.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, judgment reversed, and cause remanded, with directions to the court below to enter a decree that plaintiffs execute and deliver to the defendant a deed of the land in controversy, upon payment by defendant within a reasonable time, to be fixed by the court, of a ratable proportion (according to the number of acres) of the balance of the purchase money paid by plaintiffs to the railroad company, the plaintiffs to recover their costs of appeal.

73 Cal. 182

BAKER and others v. FIREMEN'S FUND INS. CO. (No. 12,136.)

(Supreme Court of California. August 13, 1887.)

1. VENUE—ACTION TO DECLARE A DEED A MORTGAGE.

Const. Cal. § 16, art. 12, provides that a corporation may be sued in the county where the contract is made or to be performed, or where the obligation or liability arises, or in the county where its principal place of business is situated. Code Civil Proc. § 392, requires actions for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such estate or interest to be brought in the county where such real estate, or any part thereof, is situated. *Held*, that an action to declare a deed absolute on its face to be a mortgage, and for the reconveyance of the real estate described therein, was properly brought in the county where the real estate was situated, although the defendant, a corporation, had its principal place of business in another county, and it appeared from the recitals in the deed and agreement that defendant's assignor, the original mortgagee, was a resident of, and the deed had been acknowledged before a notary of, the county where the land was situated.

2. SAME—CHANGE OF VENUE—SETTING ASIDE ORDER.

The court has jurisdiction to set aside an order granting a change of venue, on the ground that it was inadvertently made.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINERTON, Judge.

W. C. Belcher, for appellant. J. C. Campbell, for respondent.

SEARLS, C. J. The action in this cause was brought in the superior court of the county of San Joaquin to procure a decree declaring a deed absolute on its face to be a mortgage, and for a reconveyance of the real estate described in said deed, which real estate is situate in said county of San Joaquin.

Defendant, a corporation organized and existing under and by virtue of the laws of the state of California, and having its principal place of business at San Francisco, demanded a change of the place of trial to the city and county of San Francisco, which demand was not acceded to; whereupon defendant moved, upon affidavit, and upon the papers in the cause, for a change of the place of trial to said last-mentioned city and county. The motion was at first granted, but on the following day the order granting the change, as asked for, was set aside upon the ground that it "was inadvertently made," and an order entered denying such motion. From this order defendant appeals.

The only other facts deemed essential are—*First*, defendant sets out in its affidavit that San Francisco is its residence; *second*, it appears from the complaint that defendant was and is conducting and carrying on business in the state of California, and in the county of San Joaquin; *third*, the deed and agreement, which taken together are claimed to constitute a mortgage, were made and executed by plaintiffs and one H. Barnhart, who, according to the recitals of the agreement, were residents of the county of San Joaquin, and they were acknowledged and certified before a notary of said last-mentioned county. Defendant holds as an assignee of Barnhart.

Beyond the recitals above referred to in the agreement, which is set out in the complaint, there is no affirmative allegation as to the residence of the parties or place at which the contract sued on was made.

Appellant contends—"First, that the proper county for the trial of this action is one in which the principal place of business of the defendant is situ-

ated, and that the case does not come within any of the other specifications of section 16 of article 12 of the constitution, or within the proviso to section 5 of article 6; *second*, that by the order of March 23, 1887, the case was actually transferred to the superior court of the city and county of San Francisco, and was thereafter pending therein, and that, therefore, the superior court of San Joaquin county had no jurisdiction to make the order of March 24, 1887, and the same is void."

Section 16 of article 12 of the constitution is as follows: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated; subject to the power of the court to change the place of trial as in other cases." By section 392, Code Civil Proc., actions for the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest, must be tried in the county in which the subject of the action or some part thereof is situated. The land is *the subject-matter* concerning which the contest is waged, and it is situate in San Joaquin county. The right or interest of the plaintiffs in this subject-matter, if any, is the question to be ultimately determined in this action. Such being the case, the action was properly brought in the county of San Joaquin, where the land was situated. *Bush v. Treadwell*, 11 Abb. N. S. 27. This last case was an action like the present, to have the title to certain real estate declared to be in the plaintiffs, on the ground that the deed conveying title to the defendant was a mortgage, and for a conveyance thereof to the plaintiffs, and the court held that under the Code of that state, (New York,) of which our section 392, Code Civil Proc., is an exact transcript, the action should have been brought in the county where the land was situated. It was there that the liability or obligation (if any) arose, within the meaning of section 16 of article 12 of the constitution. There is nothing in this view in conflict with the case of *Le Breton v. Superior Court*, 66 Cal. 27, 4 Pac. Rep. 777, cited by appellant. That was an action brought against a trustee, in the county in which he resided, to enforce a trust both upon personal and real property, and the court held that, as the suit was brought to reach personal property in the hands of the trustee, that fact gave the court jurisdiction.

In response to the second cause of contention by appellant, it may be said that the same question arose in *Wiggin v. Superior Court*, 68 Cal. 398, 9 Pac. Rep. 646, and was decided adversely to the position assumed by appellant. See, also, *Hall v. Polack*, 42 Cal. 218.

The order appealed from is affirmed.

We concur: PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; MCKINSTRY, J.

TEMPLE, J., did not participate in the decision.

73 Cal. 186

PEOPLE v. BEZY. (No. 20,224.)

(Supreme Court of California. August 13, 1887.)

MURDER—DEGREE OF—EVIDENCE TO SUPPORT VERDICT.

On the trial of an indictment for murder, where the only extenuating circumstances were those sworn to by defendant, and some of those were improbable, evidence of prior ill feeling and threats on the part of defendant towards deceased, held to justify a verdict of murder in the first degree.

In bank. Appeal from superior court, Fresno county; S. A. HOLMES, Judge.

J. C. Campbell, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

BY THE COURT. Defendant was convicted of murder in the first degree, and the punishment fixed at imprisonment for life, for the killing of one John Mengetti, on the third day of June, 1884, at the county of Fresno. The appeal is from the final judgment in the cause, and from an order denying a new trial.

The only point urged by counsel for appellant at the hearing was that the evidence is insufficient to sustain the verdict, or to warrant any verdict above the grade of manslaughter. Defendant and the deceased had, according to the evidence, been acquaintances and friends from boyhood until within, say, one year of the death of the latter, when they had a falling out, subsequent to which there is testimony tending to show threats by defendant against deceased. This prior ill feeling, coupled with all the circumstances detailed at the trial, forces the conclusion that the verdict was warranted by the evidence. There was no person present at the time and place of the shooting of deceased by defendant except these persons. Taking the testimony of defendant as absolutely true in all its parts, and it may well be considered that the killing (which was admitted) did not constitute a higher grade of crime than manslaughter; but the jurors were the judges of the weight to be given to defendant's statement as a whole, and to its various parts, and we can very well see that in the exercise of sound judgment they may have discarded as improbable some of the extenuating facts sworn to.

The judgment and order appealed from are affirmed.

NORTHERN PAC. R. CO. v. HOLMES.

(*Supreme Court of Washington Territory.* February 4, 1887.)

CONTRIBUTORY NEGLIGENCE—RAILROAD CROSSING—NONSUIT.

In an action against a railroad company to recover for injuries received at a crossing, the plaintiff's testimony showed that he was driving two horses, which were gentle and manageable, on a street which crossed the railroad at nearly right angles, in defendant's switch yard; that north of the main track, five or six feet from and parallel with it, was a side track of considerable length; that plaintiff approached the crossing on the north side, and, when about 60 feet away, a train (not a regular one) passed rapidly, and went out of sight behind some box cars that were standing on the side track to the east of the street, and partly obstructing it; that eastward of the street, on the north side, was a depot, with a platform on its west; that the crossing was planked, the planking extending along the end of the depot platform the width of the street, and about 30 feet from the main track; that just before going on the planking he slowed up to a walk; that the yard-master was at a switch on the opposite side of the main track; that, as soon as the train passed, two wagons started from the opposite side where they had been waiting, and crossed, passing him, all being on the planking at once; that, without stopping or speaking to any one, he kept his horses going at a walk, not hearing any bell, whistle, or other noise of a train, though listening, until, just as he got by the end of the box cars, he saw the train close on him; that he whipped up his horses on the main track, and, as they sprang forward, he heard a cracking noise, and knew no more until in the doctor's hands. It further appeared that plaintiff had lived in the town some time, and had worked for the railroad at its car-shops nearly a year; was well acquainted with the crossing, and knew that they switched cars there; that he was familiar with the switch-yard, and knew the location of the switches. *Held* that, under all the circumstances, he was guilty of such culpable and contributory negligence as precluded his recovery, and a nonsuit should have been ordered. LANGFORD, J., dissenting.

McNaught & Co. and Hyde & Turner, for plaintiff in error. *Andrews & Jones*, for defendant in error.

GREENE, C. J. Plaintiff in error was sued by the defendant in error to recover damages for injuries suffered in a collision between the team of the latter and the railway train of the former. The action resulted in a verdict against the railway company, and this writ of error is taken from the judgment rendered thereon.

One of the errors assigned is the refusal of the district judge to allow the counsel for the company to interrogate the jurors, while they were being selected, as to their relations to the plaintiff's attorneys, and particularly whether they were clients of plaintiff's attorneys. It appears that the jurors were being examined in their *voir dire*, as customary in our courts, and that no issue of fact on a challenge made was pending. It does not appear but that the jurors whom it was proposed to interrogate were members of the regular panel, respecting whose relations there had been ample opportunity for investigation before they were called into the box. We regard the line of inquiry proposed as a proper one to be pursued in the trial of a challenge for actual bias, or in the endeavor to become acquainted with a talesman or other juror, respecting whose antecedents there has been no previous fair means of information; but we do not perceive that in the instance before us the judge departed from a legitimate exercise of his discretion.

After the plaintiff's evidence was all in, the defendant moved for a nonsuit, and the most interesting and main question submitted for decision in this case is upon this motion for nonsuit,—whether any contributory negligence of the plaintiff appears as matter of law from his evidence. Unless he was free from such negligence, he could not rightly recover. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 164. Negligence of the railway company's employees could be no excuse for his negligence. *Railroad Co. v. Houston*, 95 U. S. 697, 702. If, at the close of his evidence, his negligence contributing to his injury so clearly appeared that, in case the cause were submitted to the jury without further evidence, the court would be warranted in setting aside a verdict in his favor, then the duty of the court was to grant the defendant's motion for a nonsuit. 2 Rorer, R. R. 1061; *Wilds v. Hudson R. R. Co.*, 29 N. Y. 315; *Union Pac. R. Co. v. Adams*, (Kan.) 19 Amer. & Eng. R. Cas. 379; *Merchants' Bank v. State Bank*, 10 Wall. 637; *Oscanyan v. Arms Co.*, 103 U. S. 261.

When the plaintiff closed his evidence, and the motion for nonsuit was made, it appeared from his own testimony, under the most favorable interpretation of it for him, and without any qualification, that the injury of which he complains was inflicted upon him by a switch train of defendant's cars, while he, in a buggy drawn by two horses, gentle and manageable, which he was driving, was crossing the main railroad track of the defendant, at a street crossing, upon the track grade, in defendant's switch yard, in the town of Sprague; that he was crossing the track from north to south, along a street at right angles or nearly so to the main track; that north of the main track, five or six feet from it, and parallel to it, was a side track running east and west a considerable distance each way; that on the side track, overlapping five or six feet upon the street, and extending eastward, stood a line of several box cars; that a little to the eastward of the street, and along the north side of the side track, was a depot with a platform to the west of it; that the crossing was planked, and that the planking extended northward, along the end of the depot platform, and for the width of the street, to a distance of 25 or 30 feet from the main track; that the plaintiff approached the main track with his horses trotting at the rate of five or six miles an hour, and when about sixty feet from the track, saw the train, consisting of two box cars, two flat cars, and a caboose, with a locomotive in the midst of them, and which did not look to him like a regular train, pass rapidly eastward over the crossing, and out of sight behind the box cars standing on the side track; that after this, owing to the position of the box cars, he saw and could see no more of the train until a few seconds before the collision, but he saw the yard-master standing at a switch on the opposite side of the main track; that he continued driving at a trot till his horses came to the planking, where there was a little rise, to meet which he slowed them to a walk; that, as soon as the train passed eastward, two wagons, each drawn by two horses, one

team close behind the other, started from the opposite side of the main track, where they had been waiting, and crossed the track towards him, keeping together, and passed him as his team went over the planking, all six of the horses being on the planking at the same time; that, after reaching the planking, he kept his horses moving at a walk, without stopping, and without speaking to any one, and without hearing any whistle or bell or other noise of the train, though listening, until suddenly, as he got by the end of the standing box cars, he discovered the train close upon him, and whipped up his horses on the main track; and, as they sprang forward, heard a cracking, and knew no more till the doctor was working at his head. It further appeared from his testimony that, prior to his injury, he had resided in the town of Sprague 18 months; had worked for the railway company in its car-shops there nearly a year; was familiar with the crossing,—had frequently crossed it, going to and from his work, and was familiar also with the switch-yard, and the location of the switches therein.

We think that this statement of facts, substantially as narrated by the plaintiff himself, clearly shows that he was guilty of culpable and contributory negligence, and that his case is not to be distinguished in principle from the multitude of cases in which the highest courts of most of the states, and the supreme court of the United States, have held, under analogous circumstances, the existence of contributory negligence to be a question of law for the court, and not one of fact for the jury. *Beach, Contrib. Neg.* § 63; *Chicago, B. & Q. R. R. v. Lee*, 68 Ill. 578, and 87 Ill. 454; *Williams v. Railroad Co.*, 64 Wis. 1, 24 N. W. Rep. 422; *Flemming v. Western Pac. R. Co.*, 49 Cal. 253; *Salter v. Railroad Co.*, 75 N. Y. 278; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401, 11 N. W. Rep. 216; *Zimmerman v. Hannibal & St. Jo. R. Co.*, (Mo.) 2 Amer. & Eng. R. Cas. 191; *Railroad Co. v. Ritchie*, 102 Pa. St. 425; *Railroad Co. v. Hunter*, (Ind.) 5 Amer. Rep. 214; *Baltimore & O. R. R. v. Hobbs*, (Md.) 19 Amer. & Eng. R. Cas. 337; *Tucker v. Duncan*, (U. S. Circuit Court, S. D. Miss.) 6 Amer. & Eng. R. Cas. 268, 9 Fed. Rep. 867; *Schofield v. Chicago, M. & St. P. R. R.*, 114 U. S. 615, 5 Sup. Ct. Rep. 1125; *Kennedy v. Chicago & N. W. Ry. Co.*, (Sup. Ct. Iowa, April, 1886,) 27 N. W. Rep. 743.

Plaintiff's danger was greater, and called for greater caution, by reason of the interruption of his view. *Chase v. Maine Cent. R. Co.*, 5 Atl. Rep. 771; *Schofield v. Chicago, M. & St. P. R. Co.*, 2 McCrary, 268, 8 Fed. Rep. 488; *Tucker v. Duncan*, *supra*.

If his view had not been obstructed, his duty would have been to look and see where the train was, and what it was about; and, if he did not, he would not have been entitled to damages if injured. *Beach, Contrib. Neg. supra*, and cases cited. As his view was obstructed, he was in duty bound to do the nearest equivalent thing reasonably within his power, and likely to occur to a man of ordinary prudence so circumstanced; use the eyes of others, who could see, by inquiring of them, or listen the more intently, and with greater precaution, using such reasonable and obvious means of making listening effective as would occur to an ordinary man. It would have been a reasonable, prudent, and obvious thing for him to have inquired of either of the drivers of the two teams he met, or of the yard-master, whether it was safe for him to venture to cross, or whether the train was coming. It would have been an obvious and prudent and reasonable thing for him to have waited till the transient noise of horse hoofs and wagons on the planking had subsided, or, at least, to have stopped his own team, and silenced his part of the noise, so that he could listen to advantage. We are confident that an ordinarily intelligent and prudent man would have done one or the other or all of these things, and that, if the plaintiff had been thus careful, he would not have been hurt. The noise on the planking was one which he knew he was helping to make, which he must have known would tend to prevent his hear-

ing the train, and which was operating to prevent his hearing it, just as the standing box cars were to prevent his seeing it. It was not some distant noise, recognizable as of no special significance, and for which the rumbling of the train might, notwithstanding ordinary care, be mistaken; nor was it a continuing noise, beyond his control, like the din of a factory; but it was a noise close to him, created in part by himself, and from which a few seconds of patience would wholly relieve him. If, as he approached the track, he had taken the precaution to listen as he ought, and had heard nothing, or to have inquired about the train, and had been answered untruly or not at all, his case would have been a very different one from what it is, and then might have been consistent with a verdict in his favor. But such is not his case. His injuries are proved, out of his mouth, to be due largely or wholly to his own gross imprudence in not stopping and listening, or in not otherwise, up to the limit of ordinary good sense, making use of his wits to ascertain the whereabouts and attitude of the hidden train.

The rule, illustrated by the array of cases above cited, and requiring a traveler before trying to cross a railroad to look and listen attentively for a passing train, and, if necessary for the purpose, stop, is not a rule in favor of diminished liability in cases of collisions, but rather the contrary. It is a necessary and wholesome rule in favor of human life. There are human lives on railroad trains as well as in wagons. These lives must be preserved by just rules of law. One living in the vicinity of a railroad, at this day, must be presumed to be well aware of the terribly destructive energy active in a locomotive or stored up in a moving train. If such a person undertakes to drive a team across the railway, he must be presumed to know that he is going into a situation of great possible danger, and that a collision with his team is liable not only to kill him, but to derail a train and kill others. Should, through his negligence in crossing the track, an injury happen to an innocent passenger on the train, even though negligence of the employees of the railway company should have contributed to the injury, he or his estate would be liable to that passenger for full compensatory damages. If guilty of such negligence as would render him liable to an injured passenger, he would be guilty of such contributory negligence to any injury suffered by himself as would preclude his own recovery of any damages from the railway company.

Now, suppose a change in the case before the court. Suppose the collision had happened when and where it did, and the employees of the railway company were in fact not at all to blame. Suppose, further, that the plaintiff, being a very rich man, had driven on the track just as he did, with no more and no less care than he actually, according to his own account, exercised, and the caboose had been derailed, and a brakeman crippled for life; and that the brakeman, seeing a good prospect of collecting a judgment if he could get one, sued the plaintiff; and that the case before the court and jury, upon evidence displaying all these facts, was between the brakeman as plaintiff and this plaintiff as defendant; and the question was whether the latter had been guilty of negligence entitling the brakeman to compensation,—there can, we think, be no doubt but what the brakeman would be held entitled to recover. And why? Because Mr. Holmes had not taken care enough of his own body? No; but because he had not, under the circumstances surrounding him, used that care and caution which the public in its own interest, and in the interest of every member of it, has a right to demand that a man so circumstanced shall exhibit. But if the plaintiff, with the light of justice thus reversed upon him, would have been deemed negligent and causative of and responsible for consequences, then in his position, and amid the realities of this case, he was and must be held guilty of contributory negligence.

But while we thus condemn his conduct, and say it bars his recovery, we are disposed to think the jury were fully justified in finding very reprehensible negligence in the employees of the railway company. The box cars it would

seem, should not have been left standing where they were, partly obstructing the crossing, and largely obstructing the view. The fact that they were there, cast upon the employes of the company a greater burden of caution. The locomotive bell, if rung at all, was not rung as under the circumstances it should have been, and there was no efficient look out to serve the blind end of the train. Had Holmes been killed, there can be little doubt that one or more of the employes would have been indictable for manslaughter. It would seem that our criminal law is defective in not providing punishment for what might be termed a "negligent assault." Were such a crime created a temptation would be removed from juries who love justice to seek to arrive at it by punishing what should be crime through the medium of a civil verdict.

As our opinion on the question of nonsuit is decisive of the case, we do not think it necessary to pass on the other points made in the brief of counsel for plaintiff in error.

Let the judgment of the district court be reversed, and the cause remanded, with directions to grant the defendant's motion for a nonsuit.

HOYT, J., concurs.

LANGFORD, J., (*dissenting.*) In this case I dissent from nearly every reason, and entirely from the conclusions of my learned brothers. I shall use little of my own reasoning, and less of my own language, as the foundations of my conclusions, but shall be content to follow the decisions of the United States supreme court. The sole question is whether the court erred in submitting the case to the jury instead of granting a peremptory nonsuit. It is therefore admitted that the facts are as stated in the plaintiff's evidence, which is fairly stated by my brothers, but which I will restate in order that the statement of other cases decided by the supreme court of the United States may be more easily compared. The place where the accident occurred was at a crossing in the city of Sprague. There were two railway tracks nearly parallel, about five feet apart. The wagon road crossed these tracks at nearly right angles. The plaintiff, coming from the north upon this wagon road, attempted to cross the track. As he approached the track, he saw a freight train pass east, and go out of his sight. His sight was obstructed to the west by the buildings and cars of the defendant, so that it was impossible for him to see the track easterly until his horses were on the track where the train had just passed up. The southerly line of the railroad track, from the wagon road east, was visible for some distance, and wagons in the road on that side, as soon as the train had passed east as aforesaid, started in the wagon road across the track, and the yard-master of defendant was there. It was usual for the train to switch at this place, and when the train was moving, to ring the bell. The plaintiff, as he approached the crossing, being well acquainted with the situation and the topography, and the custom of defendant to ring the bell when the cars were moving, and having seen the train pass east out of his sight, and knowing that the defendant's yard-master, and the teams meeting him, could see east from where they were, and, seeing those crossing, he listened, and, hearing nothing, attempted to cross the track with his team and buggy almost at the same moment that another wagon, meeting him, crossed from the other side of the track at the same crossing. From these facts the plaintiff supposed the train was not coming; as he thought, if it were, the bell or the yard-master would warn him; and, not being warned by the usual sound of the bell which was usually rung, started across the track; and when his horses were on the track, and it was too late to stop, he could see the train moving rapidly towards him. He struck his horses to escape, but, though they passed, it was too late, and the car struck the hind wheels of the buggy, throwing him out, and hence the injury. It further appears that this train plaintiff had seen going east as he approached the crossing, only went so far

that the hind wheels were about 60 feet from the crossing, when the cars stopped a moment, and reversed their engine, and rapidly backed across the wagon road, and thus caught plaintiff, and nearly caught the wagon which plaintiff met.

I will now state the facts in the case of *Railway Co. v. Whitton's Adm'r*, decided by the supreme court of the United States, as reported in 13 Wall. 275, viz.: "The deceased died in December, 1864, from injuries received from a locomotive of the railway company, defendant in the case, while she was endeavoring to cross its railway track in Academy street, in Janesville, Wisconsin. This street ran nearly north and south, and was crossed by four parallel railway tracks, lying near each other, and running in a direction from north-east to south-west. Two of these—those on the northerly side—belonged to the Milwaukee & Prairie du Chien Railway Company; and the other two belonged to the defendant, the Chicago & Northwestern Railway Company. One Mrs. Woodward and a Mr. Rice were standing together with Mrs. Whitton (the deceased) just previous to the accident, upon the cross-walk on the northerly side of the tracks, waiting for a freight train of the Milwaukee & Prairie du Chien Railway, then in motion, to pass eastwards, so that they might proceed down the street, and over the tracks. The weather was at that time extremely cold, and a strong wind was blowing up the tracks from the south-west, and snow was falling. As soon as the freight train had passed, Rice crossed the tracks, moving at a brisk rate. In crossing, he states that he took a look at the tracks, and that he neither saw nor heard any engine on the tracks of the defendant. Almost immediately after getting across, and before he had gone many steps, he heard a scream, and, on turning around, saw that the women (Mrs. Whitton and Mrs. Woodward) had been knocked down by a locomotive of the defendant. This locomotive was, at the time, backing down in a westerly direction,—opposite to that taken by the freight train which had just passed,—the tender coming first, then the engine drawing a single freight car. * * *

Among the instructions given by the court in this case were the following: "Under ordinary circumstances, a person possessing the use of those faculties should use both eyes and ears to avoid injury in crossing a railroad track; and, if in this case the wind and noise of the freight train tended to prevent Mrs. Whitton from hearing the approach of defendant's engine, she was under the greater obligation to use her eyes. It was her duty to look carefully along the tracks of defendant's railway, both northwardly and southwardly, before attempting to cross them, and it was not sufficient excuse for failing to do so that the day was cold and windy, or that one train had just passed on the track nearer to her. It was the duty of Mrs. Whitton to look carefully along the tracks of defendant railway to the north before putting herself in the way of danger, and in time to see and avoid any engine or train approaching from that direction. If necessary, in order to do this, it was her duty to pause before starting to cross until the freight train had so far passed as to give a sufficient view to determine whether she could safely cross; and if she failed to look carefully along these tracks to the north, after the freight train had so far passed as to give her such a view, and in time to have seen and avoided defendant's engine, the plaintiff cannot recover. * * * As to the negligence of Mrs. Whitton, the court, in substance, instructed the jury that she was required to exercise that degree of prudence, care, and caution incumbent on a person possessing ordinary reason and intelligence, under the special circumstances of the case, having regard to the fact of its being a railroad crossing, and another train crossing the street for which she had to wait in company with Mrs. Woodward, and that she must have used ordinary care, prudence, and caution. The court declined to say to the jury how she must dispose of her limbs, her eyes, or her ears, but left it to the jury to find whether she had been guilty of any fault or negligence

which contributed to her death; and instructed them that, if she had, the plaintiff could not recover, even if the defendant had been guilty of negligence. The court also told the jury, before they could find a verdict against the defendant, they must be satisfied its employees were guilty of negligence, and that such negligence caused her death." 13 Wall. 275-278.

In this case it appears that, from the side of the track upon which plaintiff approached it, the track and train were obscured from sight of one approaching, by cars and obstructions placed there by defendant, and that the crossing was much frequented; that those coming across from the opposite side to the crossing could see the track and train while plaintiff could not; that the yard-master of defendant was at the crossing, and could see the plaintiff coming to cross, and also others, but gave no warning to plaintiff, but signaled the train to back, which it did suddenly, without ringing the bell as usual; that plaintiff being thus situated, and being well acquainted with the permanent surroundings, and knowing that the teams and the yard-master would see an approaching train if one was coming, and relying further upon the usual custom of the bell being rung when trains approached the crossing, and listening and hearing no sound, thought he was safe in attempting to cross, but the train, starting suddenly to back, caught him. It is my opinion that there is no case to be found exactly like this, wherein a court has granted a nonsuit. A case which is as extreme as any that can be found against the right to recover against a railroad is that of *Railroad Co. v. Houston*, 95 U. S. 702. In this case the supreme court declared that the court from which the appeal was taken would not have erred had it instructed the jury to find for the defendant on the facts there stated, and upon the grounds there claimed. The ground there claimed as that upon which the said instruction should have been given was that the plaintiff was a trespasser upon the private land of the defendant at the time and place where the employees on the train were not expecting to find any one; that on this account they had a right to suppose the track free; and, further, that, from the place of the accident, the approach of the train could be seen and heard for a long distance, and that when the train-men first saw the plaintiff it was too late to avoid the accident.

From these facts it plainly appeared that the defendant was not guilty of any neglect, while the plaintiff was a trespasser at no crossing, and was so very negligent that it appeared as if she must have adopted this method of suicide. In the case at bar it is admitted that the negligence of the employees of the defendant was so criminal that, if plaintiff had been killed instead of injured, the employees would have been guilty of criminal homicide. In that case the plaintiff was a trespasser; in the case at bar he is not. In that case she could see the coming train three-fourths of a mile, and could hear it also; in the one at bar the plaintiff could neither see nor hear the approaching train on account of obstructions, and the train having stopped, and, when it started, not ringing the bell as usual. In that case the plaintiff was not induced to believe the train had passed in the opposite direction; in the case at bar it did so appear. In that case it was not at a regular crossing, and the yard-master of the defendant was not where he could see the plaintiff advancing to the crossing, and then, without notifying him, signaling the train to back as if to catch him, as was true in this case. In that case the plaintiff did not see teams approaching to cross, who were in sight of the train while he could not see, as was the fact in this case. In that case it did not appear that the plaintiff looked and listened to the best of her ability; in this case it does appear. In short, there is no analogy between the facts in that case and the case at bar, and no principle can be extracted therefrom which can apply to this case.

There are two late cases decided by the supreme court where the facts are analogous to the case at bar, and, by comparing the facts as stated in these

two cases with those of the case at bar, it will appear that the facts in the three cases are as similar as it is possible for different cases to be. The two cases referred to are *Railway Co. v. Whitton*, 13 Wall. 275, and *Continental Imp. Co. v. Stead*, 95 U. S. 162.

In the latter case Mr. Justice BRADLEY, in delivering the opinion of the court, stated the facts as follows: "This is a case of collision near the village of Lima, in La Grange county, Indiana, between a train of passenger cars of the plaintiff in error and the wagon of the defendant in error. The latter brought the action below to recover the damages done to himself and his wagon, and recovered a verdict. The present writ of error is brought to review the instructions given by the court to the jury on the trial. The case, as appears by the bill of exceptions, was substantially as follows: The collision occurred in a cut about five feet in depth, in which the wagon road crossed the railroad on a level therewith, nearly at right angles, descending to it on each side by an excavation. The train was a special one, coming from the north, and did not stop at the station, which was four or five hundred feet north of the crossing, and none of the regular trains were due at that time, although special trains were occasionally run over the road. The plaintiff was going east, away from the village, following another wagon, and in approaching the railroad track could not see a train coming from the north, by reason of the cut and intervening obstructions. There was evidence tending to show that the plaintiff, though he looked to the southward, (from which direction the next regular train was to come,) did not look northwardly; that his wagon produced much noise as it moved over the frozen ground; that his hearing was somewhat impaired, and that he did not stop before attempting to cross the track; also evidence tending to show that the engineer in charge of the train used all efforts in his power to stop it after he saw the plaintiff's wagon on the track. The evidence was conflicting as to whether the customary and proper signals were given by those in charge of the locomotive, and as to the rate of speed the train was running at the time; some witnesses testifying that it was at an unusual and improper rate, and others the contrary."

The court in that case sustained a judgment for the plaintiff, which is entirely inconsistent with the conclusion of a majority of the court in this case. The reasons given by the United States supreme court in each of the cases cited lead to exactly an opposite conclusion to the reasoning of the majority of the court in this case.

Mr. Justice BRADLEY, speaking for the court in the case reported in 95 U. S. 161, and commenting on the facts, declares the law as follows: "The counsel for the railroad company requested the court to adopt certain specific instructions to the general effect that the plaintiff should have looked out for the train, and was chargeable with negligence in not having done so; that there was nothing peculiar in the crossing to forbid as high a rate of speed as would be proper in the case of other important highways; that an engineer is not bound to look to the right or left, but only ahead, on the line of the railway, and has a right to expect that persons and teams will keep out of the way of the locomotive; and that it is the duty of those crossing the railroad to listen and look both ways, along the railroad, before going on it, and to ascertain whether a train is approaching or not. The judge refused to adopt the instructions framed by counsel, but charged in effect as follows: That both parties were bound to exercise such care as, under ordinary circumstances, would avoid danger; such care as men of common prudence and intelligence would ordinarily use under like circumstances; that the amount of care required depended on the risk of danger; that, where the view was obstructed so that parties crossing the railroad could not see an approaching train, the exercise of greater care and caution was required on both sides, as well on the part of those having the management of the train as of those crossing the railroad; that the former should approach the crossing at a less rate of speed,

and use increased diligence to give warning of their approach; and, if the train was a special one, it was still more incumbent upon them, in going through such a place, to slacken their speed, and sound the whistle and ring the bell, than if the train were running on regular time; and, on the other hand, that the party crossing with a team should proceed with more caution and circumspection than if the crossing were in an open country, and not venture upon the track without ascertaining that no train was approaching, or, at least, without using the means that common prudence would dictate to ascertain such fact; but that, if a train were not a regular one, no train being due at that time, the same degree of caution would not be expected on his part as if it were a regular train and on usual time. In short, the judge charged that the obligations, rights, and duties of railroads and travelers upon highways crossing them are mutual and reciprocal, and no greater degree of care is required of one than of the other. He further charged that the plaintiff could not have a verdict unless the person in charge of the train were guilty of negligence or want of care, and unless the plaintiff himself were free from any negligence or carelessness which contributed to the injury. The evidence of the case was fairly submitted to the jury in the light of the principles thus announced. This is the general scope of the charge, and we think it is in accordance with well-settled law and good sense. If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing. On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentive to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them; such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad be in fault. They are the authors of their own misfortune. These propositions are so indisputable that they need no reference to authorities to support them. We think the judge was perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. For, conceding that the railway train has the right of preced-

ence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise, under the circumstances of the case, in endeavoring fairly to perform his duty. The charge of the judge was in substantial accordance with these views. The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railway companies have to run trains on the railroads."

I wish to follow these opinions of the supreme court of the United States, and in following them I must disagree with both the conclusions and the reasons therefor given by the majority of the court.

I am willing to reverse the parties, as my brothers have done, and imagine that the poor employes of the defendant are plaintiffs against the rich Holmes. I agree that the employes were guilty of such gross negligence as to be criminal, and by this negligence they both injure themselves and Holmes. Now, suppose that men in this condition should bring an action for their injuries. They would show that they conjointly laid a trap for Holmes, let him go into it without warning, and in their sight, and then, seeing him in the trap, run the train over him. As well might a man sue another because he hurt his hand in attempting to kill him.

CARVER and another, Partners, etc., v. LYNDE and another, Partners, etc.

(*Supreme Court of Montana. July 23, 1887.*)

1. PLEADING—DEMURRER—ANSWER OVER—WAIVER OF OBJECTION.

Where a defendant demurs, but does not stand upon his demurrer, and answers over, and goes to trial upon the merits, he cannot be heard, on appeal, to object to the action of the court in overruling the demurrer, unless the complaint should be so defective as not to support the judgment. This rule applies in the case of a supplemental complaint. Following *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. Rep. 637, and other cases.

2. ORDER—EVIDENCE—NONSUIT.

Where, in an action brought to recover the amount of an order given by a subcontractor upon his principals, and accepted by them, payable when the principal contract is paid, it appears from the transactions under the principal contract that at the time of acceptance, and after, the acceptors had received sums in payment of their contract exceeding the amount of the order, and that articles included in said contract, and paid for, were of the same class as those supplied by the subcontractor, it will be assumed, in the absence of explanation by defendant, that the sum for which the order was given and accepted was for such articles, and that defendants had received the money for them,—at least, to the extent of making such a *prima facie* case as will relieve the plaintiff from a nonsuit.

Appeal from district court Gallatin county.

Action to recover amount due upon an order. The opinion states the case. *Luce & Armstrong*, for appellants. *Vivion & Shelton* and *Henry N. Blake*, for respondents.

GALBRAITH, J. This was an action to recover the amount claimed to be due upon a certain order drawn by White Calfee, on the appellants, Lynde and Holden, and conditionally accepted by them, and payable to the respondents. The appellants had a contract with the Northern Pacific Railroad Company

for the delivery of a great number of ties, and White Calfee was their sub-contractor. White Calfee being indebted to the respondents for goods, wares, and merchandise, and the amount due him from appellants being greater than his indebtedness to the respondents, gave them an order on the appellants, which was accepted by them, subject, however, to the payment of three other claims, which were to have precedence. This order was accepted on the tenth of September, 1883, and was for the sum of \$2,814.70, and the amount of the claims subject to which it was to be paid was \$6,421.89. The action was commenced on the second day of September, 1884. There was a demurrer to the complaint, which was overruled; and, after the case was at issue on complaint, answer, and replication, the respondent filed a supplemental complaint, to which there was also a demurrer, which being overruled, the appellants filed an answer. The case was tried to a jury, which rendered a verdict for the respondents.

The errors relied upon are the action of the court in overruling the demurrers to the original and supplemental complaints of the respondents, and the insufficiency of the evidence to support the verdict of the jury. As to the first error complained of, viz., the overruling of the demurrer to the complaint, it is the settled rule of practice in this territory that when a defendant does not stand upon his demurrer, but, as in this case, answers over, and goes to trial upon the merits, he waives his right to be heard upon his objection to the action of the court in overruling his demurrer, unless the complaint should be so defective as not to support the judgment. *Francisco v. Benepe*, 6 Mont. 243, 11 Pac. Rep. 637; *Collier v. Ervin*, 3 Mont. 142; *Perkins v. Davis*, 2 Mont. 474. The same rule is applicable to the action of the court in overruling the demurrer to the supplemental complaint. To this there was an answer. The original and supplemental complaints support the judgment.

But it is also complained that the court erred in overruling the appellants' motion for a nonsuit; and that the evidence is not sufficient to sustain the verdict, in this: that it does not show that the claims to which the payment of the amount due on the order was subject, and the payment of which had precedence over that of the order, had been paid. The appellants did not introduce any evidence upon the trial, and therefore both these questions can be considered together. If the evidence will not sustain the verdict, the motion for nonsuit should have been granted. We understand the correct rule to be that the court should grant a nonsuit if, in view of all the evidence introduced by the plaintiff, it would grant a new trial, if the jury should bring in a verdict in his favor. Therefore, so far as this case is concerned, as their determination depends upon the application of the same rule or principle, both of these questions may be considered together.

The order and acceptance were in evidence, and were as follows:

"FRIEDLEYS, September 7, 1883.

"*Lynde & Co*: Pay to the order of G. H. Carver & Co. twenty-eight hundred and fourteen and 70-100 dollars, on account of the contract at Miner Creek, and charge same to my account, as per agreement made with Mr. Van Horne and myself at Bozeman.

"\$2,814.70.

[Signed]

WHITE CALFEE."

"We hereby accept the foregoing order, subject to the following claims, viz: Strasburger & Sperling, \$4,500; Seabee, Ferris & White, \$921.39; Lynde & Co., \$1,000. The foregoing to be paid when we receive the same from the Northern Pacific Railroad Company for the Tom Miner creek ties.

"Accepted, subject to the specified condition hereon.

LYNDE & CO.

"September 10, 1883."

An account stated was also shown between the appellants and the Northern Pacific Railroad Company, for transactions upon their contract with it between February, 1882, and the latter part of December, 1884, amounting in all to the sum of \$484,537.86. Upon an inspection of this account, it appears that

the transactions under this contract, up to some time in December, 1883,—it being in September of that year that the above order was given and accepted,—amounted to \$456,489.42, among which are included a large amount of ties. This account also shows that all claims of appellants for the year 1883 were paid by the railroad company, and that such payments were made promptly. The appellants did not offer any evidence to explain this statement of accounts. Looking at the order and acceptance, and all the circumstances of the transaction, it will be presumed that the sum for which it was given and accepted was for ties already delivered on the contract of Calfee with the appellants. Under the testimony in this case, we think it appears, *prima facie*, that the appellants had received the money for the ties mentioned in the acceptance of the order, although not specially mentioned in the account stated between the appellants and the railroad company, and that the respondents were entitled to recover the amount of their claim at the time the action was commenced.

It was also shown, under the allegations of the supplemental complaint, that on the eighth day of December, 1886, the appellants assigned to the First National Bank of Kansas City the whole of the balance then due them on their contract with the Northern Pacific Railroad Company, amounting to the sum of \$6,218.55, subject to the lien of the respondents by reason of an attachment issued in this case. They will be presumed to have received value for this assignment; and therefore it would appear that they received the whole amount due them on their contract with the railroad company. The amount of the claim, subject to which the order was accepted, was \$6,421.89. It appears, therefore, that the balance assigned to the bank was not sufficient to pay these claims.

Under the above state of facts, the nonsuit was properly overruled, and the verdict is sustained by the evidence. The judgment is affirmed, with costs.

BARRY v. LARABIE and others.

(*Supreme Court of Montana. July 29, 1887.*)

INDEMNITY—CONTRACT OF—CONSTRUCTION—BAIL-BOND.

Plaintiff entered into an agreement with defendants to deposit a sum of money to indemnify them in respect of a bond for the like amount, on which they were to become sureties for a third party held to bail by an order of the probate court, to answer an indictment to be preferred against him in the district court, "for obtaining money under false pretenses." Defendants entered into a bond for his appearance to answer to the indictment for obtaining money under false pretenses, or "any indictment which might be by the grand jury of the county preferred against him." The accused was indicted for grand larceny, and failed to appear, the bond was forfeited, and his bondsmen obtained and paid the indemnity deposit. *Held*, in an action to recover the amount of the indemnity from them, that the bond given by defendants was not the bond against which plaintiff had agreed to indemnify them, and that plaintiff was entitled to recover.

Appeal from district court, Deer Lodge county.

H. R. Whitehill and *T. L. Napton*, for appellant. *Robinson & Stapleton*, for respondents.

MCLEARY, J. This is an appeal from a judgment and order overruling a motion for a new trial. The cause was tried before the court below, sitting without a jury, upon the complaint, answer, and replication and evidence introduced, and judgment was rendered in favor of the defendants for their costs. The evidence adduced on the trial shows that on the twentieth day of June, 1884, the probate judge of Deer Lodge county made an order committing one Thomas Gregg to the county jail, to answer an indictment to be preferred against him in the district court, for obtaining money under false pretenses from Thomas Horne, and fixed his bail at \$1,000. On the twenty-fifth day of June, the plaintiff and defendants entered into a written contract, by the terms of which the defendants, in consideration of plaintiff's deposit-

ing in bank \$1,000, to indemnify defendants, were to become sureties on the bond for Gregg in said sum, for his appearance in the district court to answer to an indictment to be preferred against him for obtaining money under false pretenses; and that, in case said Gregg should fail to appear, as required by the terms of such bond, and his default should be declared and entered thereon, then, upon a certificate from the district clerk to that effect, the defendants were to draw the money from the bank, and the said \$1,000 was to be repaid to the plaintiff, in the event that the defendants should be exonerated from the said bond. Plaintiff deposited the money, and defendants signed a bond for the appearance of Gregg to answer to the indictment for obtaining money under false pretenses, or any offense for which he may be indicted, and Gregg was released. Thereafter Gregg was indicted for grand larceny from Holland. Gregg failed to appear, and his bond was forfeited. On certificate of the clerk, defendants drew the money from the bank, and paid it over to the county commissioners. And such was the substance of the findings of fact made by the court, whereon judgment was rendered in favor of defendants for costs.

Two alleged errors are relied on: (1) The overruling of the plaintiff's demurrer to the defendant's answer; and (2) that the evidence was not sufficient to justify the judgment of the court.

These will be considered in the order indicated.

1. The first part of the answer is a specific denial of the complaint; and it is sufficient. The second part of the answer, to which the demurrer is interposed, sets up new matter to this effect: that the money for which suit is brought, is certain money which the plaintiff had deposited with a bank to indemnify the defendants from becoming sureties for Gregg, who had been bound over by the probate court to answer an indictment for obtaining money under false pretenses, and that, by reason thereof, the defendants had become sureties on Gregg's bond, binding him to appear and answer said charge, and any indictment which might be preferred against him, and that said bond had been forfeited, etc. It seems from this portion of the answer that the defendants entered into a more onerous bond than the one against which the plaintiff had made the deposit to indemnify them. This they had a right to do, but not thereby to charge the plaintiff. He agreed to indemnify them against becoming sureties only on a bond binding Gregg to appear and answer for the crime of obtaining money under false pretenses; but thereupon the defendants became sureties on a bond which bound Gregg, not only to answer to this crime, but "to answer to any indictment which might be, by the grand jury of said county, preferred against him." Against such a bond, as appears from the answer, they had not been indemnified by the plaintiff. The demurrer should have been sustained. But, even if it had been sustained, the case would have had to proceed to trial on the specific denial; and this brings us to the next question.

2. The evidence has already been fully detailed, and need not be repeated. It will be observed that the accused, Gregg, was bound over by the probate court to answer for the crime of obtaining money under false pretenses from Horne; and that it was in signing a bond, in compliance with this order, that the plaintiff made the deposit to indemnify the defendants. But, instead of signing such a bond, they signed one much more onerous, requiring the defendant to appear and answer, not only the offense for which he was bound over, but any offense for which he might be indicted. He was not indicted for obtaining money under false pretenses from Horne, which would have been a misdemeanor, but for grand larceny from Holland, which is a felony. He failed to appear, and forfeiture followed, and the money was drawn by defendants.

This bond, which the defendants signed as sureties, was a nullity. The sheriff had no right to require it, and the defendant was not bound to give it.

It is not supported by the order of the probate court. It should not have been forfeited, because Gregg was not indicted for the crime mentioned in the order of the probate court.

But even if it had been a valid bond, it was not the bond the payment of which the plaintiff deposited his money to secure. If the defendants became sureties on any other bond than the one mentioned in their contract, they did so on their own responsibility, and not at the risk of the plaintiff. They had no right to expect the plaintiff to indemnify them against loss by any other bond than the one mentioned in the contract, much less a more onerous bond. The bond against which the plaintiff indemnified them was a bond to answer for a misdemeanor. The bond they signed bound Gregg to answer, not only to a misdemeanor, but to a felony; even a capital felony. The plaintiff could not expect to go beyond his contract, and guaranty the appearance of Gregg to do this. He might have been willing to do so, but he did not do so in the contract before us. In these particulars the judgment is not supported by the evidence, nor by the findings of the court, which fairly state the evidence.

Such a bond ought not to have been demanded, but, if demanded, the defendants should have looked to their indemnifying contract, and refused to sign it; but, having signed it, they should not look to the plaintiff to secure them. The clerk's certificate was properly issued, because it followed the judgment of the court; but the defendants had no right, under all the circumstances, to draw the money from the bank; and, having drawn it, they are liable to the plaintiff therefor.

The judgment of the district court is reversed, and judgment is here rendered on the findings of the court below for the plaintiff, for the full amount claimed in his complaint, and all the costs of this court and the court below.

MILES v. EDSALL.

(*Supreme Court of Montana. July 29, 1887.*)

CONDITIONAL SALE—LEASE—RIGHTS OF CREDITORS.

Where a party buys cattle, and has the bill of sale made out in his own name, and leases the cattle to another at a certain rent, with the understanding that the tenant may purchase the same at any time during the hiring, at a certain price, by paying the difference between the rent paid and the price, title meanwhile to remain in vendor, the transaction is valid as a lease with privilege of purchase, and the chattels leased are not liable for the debts of the lessee.¹

Appeal from district court, Gallatin county.

Savage & Elder, for appellant. *Henry & Joy* and *Geo. F. Shelton*, for respondent.

BACH, J. This is an action of claim and delivery. In his answer, the defendant, who was sheriff of Gallatin county, admits taking the property, and justifies the taking by asserting that one Mary C. Murphy was the owner and in possession of the property, and that he took the same under and by virtue of certain writs of attachment and execution, issued in actions wherein Charles A. Baker was plaintiff, and the said Mary Murphy was defendant. The pleadings in the case consist of the complaint, the answer, and the replication. Defendant made a motion for judgment on the pleadings, upon the ground that the replication did not specially deny the new matter set up in the an-

¹Respecting conditional sales, and leases with power to purchase, see *Stokes v. Baalam*, (Cal.) 14 Pac. Rep. 574, and note; *Redewill v. Gillen*, (N. M.) 12 Pac. Rep. 872, and note.

swer. The motion was denied, and properly so. The denials contained in the replication are as specific as are the allegations which they meet, and each denial controverts the substance and spirit of the allegation in the answer.

Upon the trial of the cause, the plaintiff introduced evidence tending to prove that he bought the cattle which are the subject of the action; that after his purchase he leased the same to Mary C. Murphy at a certain rent, with the understanding that she could purchase the same at any time during the hiring, at a certain price, by paying to him the difference between the said price and the rent thereof paid by her; that prior to the commencement of the action the lease had expired, and the purchase price had not been paid or tendered; also, that the agreement was that the title should remain in the plaintiff until the purchase price was paid. On the other hand, the defendant sought to prove that the sale to Miles was really a sale to the said Mary Murphy, and that the lease between the plaintiff and Mary Murphy was executed in order to conceal her ownership and defraud her creditors. There is a conflict of testimony upon the facts, and this court will not disturb the verdict, upon the ground that it is contrary to the evidence. Taking the facts as proved by the plaintiff, they do not constitute fraud in law.

In *Heryford v. Davis*, 102 U. S. 235, the court say that a lease with the privilege of purchasing might be a valid contract, as a lease with conditional sale; although, upon the facts in that case, the contract was held void as against creditors, because it appeared from the evidence in the case that the lease was in fact a mortgage, given by the vendee to secure the purchase price.

In *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51, Mr. Justice BRADLEY, commenting upon the last-cited case, says, (page 680:) "It was agreed by the court, in the opinion delivered by Mr. Justice STRONG, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claims of the vendors would have been valid."

In the case of *Heryford v. Davis*, the vendees gave their notes for the entire purchase price; there was no rent reserved by the so-called lease; and it was provided that if the notes were not paid, any sum collected thereon should belong to the vendor, who might retake the property, sell the same, and apply the proceeds to the payment of any amount due and unpaid upon the notes. It was held that the agreement was in fact a mortgage. The lease in this case contained no provision not common to every lease of personal property, and the parol agreement for a conditional sale was valid, even as against creditors. See *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. Rep. 51; *Heinbockle v. Zugbaum*, 5 Mont. 344, 5 Pac. Rep. 897; *Silver Bow M. & M. Co. v. Lowry*, 6 Mont. 288, 12 Pac. Rep. 652.

Speaking of the agreement between himself and Mary C. Murphy in regard to some of the cattle, the plaintiff testifies as follows: "Mr. Herron (plaintiff's vendor) came to me, and said that Mrs. Murphy said I was going to buy these cows, and lease them to her. He wanted to sell them to her and get the cash. I told him I had made such an arrangement with Mrs. Murphy, (referring to lease of the other cattle,) but this time I hated to do it. I gave him the money. A man named Donovan made out the bill of sale. When I saw it I found it was made out to Mrs. Murphy. I told him that was not the agreement. Then I thought I could take her note for it. I said, 'Let it go, and when you come down with the calf we can change it.' " The evidence further shows that the bill of sale was accordingly made out directly to the plaintiff. There was no unconditional acceptance by the plaintiff as the agent of Mary Murphy; no such delivery as would enable her to demand the possession of the three cattle. The plaintiff testified that he never asked her for the note; he says he determined not to do so. The only final acceptance was by the plaintiff in person.

In *Middleworth v. Sedgwick*, 10 Cal. 393, cited by appellant, the transaction was solely between the vendor and vendee, and was complete; and it was

accordingly held that the return of the bill of sale to the vendor was not a return of the title to him.

The verdict in this case is to some extent irregular, but section 267 of the Code declares, "But failure to find all the facts mentioned in this section shall not invalidate the verdict."

The judgment and order denying the motion for a new trial are affirmed, with costs.

BLACK, ADM'R, etc., v. STORY and others.
(*Supreme Court of Montana. July 29, 1887.*)

1. EXECUTORS AND ADMINISTRATORS—RIGHT TO BRING EJECTMENT.

Under Rev. St. Mont. div. 2, §§ 127, 228, 230, 532, giving to executors and administrators possession of the real and personal estate of decedents, and the right to bring actions to quiet title to and to recover the same, and Rev. St. Mont. div. 1, § 6, giving executors and administrators power to sue without joining the beneficiaries, an administrator has the right to bring ejectment in his own name, as administrator, for the possession of the real estate of the decedent as against trespassers. *Carrhart v. Montana Mineral Land & Min. Co.*, 1 Mont. 245, distinguished and overruled.

2. SAME—NECESSITY OF INVENTORY OR APPRAISEMENT.

The making of an inventory or appraisal of real estate of a decedent, as required by Rev. St. Mont. §§ 118, 126, is not a pre-requisite of the right to take possession thereof by the administrator, and it is not, therefore, necessary that the inventory and appraisement should be set out in the complaint, in an action by an administrator for the possession of real estate of the decedent, where the defendants, by the record, appear as mere trespassers.

Appeal from district court, Gallatin county.

E. W. Toole and Luce & Armstrong, for appellant. *Robert P. Vivion*, for respondents.

GALBRAITH, J. This is an appeal from a judgment rendered in consequence of a demurrer having been sustained to the complaint. The action was brought by the appellant, as administrator, to recover the possession of certain real estate. The demurrer was upon the ground that, as a matter of law, he could not, as such administrator, maintain an action for the possession of real property. It was maintained in the case of *Carrhart v. Montana Mineral Land & Min. Co.*, 1 Mont. 245, that an administrator could not maintain an action in ejectment for the possession of real estate. But that decision was rendered under a different statute in relation to the subject from that now in force. This court in that case substantially held that the chapters of our law, in regard to descents and distribution, being almost literal copies of Missouri statutes, and being construed by the supreme court of that state, and such construction being correct in principle, and according to the intention of our legislature, that such construction should be adopted. But this court in that case says: "Had the legislature intended to vest the title or possession of the realty, for the purpose of administration and distribution to the heirs, in the administrator, they would certainly have provided for his taking possession of the same; but they provide for his taking the possession of the evidence of title, and returning inventory of realty, and not for taking possession thereof,—evidently intending that he should look after the realty for the benefit of the heirs. And also, under the direction of the probate court, he may lease it, not longer than one year; evidently meaning until the heirs can be notified, and take possession." This decision, therefore, is based upon the ground that, under the statute then in force, the administrator was not entitled to the possession of the real estate of the decedent. It was rendered at August term, 1870.

It will be seen by reference to the probate act approved February 16, 1877, that provision is made by the legislature that the administrator may take

possession of the real estate of decedent. Section 127 of this act provides as follows: "The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents and profits of the real estate, until the estate is settled, or until delivered over by order of the probate court to the heirs or devisees, and must keep in good tenable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the title to the same, against any one except the executor or administrator." 2d Div. Rev. St. 1879, p. 214. Section 532 of the same act reads as follows: "The property, both real and personal, of one who dies, without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration." Id. 282. The following are sections 225 and 226 of the same act: "The executor or administrator must take into his possession all of the estate of the decedent, real or personal, and collect all debts due to the decedent, or to the estate. For the purpose of bringing suit to quiet title, or for partition of such estate, the possession of the executor or administrator is the possession of the heirs or devisees. Such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title." "Actions for the recovery of any property, real or personal, or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators, in all cases in which the same might have been maintained by or against their respective testators or intestates." Section 6, 1st Div. Rev. St. p. 42, reads as follows: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him, the person or persons for whose benefit the action is prosecuted. * * *"

By virtue of the above statutory provisions, the administrator is expressly given the right to the possession of the real estate of the decedent, and may bring ejectment in his own name, as administrator, for the possession thereof, as against the respondents, who, so far as their record shows, are trespassers.

It is claimed that the complaint is insufficient, in that it does not allege that the real property described therein was ever inventoried or appraised, or an inventory or appraisal thereof returned and filed in the office of the probate judge, as provided for in sections 118 and 126 of the act above referred to. These are as follows: "Every executor or administrator must make and return to the court, at its first term after his appointment, a true inventory and appraisal of all the estate of the decedent, including the homestead, if any, which has come to his possession or knowledge." Section 126. "Whenever property, not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced after notice, by attachment or removal from office."

It will be observed that no time is mentioned within which the administrator shall take possession of the property, real or personal, of the decedent, but that a time is mentioned within which he shall file an inventory. But it cannot be contended that, under the foregoing provisions of the statute, the administrator may not have possession of the real estate before the time arrives for the filing of the inventory, if he can have it at all, which, as we have before seen, he may. This alone is a strong reason for holding that it was not the intention of the legislature to make the taking possession of the real estate dependent upon the filing of the inventory. Certainly the filing of an inventory is not expressly made a prerequisite to the taking possession of the

property, nor do we think it is made so by implication. These provisions are not, we think, intended by the legislature as requisite preliminaries to the taking possession of the property of the decedent, but for the benefit and protection of the estate, and as a guide to the probate court in relation to matters of administration. It was not necessary, therefore, that they should be set out in the complaint, at least in an action for the possession of real estate, where there is nothing in the record to show but that the defendants are mere trespassers.

Judgment reversed, and cause remanded, with instructions to the court below to overrule the demurrer.

TERRITORY v. LAYNE.

(*Supreme Court of Montana. July 29, 1887.*)

ASSAULT WITH INTENT TO MURDER—INDICTMENT.

An indictment charging that the accused "with intent, him, the said ———, then and there to kill and murder, willfully, unlawfully, maliciously, and feloniously did make an assault with a certain pistol," etc., sufficiently charges the crime of an assault with intent to murder.

Appeal from district court, Beaverhead county.

Campbell & Duffy, for appellant. *W. S. Barbour, Co. Atty.*, for respondent.

BACH, J. The defendant was convicted of an assault, with intent to murder, upon an indictment charging substantially as follows, omitting allegation of time and venue: "On the person and body of one James Sullivan, with intent him, the said James Sullivan, then and there to kill and murder, willfully, unlawfully, maliciously, and feloniously, did make an assault, with a certain pistol loaded with powder and leaden balls, * * * and, by means of the powder and balls aforesaid, then and there discharged and fired off, in and upon the breast and body of him, the said James Sullivan, then and there did inflict a dangerous wound," etc.

Defendant now appeals from the judgment, from the order of the court below overruling his demurrer to the indictment, and from an order denying a motion to set aside the indictment, for the reason that such indictment "is not signed by the district attorney of the Second judicial district, or by any other proper and authorized prosecuting officer."

As to the motion to set aside the indictment, the transcript contains an extract from the minutes, in all respects similar to that mentioned in the case of *Territory v. Harding*, 6 Mont. 327, 12 Pac. Rep. 750. In fact it is the very same order, appointing, for certain reasons therein mentioned, Robert B. Smith to represent the territory as prosecuting attorney. Upon authority of that order, Mr. Smith acted as prosecuting attorney, and signed this indictment.

The case referred to is decisive upon this point, and the motion to set aside the indictment was properly denied.

The point relied upon, on the appeal from the judgment, is that the indictment will not support the verdict and judgment, which is substantially the same question as that raised by the demurrer, which was overruled. The demurrer was based upon the grounds following: "*First*, that the acts constituting the offenses are stated in an ambiguous and uncertain manner; *second*, that more than one offense is charged in said indictment; *third*, that the facts stated do not constitute a public offense."

The indictment is neither ambiguous nor uncertain, and it does not state more than one offense. It states certain alleged facts fully and clearly, perhaps describing with unnecessary fullness the acts complained of, and which constitute the assault alleged therein; but the one crime charged is the crime of an assault with intent to murder. This the counsel for defendant admit by relying in their brief upon the third ground stated in the demurrer. Coun-

sel for appellant seems to conclude that the words "willfully, unlawfully, maliciously, and feloniously" are used in the indictment to qualify and define the words, "with intent * * * to kill and murder." We are of opinion that the former words are used to define and qualify the words, "did make an assault;" that is to say we think the pleader meant to define the act of assault, and not the intent to kill. At all events, the appellant does not suffer from that interpretation; and, as the indictment presents this question, when an indictment, after stating time and place, alleges that the defendant feloniously made an assault upon A. B., (stating the facts constituting the assault,) with the intent then and there to kill and murder the said A. B., does it contain facts sufficient to constitute a public offense?

In this territory, the unlawful killing of a human being is either murder or manslaughter. If to an indictment properly and fully alleging an unlawful killing, the words "malice aforethought" are properly added, then the indictment charges murder; if the other necessary words are added, then the indictment would charge murder in the first degree. The indictment need not, however, undertake to define the legal signification of the words "malice aforethought," which have a meaning quite as technical as do the words "intent to murder" in the indictment which we are considering. But when an indictment charges an unlawful killing, and further defines the killing, by the technical words "malice aforethought," it contains the description of a killing which, by our statute, is declared to be murder, and it informs the defendant that he is charged with the crime of murder. So, in our statutes, we have different kinds of assault; and, if the indictment alleges the facts constituting an assault, and in addition thereto alleges that the assault was made with "the intent to murder," it contains a full description or definition of a crime declared by our statutes to be "an assault with the intent to murder."

The word "murder," in such an indictment, has a technical and statutory definition. It means a killing of a certain kind, as declared by our statute; and that definition and meaning are presumed to be known. The legal definition of "murder" is no more necessary to such an indictment than is the legal definition of the expression "malice aforethought" necessary, when those words are used to assert that a certain unlawful killing was a murder. In either case, the defendant is fully apprised of the nature of the crime charged against him, as those crimes are defined by our statute; and, in that respect, the indictments satisfy the requirements of the criminal practice act contained in section 165, and in section 170 of said act. The former section declares that an indictment must contain "a statement of the facts constituting the offense;" and section 170 declares that an indictment is sufficient when the "offense charged is clearly set forth in plain and concise language."

The sections are similar to certain sections of the Laws of Texas and of other states. In the case of *Martin v. State*, 40 Tex. 19, the indictment charged that the defendant did commit an assault upon the body of one Ed. Martin, with a pistol, etc., "with the intent him, the said Ed. Martin, to willfully, maliciously, and of his malice then and there to kill and murder;" and counsel for the accused sought to maintain that the indictment was fatal, because the word "aforethought" was not inserted. The learned judge writing the opinion (Mr. Justice GRAY) says: "An assault and a murder are defined in other articles by stating what acts and purposes constitute those offenses. Their meaning is definite and well understood. To constitute murder, the killing must have been done with malice aforethought; and in an indictment for murder that intent must doubtless be alleged, for the simple reason that it is so defined in plain language in the Code. The charge of an assault with intent to murder clearly conveys to the mind that the party charged did make an attack upon the party assaulted, under circumstances constituting the offense of an assault, and that he did so under the circumstances constituting the offense of murder; that is, the intent to kill with malice aforethought."

If the language of the Code in defining this offense is in plain language enough to be clearly understood, then it would seem to follow that an indictment charging a party in that language must be deemed to be in plain and intelligible words, and a sufficient compliance with the law." See, also, *Mills v. State*, 13 Tex. App. 487.

In *People v. Villarino*, 66 Cal. 229, 5 Pac. Rep. 154, it was held that an information charging the defendant with having "feloniously assaulted one Raphael Soto, with a deadly weapon, with intent to kill and murder him, the said Soto," sufficiently stated the crime of an assault with intent to murder. This case practically overrules the case of *People v. Urias*, 12 Cal. 326, cited by appellant.

In the case of *Com. v. Doherty*, 10 Cush. 53, it was held that an indictment charging the statutory crime of breaking and entering a dwelling-house, with intent to commit rape, need not technically set out the crime of rape; that it was sufficient to allege the breaking and entering the house "with the intent to commit the crime of rape." See, also, *Rice v. People*, 15 Mich. 9.

We are of the opinion that the demurrer was properly overruled, and that the indictment fully sustains the verdict and judgment.

The judgment and the order appealed from are affirmed.

DODGE v. JONES and others.

(Supreme Court of Montana. July 23, 1887.)

1. SALE—DELIVERY AGAINST CREDITORS—TURNING HORSES OUT ON RANGE.

Under the Montana act, (section 169, Rev. St. p. 436,) which requires that "every sale made by a vendor of goods and chattels in his possession, or under his control, * * * unless the same be accompanied by the immediate delivery, and followed by an actual and continued change of possession, of the thing sold and assigned, shall be conclusive evidence of fraud, as against creditors of the vendors, * * *" it is a sufficient change of possession if the vendor parts with the actual possession of the thing sold, though the possession of the vendee may be only constructive. Therefore, where certain horses in a corral were sold to a *bona fide* purchaser for value, and were given a distinguishing mark at the time of the sale, and then immediately turned on the range in the actual possession of no one, *held*, that there was an immediate delivery and change of possession, within the requirement of the act.¹

2. SAME—VENDEE RETAKING POSSESSION AS AGENT.

The purpose of Rev. St. Mont. § 169, p. 436, requiring in sales of personal property, to be valid against creditors, an actual and continued change of possession of the thing sold, being to prevent fraudulent and colorable sales made to hinder and delay creditors, it is not fraud *per se* if the vendors, having given possession of the property sold to the vendee, subsequently, at the expiration of a reasonable length of time, retake possession of the same as the agent of the vendee.¹ *Bach, J.*, dissenting.

3. SAME—BONA FIDES—JURY.

And, in such a case, whether the transaction is *bona fide* is a question of fact, to be determined by a jury.¹

Appeal from district court, Beaverhead county.

Galbraith & Burleigh, for appellant. *Smith & Mellon and Robinson & Stapleton*, for respondents.

MCCONNELL, C. J. In this case, the court, sitting instead of a jury, gave judgment for defendants. A motion for a new trial was made and overruled; and from the order overruling the motion for a new trial, and the judgment, the plaintiff below appeals to this court. This is a case of sale and delivery, under section 169, p. 436, Rev. St. Mont.

¹Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is question for the jury, see *Stull v. Weigle*, (Pa.) 8 Atl. Rep. 578; *Young v. Poole*, (Cal.) 13 Pac. Rep. 492; *Cook v. Rochford*, (Cal.) 12 Pac. Rep. 508, and note.

The court made 15 special findings: "(1) Defendant Elling, ever since 1880, has been a creditor of James and Robert Kirkpatrick. (2) Defendant Elling, in October, 1885, reduced his claim against said James and Robert Kirkpatrick to a judgment. (3) Said judgment is still unpaid to the amount of \$2,985. (4) That in October, 1881, said James and Robert Kirkpatrick sold to plaintiff, Lydia C. Dodge, twenty head of horses and mares; and that the said horses and mares thus sold, and their offspring, are the same property mentioned in the complaint. (5) That the plaintiff and Robert Kirkpatrick went into the corral of Kirkpatrick, and the twenty head were pointed out to her. (6) That the Kirkpatricks owned a large band of horses branded 'K' on left shoulder, and those sold to plaintiff had this brand on them. (7) That the horses bought by plaintiff were turned out on the range with the rest of Kirkpatricks' horses, and continued to run with them until the sheriff levied on them in July, 1886. (8) That James and Robert Kirkpatrick have at all times, and continuously, had the care, control, and use of said horses, ever since plaintiff claims to have bought them. (9) That there was no immediate delivery, or continued change of possession, or the horses mentioned in the complaint, from Kirkpatricks to the plaintiff. (10) That plaintiff's brand was put upon the horses in the spring of 1884, after Kirkpatricks had made an assignment. (11) That the horses mentioned in the complaint were, by the defendant Jones, levied upon and taken into his possession, by virtue of a writ of execution in the case of *Elling v. James and Robert Kirkpatrick*. (12) That the plaintiff replevied, and now has the possession of, said horses. (13) The court finds that the plaintiff paid Kirkpatricks twelve hundred dollars for said horses. (14) The court finds that there was and is a constructive fraud in said sale, under the statute."

There is no controversy but that the appellant bought the 20 head of horses from James and Robert Kirkpatrick in October, 1881, and paid \$1,200 for them, and that this was done in perfect good faith. It is equally admitted that respondent Elling was the creditor of James and Robert Kirkpatrick in 1880; that in 1885 he put his claim into a judgment, and in July, 1886, had an execution issued, and levied upon the 20 horses sold to the appellant in 1881, and the increase therefrom, amounting to 20 more; and the only question is, was the sale made by the Kirkpatricks to the appellant void, under the above statute, for want of an immediate delivery, and followed by an actual and continued change of possession, as required by said statute? Said section 169, p. 436, Rev. St. Mont., is as follows, to-wit: "Every sale made by a vendor of goods and chattels in his possession, or under his control, * * * unless the same be accompanied by the immediate delivery, and followed by an actual and continued change of possession, of the thing sold and assigned, shall be conclusive evidence of fraud, as against the creditors of the vendors. * * *" The court below found that there was no immediate delivery, or actual and continued change of possession, of the horses mentioned in the complaint, from the Kirkpatricks to the appellant. This finding is a conclusion of law from the facts found, or, rather, it is an ultimate fact which the law concludes from the facts and circumstances surrounding the sale. A delivery is a question of act and intent,—a mixed question of fact and law. All the facts attending the sale are not in the special findings of the court. When the horses were picked in the corral, and sold to the appellant, a bar was branded on those sold, under the K, and then they were turned out on the range, with the horses of Kirkpatrick, and there was a bill of sale executed and delivered to appellant.

No particular act or formal ceremony is necessary to make a delivery in law. Any act done, coupled with the intent to change the ownership, which has the effect to change the dominion over the thing sold to the buyer, is a delivery. Any small chattel, capable of being handled, may be delivered by handing it to the buyer, as selling goods across the counter in a store; but horses are not

capable of this manual kind of delivery. We think when the bar was branded under the K, so that the appellant's horses could be distinguished from that of the Kirkpatricks, and they were turned out on the range, those acts were done with the intent to transfer the ownership and dominion over these horses to the appellant. When they were on the range, the actual possession was in no one. The range was common pasturage for everybody, and the constructive possession accompanies the title, and was in the appellant. What more could have been done to constitute a delivery? The law does not require a proclamation of delivery to be made, nor that these horses should be temporarily separated from the others, or put in a *corral* or inclosure. All that was necessary to be done was done. There was a permanent identification of her horses, and the relations of the parties to these horses were changed. But when this was done, they were turned out of Kirkpatricks' *corral*, and went off on the range thus severing all connection between them and their former owner. By this there was an unmistakable delivery and actual change of possession. We do not review the findings of fact by the court in coming to this conclusion; the facts are not disputed. But we hold, whether the facts found constitute a delivery is a question of law, and that the court erred in its conclusion of law when it found there was no immediate delivery. The question as to whether there was such a venting as the statute contemplates, does not enter into this discussion. The horses were not *vented* in any sense of that word. The effect of putting the bar under the K was to distinguish them from the horses of the vendors, and to be looked to, in connection with other facts, to determine whether there was a delivery.

But, as we are construing the statute of frauds, above referred to, perhaps it would be well to further notice the term "delivery," as used in the authorities. It is sometimes used to denote the transfer of *title*. Upon the subject of constructive possession, Wait, in his *Actions and Defenses*, (volume 5, p. 574,) says: "A sale of personal property must, in general, be accompanied by a change of possession of the thing sold. The law, however, does not require the parties to a sale to perform acts extremely inconvenient, if not impossible, but accommodates itself to their business, and the nature of their property; and therefore, as some kinds of property are not susceptible of immediate manual delivery, the law requires only such delivery and change of possession as the nature of the property will allow, [citing *Long v. Knapp*, 54 Pa. St. 514; *Bailey v. Ogden*, 3 Johns. 399;] and, in general, the assertion of complete authority on the part of the vendee, by acts consistent only with ownership, and assented to by the vendor, constitutes a sufficient constructive delivery, [citing authorities.]" The circumstances which are to be held tantamount to actual delivery ought, however, to be so strong and unequivocal as to leave no reasonable doubt as to the intent of the parties. *Clark v. Draper*, 19 N. H. 419; *Cartwright v. Phoenix*, 7 Cal. 281. "Selecting and marking sheep in possession of a third party, who is desired to retain possession of them for the purchaser, is a sufficient delivery to complete the sale, and pass the property. *Barney v. Brown*, 2 Vt. 374. And when the seller pointed out certain cattle of his, which were running with others in a pasture, and designated their price, which the purchaser agreed to take as they were, and at the stipulated price, it was held that this constituted a delivery of the cattle. *Brown v. Wade*, 42 Iowa, 647; *Sutton v. Ballou*, 46 Iowa, 517.

But it is needless to multiply authorities on this subject. The facts found and admitted are: (1) Sale of the horses to appellant by James and Robert Kirkpatrick; (2) price paid, and bill of sale executed and delivered; (3) bar branded under letter K on horses sold; (4) turned out of *corral* of vendors upon the "range;" (5) they were range horses; (6) all this done within one hour. We hold that this constitutes an immediate delivery and actual change of possession.

The court below found that James and Robert Kirkpatrick have at all times, and continuously, had the care, control, and use of said horses, ever since

plaintiff claims to have bought them. The appellant, in her assignment of errors, says that this finding is not justified by the evidence, and is against the law. The statute provides that this change must be "actual and continued." When the title to a chattel is in a person, and it is not so situated as to be under his dominion, and is in the actual possession of no one else, it is said to be in his constructive possession. The horses, when in the *corral* of the Kirkpatricks, under their immediate dominion, were in their actual possession; but when they left this inclosure, and were on the "range," they were in the actual possession of no one, but in the constructive possession of the owner. Now, if we are right in our conclusion that there was a delivery and a change of possession, and that the horses, when on the "range," were in the constructive possession of the owner, does the record show that the vendors of the appellant regained possession, so as to bring this transaction within the statute of frauds?

But, before doing this, it is necessary to construe the meaning of the words "continued change." Does it mean that the chattel sold shall never again come into the possession of the vendor without being subject to seizure for his debts? Certainly not. If this was the correct meaning of it, the law would soon stop the whole machinery of trade, and no one would dare to let his vendor have the possession, ever so short a time, of any chattel he may have obtained from him. The purpose of the statute was to prevent fraudulent and colorable sales, made to hinder and delay creditors, in which the vendor never parts with the thing sold, or, if he does, it is only for a short time, when it is returned to him, and he continues to use and enjoy it. Hence the statute provides that there shall be an "immediate" delivery, and there shall be an "actual" change of possession, and this change shall be a "continued" one. But continued how long? We think, for a reasonable length of time; such a length of time as will preclude the idea that the sale is a colorable one. To give this statute any other construction would be to convert its beneficent provisions into an engine of injustice and oppression.

In the case of *Stevens v. Irwin*, 15 Cal. 503, the supreme court of the state of California, in construing their statute of frauds, which is identical with ours, (Mr. Justice BALDWIN delivering the opinion of the court,) said: "In this controversy as to what the true common-law rule is, the legislature wisely adopted, by statute, the construction given by the supreme court of the United States; for this course had at least the advantage of giving to the state one uniform rule in all courts on this important subject. But we apprehend that the legislature never intended, by this statute, to go beyond the extreme rule adopted by the supreme court of the United States, and the English cases on which that rule rests. There was no reason of policy for such extension; indeed, such extension might defeat, in some degree, the reason for adopting the federal rule. The rule, as defined by our statute, is almost in the language of that given in the cases which establish the rule in England. It is true, some stress is laid on the words 'actual and continued change of possession;' but these words are suggested by the facts and principles of the decided cases referred to. The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued,' to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, 'continued change of possession,' as to require, upon a penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results. The vendor would never become trustee of the goods without their being forfeited or liable for his debts. If a livery-stable keeper hired a horse to the original vendor, it would be liable for his debts; or, if a boarder came into a room, the furniture might be liable for his debts if he once owned it. The 'continued change of possession,' then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all

use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrine of the courts holding the general principles transcribed in the statute. The delivery must be made of the property. The vendee must take the actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the actual relation to the property which owners of goods occupy to their property. This possession must be continuous; not taken to be surrendered back again; not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement of the *status* of the property, and the claim to it by the vendee."

This case is referred to and approved by SANDERSON, C. J., in the case of *Godchaux v. Mulford*, 26 Cal. 325.

If Robert Kirkpatrick merely had charge of the horses after they were sold, as an agent, and held them openly in that capacity, it may well be doubted whether that would bring the case within the prohibition of the statute, which says the change of possession must be continued. In the case in 26 Cal. already cited, the court, discussing the effect of putting the vendor in possession of a stock of goods, to sell them as a clerk, says: "Such employment is undoubtedly a strong circumstance tending to show that there has not been such an actual change as the statute requires; but it is not *per se* a fraud which admits of no explanation. As is well said by counsel for the plaintiffs: 'A hired clerk or salesman is no more in the possession of the goods of his employer than a hired laborer is in possession of the farm on which he is employed at work.' The employment of the vendor in a subordinate capacity is colorable only, and not conclusive on the question as to whether there has been an immediate delivery, and an actual change of possession. He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts, in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the owner, and another has acquired and openly occupied that position; that he has ceased to be the principal in the charge and management of the concern, and become only a subordinate or clerk,—the reason of the rule announced in the statute is satisfied. The immediate delivery, and actual and continued change of possession, are the ultimate facts by which, according as they are present or absent, the statute determines the legal character of the sale; but the instruction in question makes the bare employment of the vendor by the vendee, in a subordinate capacity, regardless of the fact whether such subordinate capacity is open and notorious or not, the ultimate fact by which the statute determines the question of fraud; whereas, it is only a probative fact to be taken into account in determining the ultimate facts mentioned in the statute, and by which the question of fraud is determined. * * *" *Warner v. Carlton*, 22 Ill. 424.

Now, let us see what evidence there is to support the finding of the court below that the possession remained with the vendors of the appellant. She says she left the horses in charge of the Kirkpatricks, and went to Santa Barbara, California, to spend the winter. The horses were cared for by the Kirkpatricks up to some time in 1884. "In that year I received a letter from the Kirkpatricks informing me that they were intending to make an assignment for the benefit of their creditors, and that there might be danger to my horses, as they were not then branded. I then had them branded with the 'apple' brand which my sister had caused to be made for me. My reason for not branding the horses at the time of the purchase of them by me from the Kirk-

patrick was that I thought it very cruel to do so. In April, 1882, when I came back, I saw the horses nearly every day. In September, 1882, I went to Lynn, Mass., and remained there nearly two years. During that time Robert Kirkpatrick had charge of the horses for me. At the time I bought the horses they were branded with the letter K on the left shoulder, and they were vented with a straight bar under the letter K."

Robert Kirkpatrick testified: "The horses were sold to Miss Dodge in 1881. At the time of the purchase by her they were in a *corral*. They were branded K on the left shoulder; vented them by putting a bar under the K. In the spring of 1882, I got up some of the horses with our brand on them. During the years 1882, 1883, and part of 1884, I had charge of the horses. We put the apple brand on the horses in 1884. Monroe Mann gave us contract to breed the mares to the stallions. Know the gray mare; used her. Do not remember of using or working more than one of the horses. Allen Black broke a five-year-old horse, at my request, in the spring of 1886. They were range horses,—stock horses. In 1884, Monroe Mann was the agent of Miss Dodge, and I had charge of the horses under Mann's direction."

Mr. Jones testified that the horses were in charge of the Kirkpatricks from the date of the sale or assignment, which they made of their own stock, which was in 1883.

It will be seen from the testimony that the horses were range or stock horses. The appellant bought them in October, 1881, and spent the winter following in California, and left them, not in the possession of the Kirkpatricks, but on the range, in the possession of no one, but in charge of her vendors. Robert Kirkpatrick says he got some of them up in the spring of 1882, and that is the first act of control he exercised over them, so far as the record discloses. The sale was made in October, 1881; there was delivery and change of possession, and no act of control by the vendors for five or six months afterwards.

1. We find, then, that, as a matter of law, from the facts found by the court, with the additional facts which are admitted, that there was an immediate delivery at the time of the sale, and that the court, in concluding that there was not, from the facts found and admitted in argument before us, was in error.

2. The court erred in finding that there was not a change of possession, when he found the fact that the horses were turned out of the *corral* of the Kirkpatricks on the "range."

3. The court below, in its findings, has erroneously concluded that there was no delivery, and no change of possession, and necessarily could not have considered whether the interval occurred between the severance of the possession of the Kirkpatricks, and the time when they gained the possession, if they did regain it at all. If there was a continued change of possession for a reasonable length of time, then they might retake the possession, as the agent of the appellant, without being obnoxious to the statute of frauds. The question as to whether there was a regaining of the possession, and, if so, when it took place, and the nature of it, and whether it was a reasonable time after the actual change of possession had taken place, as well as what would be a reasonable time, under the circumstances, are all questions of fact for the jury upon a new trial, or for the court, if it sits again in lieu of a jury.

Let the case be reversed, and remanded for a new trial under the principles set forth in this opinion.

(August 6, 1887.)

BACH, J., (*dissenting*.) I am compelled to differ from the majority of the court in this case. The case is one of peculiar hardship, for there is no question of fraudulent intent, or fraud in fact. In my view of the evidence, it is a case which is governed by the statute concerning fraudulent conveyances, as passed by the legislature of this territory, which, wisely determining to

avoid the conflicting authorities upon this question, declared that the presumption of fraud was conclusive, as to creditors and purchasers in good faith, when a sale of personal property was not followed by an immediate delivery, and an actual and continued change of possession.

While I do not dispute the rules of law stated in the prevailing opinion, I doubt that they control this case. There cannot always be a manual delivery, or personal and definite possession of property. The very nature of certain classes of property prevents that; and there can be no force in the rule of law that would seek to forbid the vendor from ever having the possession of the property, even as the agent of the vendee, or as his bailee for hire. But the delivery of the property, however indefinite it may be, must be a delivery to the vendee, and must be a breaking up of the possession of the vendor; and the possession (to quote the opinion cited by the learned chief justice, *Godchaux v. Mulford*) "must be continuous; *not taken to be surrendered back again*; not formal, but substantial." In this case there was but a formal delivery, if indeed there was delivery at all, to the vendee. If there ever was possession in the vendee at all, it was "taken to be surrendered back again" immediately to the vendor. The possession of the property, however definite or indefinite, was in the vendor, and, according to the testimony of the plaintiff herself, it remained in the vendor. It is true the brand on the horses was changed, but it was not vented, and the brand of the plaintiff was not placed on them for years after the sale.

It is my opinion that the testimony of the plaintiff shows that there was no actual, "substantial" change of possession or immediate delivery of the property. That testimony is brief, and is as follows, in full:

"Am plaintiff in this action. Know the property described in the complaint. Bought it in the fall of 1881. Took a bill of sale of it, and had it in my possession. The signature of it is in the handwriting of Robert Kirkpatrick. I paid \$1,200 for the property. Bought the horses of the Kirkpatricks. At the time I bought them they were driven into a *corral* with a lot of other horses. The horses I bought were shown to me; the price for each one named. I took those which suited me, and they were then driven or turned out on the range near by within an hour afterwards. Left the horses in charge of the Kirkpatricks, and went to Santa Barbara, California, to spend the winter. The horses were cared for by the Kirkpatricks up to some time in 1884. In that year I received a letter from the Kirkpatricks informing me that they were intending to make an assignment for the benefit of their creditors, and that there might be danger to my horses, as they were not then branded. I then had them branded with the 'apple' brand which my sister had caused to be made for me. After that I made Mr. Monroe Mann my agent to look after my horses, but he was not prepared to take care of them, and Mr. Robert Kirkpatrick has had almost the entire control of said horses until they were levied on by the sheriff, and has used them and worked some of them; and Mr. Kirkpatrick has had the most of the care and control of said horses all the time. My reason for not branding the horses at the time of the purchase of them by me from the Kirkpatricks was that I thought it very cruel to do so. In April, 1882, when I came back, I saw the horses nearly every day. In September, 1882, I went to Lynn, Mass., and remained there nearly two years. During that time Robert Kirkpatrick had charge of the horses for me. At the time I bought the horses they were branded with a 'K' on the left shoulder, and they were vented with a straight bar under the K."

If there was a substantial change of possession, as evidenced by the statement of the plaintiff, it would be difficult to imagine any case which would come within the statute relating to fraudulent conveyances. The chief justice cites, with approval, the following: "The delivery must be made of the property; the vendee must take the actual possession; that possession must

be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee." In this case, was the possession "unequivocal, carrying with it the usual marks and indications of ownership by the vendee?"

There never was any delivery of any kind. The vendee never had the horses in her actual possession for one moment, and the constructive possession by the vendee, if any there was, cannot be called a "substantial" or "unequivocal" possession; it was "taken merely to be surrendered back again." The horses were in the possession of the vendor before they were driven to the corral; they were in his possession in the corral; they were driven out of the corral; and, in the words of the plaintiff, they were turned out on the range, and the vendors "had the care and custody of them all the time."

So much for the possession. What change was there which would "give evidence to the world of the claim of the new owner?" They were in the care and control of the vendor; they were on the same range that they had occupied before the sale, (which in this country is no slight evidence;) they were never out of possession of their former owner. The only circumstance evidencing a change was the addition of the bar to the K brand. This was not the "usual mark of ownership of the vendee;" and it did not "give evidence to the world of the claims of the new owner." The brand K with a straight bar was the brand of no one. It was certainly not the brand of the plaintiff. Her brand was the "apple" brand. It was not even the venting of the vendor's brand, which might have been *prima facie* evidence of a change of ownership, and thus, perhaps, notice to the world "of the claims of the new owner." Section 113, p. 426, Rev. St., provides that the venting of "such original brand shall be *prima facie* evidence of sale or transfer;" and that section provides what shall be considered a "vent brand," and the straight bar is not one of the modes of venting an original brand. It is true the plaintiff testifies that she did not have the horses branded because she thought it very cruel to do so; but it is doubtful that such a tender sentiment would excuse the performance of an act which in this country would be some evidence of the "claims of the new owner," especially when that sentiment did not prevent her from assenting to the branding with the straight bar at the time of the sale, or to the branding with the "apple" brand, when she was warned of the assignment by the vendors for the benefit of their creditors.

To briefly state the points I would make: I am of the opinion that the expression, "immediate delivery, and actual and continuous change of possession," must be interpreted reasonably and fairly; that where an actual delivery cannot be had,—where personal possession cannot be had,—the delivery and the possession may be constructive; but that constructive possession must be as complete as possible under the circumstances. I am also of the opinion that the character of the delivery and possession must depend upon the kind of the chattel sold, and that it therefore may be indefinite; but, however definite or indefinite the delivery and possession may be, it must be a delivery to the vendee. And I cannot agree with the learned chief justice either as to the statement of fact, or as to the statement of law, in that portion of his opinion which reads as follows: "The appellant bought them in October, 1881, and spent the winter following in California, and left them, *not in the possession of the Kirkpatricks, but on the range, in the possession of no one, but in the charge of her vendors.*" As a question of law, it is impossible to conceive of personal property being "in the possession of no one," unless it is lost; as a question of fact, the plaintiff says, "Mr. Kirkpatrick has had most of the care and control of said horses all the time;" and, again, "I left the horses in charge of the Kirkpatricks, and went to Santa Barbara." Prior to, or at the time of, the sale, the horses were in the constructive possession of the vendors; while in the corral they were in the actual possession of the vendors; immediately thereafter they were left in the "charge," in the "care and control," of the vendors, and they were therefore again in the, at least, constructive posses-

sion of the vendee; and upon no occasion did she perform any act which would give evidence to the nearest possible and most careful observer that she was "the new owner" of the horses.

The cases of *Stevens v. Irwin*, 15 Cal. 508, and *Godchaux v. Mulford*, 26 Cal. 325, so much relied upon in the prevailing opinion, seem to me to be authority for this dissenting opinion; and that seems to be the conclusion of the supreme court of California in *Woods v. Bugbey*, 29 Cal. 467. In the first opinion delivered in the last cited case the court say, (page 473,) commenting on the former cases: "In no case that we are aware of has the supreme court of this state laid down a rule requiring less than that the purchaser must have that possession which places him in the relation to the property which owners usually are to the like kind of property." And again, in the opinion delivered on the rehearing, the court say, commenting on the same case, (page 475:) "The plaintiff's counsel is quite mistaken in supposing that we overruled *Godchaux v. Mulford*, *ex necessitate*, by anything said in our opinion in this case. In that case, it is distinctly held that the vendor cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale; for that, it is said, would be inconsistent with such an open and notorious delivery and actual change as the statute exacts, in order to exclude from the transaction the idea of fraud." See, also, *Hamilton v. Russell*, 1 Cranch, 310; *Tilson v. Terwilliger*, 56 N. Y. 274; *Sutton v. Ballou*, 46 Iowa, 518; *Dexter v. Parkins*, 22 Ill. 144, in which case the court say, (page 146:) "In this case, the evidence does not show any delivery of the property to the claimant after the execution of the bill of sale. It is absolute on its face, yet the property remained *as much in the possession* of Smalldridge as it did in that of the claimant, after as before its execution. Such circumstances are not evidence of fraud, but are fraud absolutely."

The learned chief justice cites as authority the case of *Warner v. Carlton*, 22 Ill. 415. In that case the court say, (page 424:) "If the vendor, after the sale without a delivery of the goods, were to remain in the sole and exclusive possession, *it would amount to a fraud in law*; but such is not the evidence in this case. No evidence showed that R. H. Carlton (the vendor) was in the sole and exclusive possession, but it tended to show that he was acting as a clerk, and that Tilfer was the person having charge of the concern, and was the principal in its management." Tilfer was the representative of the vendee. Inasmuch as, in the case which we are now considering, the vendor did remain "in the sole and exclusive possession," and that he did have the charge of the property, it may well be doubted that the last cited case is an authority sustaining the validity of the sale in this case; more especially, when we consider the language of the same court, in the same volume of reports, as cited in *Dexter v. Parkins*, *supra*.

The case of *Sutton v. Ballou*, 46 Iowa, *supra*, is also cited in the prevailing opinion as authority therefor. The following statement of facts is taken from the opinion of DAY, C. J.: "The evidence tends to show that, before the contract of purchase was made, the cattle had been separated from O'Harra's (the vendor's) other cattle on the range, by his son, and driven about a mile. After the plaintiff bought them, they were driven twenty or thirty rods on the range, and then plaintiff hired O'Harra's boy, through his father, to herd them. After that these cattle remained with others owned by O'Harra, and were herded on the prairie, sometimes by this boy, and sometimes by O'Harra's other children. The cattle went into a bunch together, were driven up at night by the boy, and O'Harra frequently went out in the morning to look after them. No change was observable in the manner of keeping the cattle until O'Harra left, about the last of July." The learned chief justice of this court is mistaken when he says that the Iowa court held the sale valid as against creditors. The jury had held the sale fraudulent for want of delivery, and in delivering the opinion, Mr. Chief Justice DAY says,

(page 519:) "In this case the jury might well find, from the testimony, that the property was left with the seller, and his relations to it remained unchanged, so far as the world could know from the acts of the parties. The verdict, we think, therefore, is not without support in the testimony." And again, on page 521, the learned judge says: "However sufficient these facts might be as between the parties to pass the title, they are not sufficient under section 1923 of the Code, so long as the vendor was allowed to retain the actual possession." The sale was held to be void as against a subsequent mortgagee without notice. I have already cited this as an authority for my view of this case; and it seem to me to be conclusive, although not so strong. The relation of the Kirkpatricks to the horses remained for years. There was no son who had the control, but that control was in the vendors directly.

The case of *Brown v. Wade*, 42 Iowa, 647, is also cited. There was no question of a fraudulent sale in that case; there was no creditor interested in the action. The point in that case was whether or not there had been such a delivery as to take the contract of sale out of that section of the statute of frauds which refers to parol executory contracts. Mr. Chief Justice DAY wrote the opinion in that case also; and in the subsequent case of *Sutton v. Ballou* he briefly draws the distinction between delivery as between the parties under the statute of frauds, and delivery under the statute concerning fraudulent conveyances, and says, (page 518:) "Appellant cites and relies upon *Brown v. Wade*, 42 Iowa, 647. That case involved simply a question of delivery as between the parties to the contract."

And the citation from 5 Wait, Act. & Def., as follows: "And in general the assertion of complete authority on the part of the vendee by acts consistent only with ownership, and assented to by the vendor, constitutes a sufficient constructive delivery,"—refers to the question of delivery as between the vendor and the vendee, as to compliance with the statute of frauds relating to parol contracts. The learned author, Mr. Wait, cites as his authority section 311, Story, Sales, and the language used is a quotation from section 311. That section (311) is a portion of chapter 10, Story, Sales, which treats of the question of delivery as between the parties; and the learned author, at the very outset of chapter 10, (see section 295,) cautions his readers to draw the distinctions. In section 295 he says: "There are four different species of delivery: First, that delivery which suffices to pass the title, so that, if the goods be destroyed, the loss falls upon the vendee, which will form the subject of the present chapter; second, that delivery which suffices to destroy the lien of the vendor," etc. It is evident that the learned author, Mr. Story, was not treating of the question of delivery under the statute relating to conveyances fraudulent as to creditors and subsequent purchasers in good faith.

And so in the case of *Bailey v. Ogden*, 3 Johns. *399, cited in the prevailing opinion of this court, and by Mr. Wait in support of his quotation from Story. That was a case between the vendor and vendee, involving the statute of frauds relating to parol executory contracts. Mr. Chief Justice KENT delivered the opinion of the court, and, at the very commencement of his opinion, says: "This case depends upon the decision of two general questions: (1) Was there a note or memorandum in writing, binding upon the defendants, within the meaning of the statute of frauds? If not, then, (2) was there a delivery of the sugars, so as to change the property, and throw the risk of the subsequent loss upon the defendants?"

A delivery may be sufficient to satisfy the statute of frauds relative to statutory parol contracts, and yet fall far short of satisfying the statute against fraudulent conveyances. See Story, Sales, § 279, note 1. See, also, citation from *Sutton v. Ballou*, *supra*.

It remains only to consider the facts in the two cases chiefly relied upon by the learned chief justice: *Stevens v. Irwin*, 15 Cal. 503, and *Godchaux v. Mul-*

ford, 26 Cal. 317. The facts differ essentially from the facts of this case. In *Stevens v. Irwin*, it appears (see page 507) that the vendee had the exclusive possession of the property for a year or more. In *Godchaux v. Mulford* (page 321) the facts are stated to be as follows: The sale closed on December 16, 1857, by the execution of a bill of sale, and a lease of the store-room, from which the vendor's sign was removed, and the vendee's sign was placed thereon. A person by the name of Blum, who seems to have had no connection with Kraft (vendor) in any way, was employed by the plaintiffs (vendees) to take immediate possession for them. He did so take possession, and retained it until one Black was sent up by them from San Francisco, who remained there until the goods were seized by the sheriff, in February, 1858. After the sale, Kraft was absent some three weeks in San Francisco, but at the time of the levy by the sheriff he, *together with one of the plaintiffs and Black, was in the store*, and was arranging goods in a show-case. In the first case, it will be seen that the vendor did not resume possession until a year or more after the sale, during which time the vendee was in the exclusive possession. In the second case, the vendor parted with the possession absolutely for some considerable time, parted with the building by leasing it, his sign was removed from the store, and the vendee's sign was placed thereon, and the vendor never was again in the sole and exclusive possession of the property. These facts do not resemble those in the case at bar. But the opinion in the case of *Stevens v. Irwin*, 507, (cited in *Godchaux v. Mulford*,) does apply with peculiar force to this case. "The delivery must be made of the property; the vendee must take the actual possession. * * * This possession must be continuous; not taken to be surrendered back again; not formal, but substantial."

In my opinion, therefore, the court below had some testimony upon which to base the finding that there was no immediate delivery, or actual and continued change of possession; and the judgment and order of the court below should be affirmed.

LINDLEY v. DAVIS and another.

(*Supreme Court of Montana. July 29, 1887.*)

1. PARTNERSHIP PROPERTY—WHAT IS—CONVEYANCE BY ONE PARTNER TO ANOTHER.

Where a member of a copartnership conveyed an undivided half interest in fee-simple in a house and lot to his copartner, who thereupon moved into it, and duly filed and recorded his declaration claiming it as a homestead, *held* that, it being clear that it was not the intention of the copartners to hold the property as assets of the partnership, the same was not subject to the doctrine of equitable conversion, and the partners held the realty merely as tenants in common.

2. HOMESTEAD—RIGHT TO—TENANT IN COMMON.

A tenant in common, being an owner, within the meaning of the Montana homestead law, is entitled to a homestead exemption.¹

BACH, J., dissenting.

Appeal from district court, Gallatin county.

Luce & Armstrong, for appellant. *J. J. Davis*, for respondents.

MCCONNELL, C. J. This was an action of ejectment. Respondents, in their answer, disclaimed as to a part of the premises, and set up homestead exemption as to the remainder. Appellant, in his replication, denies the right of respondents to homestead. Trial by the court, sitting instead of a jury. Judgment for defendants, and appeal in error by plaintiff.

There seems to be no dispute about the facts. Those material to be noticed

¹Respecting the title necessary to support a claim of homestead exemption, see *Fitzgerald v. Fernandez*, (Cal.) 12 Pac. Rep. 562; *King v. Goetz*, (Cal.) 11 Pac. Rep. 656, and

are as follows, to-wit: William H. Babcock conveyed an undivided half interest in fee-simple to the disputed premises—a house and lot—to respondent Will F. Davis, June 3, 1881; said Babcock having the fee-simple title to the whole of it prior to that time. Respondents, Will F. Davis and Ollie I. Davis, were intermarried May 27, 1883, and began to occupy said house and lot as their home, October 10, 1883, and made formal declaration of homestead, November 17, 1883, and had it duly recorded. Nelson Story commenced suit against W. H. Babcock and Will F. Davis, as partners, under the firm name and style of Babcock & Davis, and sued out an attachment, and had it levied on said house and lot, November 28, 1883. Said Nelson Story recovered judgment in said suit, September 26, 1884. Appellant, Lindley, purchased of Story this judgment. Execution was issued October 1, 1884, and the lot sold and purchased by appellant, who took a sheriff's deed. Babcock and Davis were partners in the business of loaning money and selling real estate. They executed partition deeds in severalty of their real estate, June 3, 1884, by which respondent Will F. Davis became sole owner in fee-simple of the house and lot in controversy, but after the levy of the attachment, November 28, 1883. While Babcock and Davis were partners they held the title to this house and lot, not in their firm name of Babcock & Davis, but in their individual names, as tenants in common. After Davis became the sole owner of the house and lot, June 3, 1884, he filed, and had duly recorded, another declaration, claiming homestead therein. Appellant purchased the judgment of Story, and the house and lot, at sheriff's sale, with full notice of the homestead claim of respondent, who served notice of his claim on the sheriff before the sale, which notice the sheriff read at the time of the sale. It is conceded that the lot does not contain over one-quarter of an acre, and the value of the house and lot is not over \$2,400. The respondent, as the head of a family, occupied and claimed the house and lot, which are situated in the town of Bozeman, as a homestead, from October 10, 1883, up to the present time.

The sole question, then, is, did the court err in finding that the respondents were entitled to a homestead exemption, under the foregoing state of facts? The rights of the appellant relate to the time of the reception of the lien of the attachment. The respondents, in their claim of a homestead, must stand or fall upon the title of the respondent Will F. Davis to an undivided half interest in the premises in controversy at that time. We are met upon the threshold of this discussion, with this question: What are the interests of respondent, Davis, in the premises in controversy? Were they partnership property? If so, must they not be regarded as a part of the capital stock of the concern, and as personalty? We find the doctrine upon this subject very clearly stated in the case of *Hewitt v. Rankin*, 41 Iowa, 35: "Real estate held by a partnership is to be regarded as the property of the firm, as to the creditors and all persons dealing with it, when necessary to protect their rights. The partner is to be regarded in such cases as holding only an interest in the stock or capital of the partnership, which is personal property. If the business of the firm be in operation, or there be outstanding liabilities against them, the partners have not an interest in its lands, or other assets that may be regarded as property. Their interest is in the stock of the firm, —whatever, upon final settlement, may be due them;" citing *Meily v. Wood*, 71 Pa. St. 488; 1 Wash. Real Prop. (3d Ed.) 574; Lindl. Partn. 463.

The conversion of real property into personalty is a device of equity, in order to effectuate the settlement of partnerships. The rule closes when the partnership is settled, and its debts are paid. The partners then hold their real estate as tenants in common, relieved of any trust in behalf of the partnership. The weight of American authorities sustains this doctrine. *Freem. Co-Tenancy*, § 118. If the decision of this case rested upon the doctrine above stated, then the respondents cannot be allowed a homestead, for this exemption cannot be carved out of personal property. The fact that tenants in

common are also partners does not of itself invest the realty with any of the characteristics of personality; nor is the fact that it was paid for out of partnership money decisive of the question. Copartners may withdraw realty from the partnership for the purpose of holding it severally; and in this event they become simple co-tenants in such land. *Freem. Co-Tenancy*, § 114.

In this case, Babcock & Davis built the house with partnership money, in the years 1880, 1881, and lived in it. In May, 1883, Davis married, and October 10, 1883, moved with his wife into this house, for the purpose of making it his home. On November 11th following, he filed his declaration, claiming it as his homestead, and had it duly recorded. This, we take it, was a public withdrawal of this house and lot from the partnership assets, and a dedication of it as a homestead. Babcock, by his silence at least, consented to it, and in June, 1884, in confirmation of what had already been done, he executed a deed of his undivided half to Davis. We think, as a matter of fact, it is clear, from the proof in the case, that it was not the intention of the copartners, to hold this house and lot as any part of their partnership assets or stock in trade, but to withdraw it, if it ever had been such, that Davis might have it as a home. This dedication of the place as a homestead was made before the levy of the attachment. Story had full knowledge of respondents' claim when he sued out the attachment, and so had Lindley, the appellant, when he purchased the judgment, and had the house sold, and took his sheriff's deed. There is no pretext that the firm was insolvent at the time this homestead was set apart and claimed as such, or that there existed equitable grounds upon which it should be subjected to the payment of appellant's judgment, notwithstanding its withdrawal from the partnership assets, and dedication to the purposes of a homestead. We hold that, under the proof in the record, Babcock & Davis were tenants in common of the house and lot in controversy, and the question is whether a co-tenant is entitled to a homestead exemption under our law. We think he is, and that the judgment of the court below should be affirmed.

This case was heard at the last term of this court, and reversed; the court holding that the respondents were not entitled to a homestead. 6 Mont. 453, 13 Pac. Rep. 118. The learned justice who wrote the opinion placed the decision upon the ground that our statute granting the homestead exemption was taken from the California act, and the courts of that state held that a tenant in common in land was not entitled to the homestead exemption. They had so held before the passage of our act, and this was a sufficient evidence of what the legislative will was in the passage of our act. This court, however, before adjournment, granted a rehearing of the case, and vacated the order reversing it, and continued it until this term. This case is now before us for final determination.

The decisions of the different courts of last resort in the several states and territories are in hopeless conflict,—some of the judges giving to the language of the homestead exemption statutes a liberal construction, and holding tenants in common in land entitled to the exemption; while others, giving a strict construction, hold that they are not entitled thereto. But we are told that we are bound by the California decisions already referred to. We do not think so. By a comparison of our statute with that of Minnesota, we find it almost a verbatim copy of the Minnesota law on the subject of homestead. There is no mistaking the fact that the draughtsman of our statute copied it from the Minnesota statute, (St. Minn. 498, Revision 1866.)

There is much similarity between our statute and that of California. Our section 313 is common to both the California and Minnesota statutes; but there are material matters about which they widely differ. The only measure of the homestead is its value under the California act. The homesteader is entitled to \$5,000 worth of realty, no matter where situated, or for what purpose used. Under our act, if the homestead is land used for agricultural

purposes, and not in any town plot, city, or village, 160 acres are allowed, provided its value does not exceed \$2,500; or, if it is a lot in a town plot, city, or village, then it must not exceed one-fourth of an acre, and its value must not exceed \$2,500. The homesteader may take his choice of the farm in the country, or the lot in town, the value being the same. These are precisely the provisions of the Minnesota statute, except the former cannot exceed 80 acres, and, instead of one-fourth of an acre in town, it says one lot. The attention of the court was not called to the Minnesota statute last term, nor did it have the whole of the California act before it.

A late senator, in advocating in the United States senate the adoption of a general homestead law, said: "Tenantry is unfavorable to freedom. It lays the foundation of separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder is the natural supporter of a free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants."

The homestead exemptions are not in derogation of the common law; hence this is no reason why they should be strictly construed. By the common law, a man could only have satisfaction of goods, chattels, and the *present* profits of land, but not of the lands themselves. 3 Bl. Comm. 418; Thomp. Homest. & Ex. § 2 *et seq.* We think our statute should be liberally construed. Our statute provides that "a homestead, consisting of any quantity of land, not exceeding 160 acres, used for agricultural purposes, and the dwelling-house thereon, and the appurtenances to be selected by the owner thereof, and not included in any town plot, city, or village; or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling-house and its appurtenances, owned and occupied by any resident of the territory," etc.: "provided, said homestead shall not exceed in value the sum of \$2,500." Rev. St. 101, § 311. It will be seen that the homestead is dedicated to the *owner*; the language of the statute being, "owned" and "occupied" by any resident. To aid us in arriving at its meaning, we quote section 315. It provides that "any person owning and occupying any dwelling-house on land not his own, which land he shall be rightfully in possession of by lease or otherwise, and claiming such house as his homestead, shall be entitled to the exemption of such house." The statute says the head of a family owning and occupying a house, on land not his own, but which he is lawfully in possession of, shall have the benefit of it. He need have no title to any part of the land. And the other section gives the homestead in land and houses to the owner and occupier of them without qualification. He need not be the sole owner, nor does it prescribe the character of the title, whether equitable or legal. The statute does not say to him who owns the entire estate in the lands, but to him who owns and occupies it; leaving it to the court to say when the head of a family is the *owner*. "The word 'owner,' within the meaning of the homestead and exemption law, and even in the case of certain criminal offenses, includes all who have a claim or interest in the property, even though it is an undivided interest, or falls short of absolute ownership in fee." *Lozo v. Sutherland*, 38 Mich. 168; Thomp. Homest. & Ex. § 174.

As already stated, the courts of California have held that tenants in common are not embraced by this term, "owner." The first case in which this doctrine was held is that of *Wolf v. Fleischacker*, 5 Cal. 244; and upon this, and this alone, all the others are founded. *Kellersberger v. Kopp*, 6 Cal. 564; *Bishop v. Hubbard*, 23 Cal. 514; *Elias v. Verdugo*, 27 Cal. 419; *Seaton v. Son*, 32 Cal. 481, and *Carroll v. Ellis*, 63 Cal. 441. The reason given for all these decisions is thus briefly laid down in the case of *Wolf v. Fleischacker*, to-wit: "The statute did not contemplate that homesteads should be carved

out of land held in joint tenancy or tenancy in common, because it has not provided any mode for their separation and ascertainment. All of the questions of excess of value, appraisal, and division between debtor and creditor, would arise only to give complexity to a state of facts for which no provision of the statute seems to be adequate, and would force into litigation, or, at least, into care and trouble, the innocent co-tenants, who would be thus subjected to annoyance without any fault of their own."

There is no pretense that the word "owner" cannot be applied to a tenant in common. There is no pretense that he cannot lawfully occupy all and every part of the premises, to the exclusion of all the world except his co-tenants, but a plea of want of adequate means to set apart the homestead, and the inconvenience of it. We cannot see the force of these reasons. Why cannot 160 acres, or the fourth part of an acre, more or less, be as easily set apart to a co-tenant as to the owner of the entirety? To meet this very construction, the legislature of California, in 1868, passed an act extending the homestead exemption to joint tenants or tenants in common; but made no provision whatever for carving the homestead out of such interests, leaving it to be set apart under the same provisions of law which the court said are not adequate. St. Cal. 1867-68. The California court having announced, in the case of *Wolf v. Fleischacker*, the doctrine that a tenant in common could not take homestead exemption, applied it to a case in which the husband and father, his wife and child, were tenants in common, and living on the land so held as their homestead, and denied them this exemption. In another case a head of a family, supposing that he had a good title to all of his land, lost all of his exemption because it turned out that his title was defective to one undivided eighteenth of it. And in still another case, the head of a family sold an undivided interest in his homestead, and it was held that he thereby lost his exemption. And thus it worked, until the legislature passed the act alluded to.

In commenting upon the above reasons, the supreme court of Minnesota said: "In setting off the homestead between the claimant and his creditor, the rights of third persons are not considered, nor does it matter that a portion selected by, and set off to, the claimant, as between him and the creditor, may, in a subsequent controversy between the claimant and some third person, be lost forever. The object of the statute is not to vest in the claimant an assured title to the portion set off, but to protect that portion from levies and sales under judgments. When there is the requisite ownership and occupancy in that portion set off, it cannot be material that such ownership and occupancy may be subsequently defeated, as by foreclosure of a lien already attached, or re-entry for condition broken, or the like." *Kaser v. Haas*, 27 Minn. 409, 7 N. W. Rep. 824.

The setting apart of the homestead, as between the debtor and his creditor, does not affect the rights of the co-tenant. His title to his undivided interest, and his right of entry and joint occupancy with the homesteader, are not impaired. Because he may enter and occupy the homestead with him, seems to us a very unsatisfactory reason to be given for depriving the debtor of his home. Nor can we see that any change whatever is made in the relations of the co-tenants to the realty owned by them by setting apart to one of them a homestead therein. The homesteader gets only his interest in the land, subject to all the rights of the other tenant, and with all the risk of losing his improvements upon partition. But what concern is this of the creditor? The law will not presume that the tenant, enjoying his homestead exemption, will usurp the rights of his co-tenant, and thus produce litigation and inconvenience.

We close this discussion with a pertinent criticism upon the doctrine that a tenant in common is not entitled to a homestead exemption, made by Mr. Freeman in his work on *Tenancy & Partition*, § 54: "But we see no sufficient

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reason, even in the absence of statutes directly bearing upon the subject, for holding that a general homestead act does not apply to lands held in co-tenancy. The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other co-tenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other co-tenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But as long as his interests are respected, or so nearly respected that he feels no inclination to complain, why should some person having no interest in the co-tenancy be allowed to avail himself of the law of co-tenancy for his own, and not for a co-tenant's, gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor, and his equally unfortunate, but more helpless, family, the shelter and influence of home. A co-tenant may lawfully occupy every parcel of the lands of the co-tenancy. He may employ them, not merely for cultivation, or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may, of right, occupy and enjoy the premises with him. Upon the land of which he is but a part owner, he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because the other co-tenants are entitled to equal advantages in the same home. That he has not the whole, is a very unsatisfactory and a very inhumane reason for depriving him of that which he has."

We are all supported in these views by the following authorities: *Tarrant v. Swain*, 15 Kan. 147; *Kaser v. Haas*, 27 Minn. 406, 7 N. W. Rep. 824; *McClary v. Bizby*, 36 Vt. 258; *Thorn v. Thorn*, 14 Iowa, 54; *Lozo v. Sutherland*, 38 Mich. 169; *Horn v. Tufts*, 39 N. H. 478; *Greenwood v. Maddow*, 27 Ark. 660.

Let the case be affirmed, with costs.

(August 9, 1887.)

BACH, J., (*dissenting*.) The former decision in this case, reported in 6 Mont. 453, 13 Pac. Rep. 118, was based upon the theory that our homestead laws were taken from the laws of California, and were therefore to be interpreted in harmony with the decisions of California prior to the time of their adoption. Although some of the sections closely resemble some provisions of the laws of Minnesota, I am still of the opinion that the whole spirit of our exemption laws is based upon the laws of California. Upon that point reference is made to the former decision. In basing that decision upon the well-known rule of interpretation of statutes, I was governed by the desire to throw as little doubt as possible upon the exemptions elsewhere provided for by our Code, and by the firm conviction that the decisions of California were sound in principle, and in accord with the current of authorities. Even though our homestead laws were taken from those of Minnesota, the decisions of that court cannot be said to be binding upon us; because they were not rendered until after our legislation had adopted the sections referred to.

It is a well-known rule of law that a firm cannot be the grantees in a deed. The law recognizes no such name as Jones & Co. The deed must be to the individual partners. The legal title, in such case, would be in those only whose names are mentioned, subject to equitable rights of the others. *Winter v. Stock*, 29 Cal. 407; citing *Arthur v. Weston*, 22 Mo. 378; *McCauley v. Fulton*, 44 Cal. 355.

It is also a well-known rule of law that partnership real estate may stand in the name of one partner, or it may stand in the name of each of the partners. In either case, the firm would own the real estate, if it came within the rule of law which makes real estate assets belonging to the partnership. Babcock himself recognizes that rule in his testimony. Speaking of the deed from himself to Davis, dated June 3, 1881, he says: "Davis virtually owned a half interest in said premises before a deed was given for it." So there can be but little importance in the fact that the property stood in the name of the copartners. In whatever way it stood, it was firm property. In the first part of the prevailing opinion, the deed from Babcock is described as though it was a conveyance to Davis of a half-interest in the premises in dispute only,—a house and lot. It was in fact a conveyance of an interest in a much larger tract of land; it comprised all the land of the partnership. Davis & Babcock were partners in the business of buying and selling real estate. This made the property partnership property. This is conceded by the learned chief justice, who also states the rule of law to be that a homestead cannot be carved out of real estate owned by partners as partnership property; but he states that the property was withdrawn from the partnership by consent, and that then the partners became co-tenants merely.

I presume that undoubtedly partners may withdraw real estate from the firm, and that it would then be the property of the individuals of the firm; but it is in respect to such a withdrawal that my opinion differs from the opinion of a majority of the court. The learned chief justice bases the theory that the property in question was withdrawn from the partnership upon the following grounds: (a) Babcock and Davis lived in it from 1880 to 1881. (b) In May, 1883, Davis married, and in October, 1883, Davis and family moved into the house. (c) On November 17, 1883, Davis filed and recorded his declaration of homestead,—all of which the learned chief justice concludes was a public withdrawal from the partnership assets,—with (d) Babcock's consent to it by his silence, and that he confirmed this in June, 1884, by a deed to Davis.

I wish to carefully examine these facts:

(a) Why should not Babcock & Davis occupy their firm property when there are no other tenants for it? We will see that, just prior to the marriage of Davis, a certain Mr. Bogert was occupying the property.

(b) The fact that Mr. Davis and family moved into the house was not necessarily adverse to the claims of the partnership. Davis merely became a tenant of the property, was liable for rent to the firm as landlord, upon an implied agreement to pay the reasonable rent therefor. See *Lindl. Partn.* *652, note; *Stoughton v. Lynch*, 2 Johns. Ch. 209.

(c) The recording of the declaration is not shown to have been known to Babcock, who, therefore, had no actual notice thereof. That notice was dated November 17, 1883, and the attachment under which plaintiff claims was levied on November 28, 1883, so that his silence was only of 11 days' duration, and, as we shall see, it was the silence of ignorance, and not acquiescence. Neither can it be said that Babcock had constructive notice of the declaration of homestead, (1) because there is no provision in our statutes for recording such a declaration, (2) because Babcock was not bound to look for it, as he was not a subsequent purchaser or incumbrancer.

(d) As to Babcock's acquiescence. He, as we have just seen, had neither actual nor constructive notice of the filing of the declaration. Neither did he have any notice that Davis was even living on the place with his family. Babcock testifies as follows: "Mr. Bogert occupied it when I went away, which was in January, 1883, and Mr. Davis occupied it when I came back. I think I returned in January, 1884." It will be seen, then, that, when Babcock left the country, Davis and family did not occupy the house, and that before his return the attachment was filed. Neither was the deed a confirma-

tion of Davis' act, either as to Babcock or his creditors. In the first place, it was subsequent to the lien of the attachment. In the second place, it was, according to Davis, a partition deed between the partners, given upon the dissolution of the partnership. I cannot, therefore, see any joint act or consent of these partners by which the property in question was separated from the partnership property prior to the attachment; and, following the rule stated in the prevailing opinion, that homestead cannot be had in real estate owned by partners, I am of the opinion that the judgment should be reversed. But there may have been such a withdrawal by Davis. The fact that Davis and family lived there would be presumed to be in furtherance of the partnership, there being nothing overt in the act; and, as we have seen, he would be tenant, and the firm would be his landlord. But the filing of the declaration was a direct attempt, unknown to his partner, done in his partner's absence, to withdraw that property from the firm assets, giving no consideration therefor to the partner.

According to most of the authorities, a partner, in whose name the title to real estate stands, may convey the same; and, if it be to a purchaser ignorant of the claim of the partnership, the purchaser will hold it free from those claims; but, if it be to a purchaser knowing the claims of the partnership, such a purchaser would take only the interest of the grantor, and would take that interest, subject to the claim of the firm creditors. In either case, however, the act of the partner would constitute a dissolution of the partnership, and, in the latter case, the entire property would be held as assets until the claim against the firm had been satisfied.

If the filing of the declaration of homestead claim was a withdrawal of that much property from the firm assets, it was a dissolution of the partnership, because it was done without the consent of the copartner, and was an act against the interest of that partner. The property was not held by an innocent purchaser, and was therefore held for the benefit of the creditors, was still firm real estate, subject to the claims of the creditors. Therefore, upon that ground, I think the case should be reversed.

I am also of the opinion that our statute does not contemplate the claim of a homestead by a co-tenant or by a joint tenant. The argument of the authorities holding the contrary doctrine seems to be founded upon the fact that the statutes do not say a "sole" owner; neither do they say a "co-owner," "co-tenant," or "joint tenant." As a matter of fact, where two people own real estate, they are not called "co-owners," or "joint owners," or even "owners." They are called "joint tenants," in legal phraseology, and the word "owner" is never used to define them.

A. and B. are co-tenants. If it is held that A. can have a homestead because A. owns the property, with equal propriety it can be said that A. can have a homestead in the land which B. owns, (or because B. owns it.) As a matter of fact and law, neither A. nor B. owns any one particle of it. Each owns a one-half of each particle thereof. But let us consider the purpose of this statute, and then consider the result of the interpretation of that statute by the decision in this case. It was intended by the legislature that a man with a family might provide, for himself and them, a home of which, during his life-time, he could not be deprived except by his own act; and which, at his death, should descend to his widow free from all claims of creditors, so that she would still have a home. That was undoubtedly the intent. Now, see the result of the interpretation. A. claims a homestead. B. asks for partition. The property cannot advantageously be actually partitioned. It never can when it is a city lot. The law must either destroy the homestead which it has declared to be inviolate, by a partition sale, or the law must diminish the value of the property in B. by a forced actual partition of the house, or it must deprive B. of his property entirely, which, I think, has been done in this case, as I shall attempt to show hereafter.

It is a useless task to try to reconcile or to cite the authorities upon this question. Mr. Thompson, in his work on Homesteads and Exemptions, in a note to section 180, has made a collection of authorities upon either side. Those states declaring that the homestead *cannot* be had in property held by co-tenants are Massachusetts, California, (before a statute giving the express right,) Wisconsin, Michigan, Louisiana, to which may also be added Missouri and Nevada. Those holding the contrary doctrine are stated to be Vermont, Iowa, Texas, New Hampshire, Arkansas,—to which may be added Kansas and Minnesota. The learned chief justice cites 38 Mich. In that case the so-called co-tenants were co-parceners; they were man and wife. But it will be seen that elsewhere, in *Amphlett v. Hibbard*, 29 Mich. 293, the court held that one of two co-tenants could not have a homestead. In addition to the cases in the former decision in this case, I cite the following: *Bemis v. Driscoll*, 101 Mass. 421; *State v. Spencer*, 64 Mo. 355, 357.

There is one more point in this case. It is admitted by a majority of the court that plaintiff's right accrued upon the levy of the attachment, and that no subsequent act of Babcock's could deprive the plaintiff of his right to Babcock's interest. It certainly cannot be held that Davis, by filing his declaration of homestead, could deprive his co-tenant (or partner) of his right to one undivided half of the property. Davis, in his declaration, claims only "an undivided one-half interest in said premises." The plaintiff, therefore, had certainly an undivided one-half interest therein; was, and is, at least, a co-tenant of Davis, and could not be excluded therefrom. The complaint, the answer, and the evidence, show that Davis occupied the premises to the exclusion of the plaintiff, who is at least a co-tenant. The demand necessary, as between co-tenants, is alleged in the complaint, and not denied by the answer. In fact, the answer claims the right to the exclusive possession of the property. The findings of the court below practically admit that the defendant does withhold the property from the plaintiff. The judgment of the court below denies all right to the plaintiff, and this court affirms that judgment. Where one co-tenant is deprived of his possession by his co-tenant, and his demand to be admitted is refused, he may bring ejectment against his co-tenant. See *Freem. Co-Ten.* § 290 *et seq.*, and cases cited.

It would seem to me that the judgment in this case deprives the plaintiff of his property (at least one undivided half of the premises) without due process of law, which is carrying the doctrine of homestead rights to an extent somewhat beyond the authorities cited in the prevailing opinion; and it seems to me that the result in this case is a practical illustration of the result of carving out homesteads from the property held in co-tenancy.

THOMPSON v. HOLLADAY and another.

(*Supreme Court of Oregon.* April 11, 1887.)

RECEIVER—MORTGAGE—PUBLIC POLICY.

A mortgage taken by a receiver upon property held by him as receiver, to secure advances made by him personally to the owner of the property, is contrary to public policy and void.

Appeal from circuit court, Multnomah county.

C. B. Bellinger and H. Y. Thompson, for appellants. *James K. Kelly and C. E. S. Wood*, for respondent.

THAYER, J. The respondent commenced a suit in said circuit court against a number of defendants, including the appellants herein, to recover a decree against the defendant, Ben. Holladay, on account of moneys advanced by the former to the latter, and interest on the same at the rate of 10 per cent. per annum from the time the advances were made, and to foreclose a chattel mortgage upon 1194 shares of stock of the Portland Street Railway Company, given

by the said Ben. Holladay to the respondent, to secure the said advances; said stock then being held and in the possession of the respondent as receiver in the suit of *Ben. Holladay v. Joseph Holladay*; also to restrain the appellant Joseph Holladay from selling said shares of stock, under a decree of this court directing the sale of certain property, including said shares of stock, until he should have first sold all the other property referred to in the said decree, or a sufficient portion thereof to satisfy the sum of \$315,492.46 decreed to be due from said Ben. Holladay to said Joseph Holladay.

Answers to the complaint in the suit were filed by the appellants, and a reply to the new matter therein contained was filed by the respondent. Subsequently thereto the respondent filed a supplemental complaint. The alleged mortgage bears date November 11, 1884. It recites the execution by the said Ben. Holladay of a promissory note for the sum of \$4,500, bearing even date with the mortgage, payable to the order of the respondent on or before the first day of January, 1886, with interest thereon at the rate of 10 per cent. per annum until paid, containing an agreement to repay all further advances that may be made by the respondent to said Holladay, but which were not to exceed \$500 per month from and after the first day of January, 1885, to be repaid at the time the principal sum became due, with a like rate of interest, and containing also a provision that the same should become due and payable upon the decision being made of the said suit of *Ben. Holladay v. Joseph Holladay*—the suit in which the decree was given—if said decision should be rendered before January, 1886. Said mortgage contained a granting clause, granting the said property for the purpose of securing the payment of the said note and advances that might be further made by the respondent, with the interest accruing thereon. The note referred to in the mortgage is also set out in the complaint; and it is further alleged in the complaint that, in pursuance of its terms, the said respondent, after the execution thereof, loaned and advanced to the said Ben. Holladay each month, inclusive from December, 1884, to October, 1885, excepting September, the sum of \$500, and \$1,000 in the month of November of the latter year, making \$6,000; and that the amount thereof, with the principal sum mentioned in said note, aggregating \$10,500, with accrued interest, was due, and no part had been paid. It is also alleged in the complaint that the said decree of this court in the case of *Ben. Holladay v. Joe Holladay* was given on appeal from a decree of said circuit court; that it was entered on the twenty-ninth day of June, 1886, and adjudged and decreed that the said Ben. Holladay was indebted to the said Joseph Holladay in the sum of \$315,492.46, and that certain conveyances, assignments, and transfers of real and personal property, made by and under the direction of said Ben. Holladay to the said Joseph Holladay, were decreed to be mortgages upon said property to secure the payment of said indebtedness; that the said Ben. Holladay had an equity of redemption in all of said property, and that if he failed to pay the said sum of \$315,492.46, together with interest, costs, and disbursements, then and in that case, the receivers appointed in said suit should, as directed by the attorneys of said Joseph Holladay, sell the same to satisfy the said debt, and the balance, if any, pay over to the said Ben. Holladay; that the mortgage property referred to in said decree was more than necessary to pay the indebtedness, and that the lien thereof was prior to the respondent's mortgage; that the respondent had no other lien or security for the payment of said \$10,500; and upon which facts the relief, that the said Joseph Holladay first exhaust the other property to obtain satisfaction of his indebtedness before selling said shares of stock, is claimed.

It is also alleged in the complaint that since said decree was rendered by this court, in the suit of *Ben. Holladay v. Joseph Holladay*, George W. Weidler and said Joseph Holladay were appointed receivers therein, and have the possession and control of the said mortgaged property, and were by order of the judge of said circuit court directed to be made parties to this suit. There

were two several answers to the original complaint filed by the appellants; one on behalf of Joseph Holladay and George W. Weidler in their character as receivers; and the other on behalf of Dolph, Bellinger, Mallory, and Simon; and Williams, Durham, and Thompson, who obtained leave of the court to intervene in the suit. The answer of Holladay and Weidler shows that on the twenty-seventh day of September, 1886, said circuit court made and entered an order wherein certain property, described in the decree in said suit of *Ben. Holladay v. Joseph Holladay and others*, was released and discharged from the lien of said decree, and was ordered to be transferred by them to George W. Weidler as trustee, as provided in the stipulation in the case theretofore filed; that on the said twenty-seventh day of September, 1886, it was so transferred and said receivers had no custody or control of it as such receivers. The property so released is the stock in the Oregon Real-Estate Company, the stock in the Willamette Real-Estate Company, divers tracts of land, town property, and a balance due from Halsey, on stock in the Willamette Real-Estate Company, of \$1,328. Said answer contains an averment that the amount then due Joseph Holladay, and secured by the lien of said decree upon the property therein described, excepting that which had been so released, was \$346,686.46, with interest thereon from the tenth day of July, 1886; and that, in case it should become necessary to sell said property to satisfy said decree, the stock in the Oregon Real-Estate Company and in the Willamette Real-Estate Company could not be sold by the receivers and the court, and that it is neither practicable nor just to order the sale of said 1,194 shares of the stock of the Portland Street Railway Company to be made after the sale of the other stock mentioned. As a further defense to the suit herein, said Holladay and Weidler alleged, as new matter, that on the eleventh day of November, 1884, at the time of the alleged execution of the note and mortgage referred to in the complaint, the respondent was the duly appointed, qualified, and acting receiver of the said circuit court in said suit of *Ben. Holladay v. Joseph Holladay et al.*, then regularly pending in said court, and as such receiver then had the custody, control, and possession of said 1,194 shares of the capital stock of the Portland Street Railway Company, which had been assigned to him, and were held in his name as such receiver, and not otherwise; and they averred that he could not, in law or equity, acquire the interest in said stock claimed in said complaint.

The answer of the other appellants, Bellinger, Dolph, and others, shows that they are and were attorneys at law; were employed as such by the said Ben. Holladay to attend to his law-business long prior to the date of said note and mortgage. That they consisted of two separate firms, said Dolph, Bellinger, Mallory, and Simon composing one; and, at the time of the employment and transaction of the business as such attorneys, the said Williams, Durham, and Thompson composing the other; that the said Ben. Holladay, on the fifteenth day of October, 1883, engaged said firms, and that on the thirteenth day of January, 1885, he agreed with them that, to secure their compensation for said services under said contract of employment, he, said Holladay, would from time to time, as said services should be performed, transfer, convey, and assign to the said law firms, or to some member thereof for the benefit of all, such property, real and personal, as might be agreed upon, which said property, when so conveyed, should be held as security for the compensation for such services and advances by said firms to said Holladay; that in pursuance of said understanding and agreement, said Ben. Holladay did, on the eighteenth day of April, 1885, assign and transfer to said George H. Williams, George H. Durham, and H. Y. Thompson, 550 shares of the capital stock of the Oregon Transfer Company, and 1,200 shares of the capital stock of the Portland Street Railway Company; that in pursuance of said understanding and agreement, said Ben. Holladay did on the twenty-ninth day of August, 1885, assign and transfer to the appellant C. B. Bellinger 5,331 shares of the capital stock

of the Willamette Real-Estate Company, 10,000 shares of the capital stock of the Oregon Real-Estate Company, 675 shares of the capital stock of the Willamette Steam-Mills Lumbering & Manufacturing Company, and 550 shares of the stock of the Oregon Transfer Company; that, in pursuance of the said understanding and agreement, said Ben. Holladay did during the month of October, 1885, and prior to the commencement of any of the actions in this state, mentioned in the complaint in which complainants obtained their judgments, duly conveyed to the said Bellinger and Thompson all the real estate described in complainants' bill of complaint; that on the second day of December, 1885, the said law firms had a settlement and agreement with said Ben. Holladay in which it was mutually agreed that there was due and owing to the said firms, on account of said services and advances by them, the sum of \$150,000, which sum said Ben. Holladay then agreed to pay, together with the further sum of \$10,000 due to said Dolph firm upon other accounts; and it was then further agreed between said firms and said Ben. Holladay, that the said conveyances, transfers, and assignments should operate as, and be held to secure, the payment of the said sums so ascertained and agreed to be due them from the said Ben. Holladay, from which facts they claimed a lien upon said property prior to the lien of the respondent.

It is alleged in said answer that, long prior to the dates and times mentioned in the complaint herein, the said Ben. Holladay was largely indebted to August Belmont, of New York, the Mutual Life Insurance Company of New York, and S. M. L. Barlow, of the same place; that on the tenth day of July, 1886, the amount so due to said Belmont was about \$154,000; the amount so due said insurance company was about \$124,000; and the amount so due S. M. L. Barlow was about \$5,200; that said Belmont and Barlow had duly recovered judgments upon their demands in said circuit court, and said insurance company had an action pending upon its said demand in the circuit court of the United States for the district of Oregon; that said judgments and suit were being prosecuted with the view of causing it to be judicially decreed that said several demands constituted a lien upon said property prior to that of said Joseph Holladay. It is further alleged therein, after a statement of the result of the suit in this court wherein Ben. Holladay was respondent and said Joseph Holladay was appellant, that on the said tenth day of July, 1886, within said 90 days, referring to the 90 days mentioned in the decree in said suit in which Ben. Holladay was allowed to redeem said property, said Ben. Holladay and Joseph Holladay entered into an agreement whereby it was provided that Joseph Holladay would forbear to foreclose his said lien until the expiration of three years from the date thereof; that as one of the considerations for such forbearance it was provided that said Ben. Holladay should adjust the demands of said insurance company, and said Belmont and Barlow, and of the said law firms, so that there should be no claim of priority, on account of either of said demands, over the lien and claim of said Joseph Holladay; and to enable said Ben. Holladay to carry said agreement into effect on his part, it was provided that, upon the assent of the said creditors to said agreement, the following portions of said property should be released from the lien of the said mortgage and decree of said Joseph Holladay: All of the stock of the Oregon Real-Estate Company, the stock of the Willamette Real-Estate Company, 31 acres of land at the car shops in East Portland, 6 lots in the town of Cornelius, in Washington county, Oregon, 3 blocks in the town of McMinnville, Oregon, 185 acres of land in Thurston county, Washington Territory, and the St. Joseph hotel property in the said town of Cornelius—and that the same should be conveyed to George W. Weidler in trust for the payment of the said debts and demands of the said Belmont, Barlow, the Mutual Life Insurance Company, and the said two law firms; and it was further provided that the said creditors should have a lien upon all the balance of said property, second to that of said Joseph Holladay, and that the said agreement

should have the effect of a stipulation for an order from the court directing the release and transfer mentioned. It is further alleged in the said answer that within said 90 days, and on the thirtieth day of August, 1886, the said creditors duly assented to the said conditions of the said agreement, and subordinated their several claims and demands to that of the said Joseph Holladay, as provided in the said agreement, and joined in and became parties thereto. It further appears from said answer that said agreement was carried out, and that in consideration thereof the said insurance company, Belmont, Barlow, and the two law firms entered into an agreement with the said Ben. Holladay whereby it was agreed that he would pay and that they would accept in full satisfaction of their said several debts and claims, the following sums respectively: Belmont, \$41,000; the insurance company, \$30,000; Barlow, \$5,200; Williams, Durham & Thompson, \$37,500; Dolph, Bellinger, Mallory & Simon, \$47,500,—which sums should be payable in three years from said date, with interest at the rate of six per cent. per annum; that thereupon said Ben. Holladay and Esther, his wife, in accordance with the terms of said agreement of July 10, 1886, executed to said Weidler their deed of trust conveying said property to him; that he accepted the trust imposed, and entered upon his duties; that said agreement and stipulations relating to the affair, entered into between said parties, were duly filed in said suit of *Ben. Holladay v. Joseph Holladay and others*, and thereupon, on the twenty-seventh day of September, 1886, an order was made by said circuit court directing that the said property, which had been agreed to be transferred in trust, as before mentioned, be released from the custody of the receivers theretofore appointed in said suit, and be transferred and assigned to the said Weidler in trust for the purpose of carrying out the said agreement, and paying the said debts and demands, and that in pursuance of said order the said receivers did on the ——— day ———, 1886, transfer, assign, and set over to the said Weidler the said shares of stock of the Oregon Real-Estate Company for the purposes before mentioned. And it is alleged in the said answer that the respondent had due notice on the eighteenth day of April, 1885, of the said assignment and transfer to said Williams, Durham & Thompson, and that all the advances made by him to said Ben. Holladay after that date were made with notice thereof, and that on the first day of September, 1885, the respondent had notice of the said assignment to said Bellinger, and that all the advances so made by him after that date were made with full notice thereof. The respondent in his reply to the said answer denied any knowledge, or information sufficient to form a belief, as to the transfers to said Bellinger and Thompson of the real estate, or of the settlement or agreement with said Ben. Holladay, alleged in the answer of Dolph and others, or of the agreement to pay the said \$10,000, or as to whether said conveyances, transfers, and assignment should operate as, or be held to secure, the payment of the said sums alleged to have been ascertained or agreed to be due to them from said Ben. Holladay; denied the notice alleged in said answer, or that the said advances made by respondent to said Ben. Holladay were made with notice or knowledge on his part of the alleged assignments and transfers.

In the supplemental complaint, the respondent alleged that prior to the determination of the suit of *Ben. Holladay v. Joseph Holladay et al.*, in said circuit court, and on the fourteenth day of May, 1884, he was appointed receiver therein; that he was such receiver on the twenty-ninth day of June, 1886, when said suit was finally determined in this court as before alleged; that, instead of complying with the terms of the decree and mandate of this court, said Ben. Holladay and Joseph Holladay colluded together to have the respondent removed from the receivership, and to have Joseph Holladay and George W. Weidler appointed receivers therein in his stead, for the purpose of hindering, etc., respondent and other creditors of Ben. Holladay in the collection of their debts, and that the agreement of July 10, 1886, between Ben.

and Joseph Holladay, set out in the Dolph-Bellinger answer, was made in furtherance of that object. A copy of the said agreement, marked "A," is attached to said supplemental complaint and referred to therein. The respondent claims that the appointment of said Joseph Holladay and George W. Weidler was without any authority of law, and, as additional relief, demanded that their appointment be declared null and void. The defendants in the suit filed an answer to the supplemental complaint, but the facts are sufficiently indicated in the pleadings already referred to, and the exhibits filed therewith, for the purpose of considering the merits of the case. It appears that after the issues were made up the parties stipulated as follows: "(1) Exhibits A and B hereto attached are true and correct copies of the original papers of which they purport to be copies, bearing correct dates and genuine signatures of the parties purporting to have executed them, and correct dates and genuine signatures to the acceptances of service and proofs of service indorsed thereupon. (2) That the papers attached to the complaint and answers in this suit are correct and true copies of the originals of which they purport to be copies, and that said original papers were duly and properly executed by the parties purporting in said copies to have executed them and each of them, and that the purported dates thereof are the correct and true dates of the execution of said papers respectively. (3) That Exhibit C hereto annexed is a true and correct copy in all respects of the original mortgage upon which this suit is brought. (4) That said Ben. Holladay did receive from said plaintiff the several sums of money at the dates and to the amount set forth in the complaint. (5) That the reasons stated on page 3 of the supplemental answer for increasing the amount of said decree of the supreme court are correct statements of the facts relating thereto. (6) That Ben. Holladay was without means to redeem the said property as provided in the decree of the supreme court, and that the allegations of the supplemental answer on pages 3, 4, 5, 6, and 7 are true, and correctly stated. And before the decree of the said supreme court a decree had been rendered in the circuit court of the United States for the district of Oregon in favor of George C. Hickox and against said Ben. Holladay, decreeing that the said conveyances of Ben. to Joe Holladay were fraudulent, and void as to said Hickox, a creditor of Ben. Holladay, which said decree was for the sum of \$38,975.86. (7) That no order discharging said receivers has been made, and they are now in the possession of said property, exercising the duties of receivers by virtue of and in compliance with the said order of their appointment. (8) That after the decree of the said supreme court the mandate of said court containing said decree was presented to the circuit court, and an order made directing the entry thereof in the journals of said court, and the same was entered and docketed, but no further decree was entered. (9) That this court, and if this case shall be appealed, then the supreme court, may refer to its record of said decree for the purpose of ascertaining its provisions for the purpose of trying this suit."

The case was submitted to the said circuit court upon these various facts, and upon which said court granted the respondent the relief claimed in his complaint, from which determination this appeal to this court was taken. From the facts agreed upon in the said stipulation, and the matters referred to therein, the following may be deduced as a fair outline of the facts of the case. Ben. Holladay, being indebted to Joseph Holladay in a sum of money, conveyed and caused to be conveyed to him all his property interests in Oregon, by deeds of conveyance, absolute in terms. Ben. Holladay subsequently claimed that such conveyances were made for the purposes of securing the indebtedness, while Joseph assumed the attitude of an absolute purchaser of the property. The former commenced a suit in said circuit court against the latter, to have the transaction declared a mortgage, and to ascertain the amount of the indebtedness, and applied for and procured the appointment by

said circuit court of a receiver in the suit. After the appointment of one receiver, and his resignation of the trust, the respondent was appointed receiver therein, and was such receiver when he advanced the money to said Ben. Holladay, took from him the mortgage in question, and made the further advances referred to in the complaint herein; that the said circuit court having decreed that said conveyances were mortgages, and that the indebtedness they were given to secure amounted to a certain sum, Joseph Holladay took an appeal from the decree to this court, where the suit was tried anew, and the same conclusion reached as to the transaction being a mortgage, but a larger amount of indebtedness was found to exist in favor of the said Joseph Holladay and against the said Ben. Holladay than that determined by the said circuit court. It was adjudged and decreed by this court that in case Ben. Holladay failed to redeem the property within 90 days, the receiver should at once pay over to Joseph Holladay all moneys in his hands as such receiver, and deliver to the sheriffs of the respective counties, in which the property was situated, all of the property to be sold by such sheriffs upon execution. This decree was remanded to the circuit court, and entered therein, whereupon the said agreement of July 10, 1886, was entered into, which was sanctioned and carried out by the said court so far as any action of the court was provided for therein. Exhibit A, referred to in said stipulation, is the agreement mentioned in the Dolph-Bellinger answer, wherein Belmont, the insurance company, Barlow, and the two law firms agreed to accept the lesser sums in settlement, satisfaction, and discharge of their respective claims against the said Ben. Holladay; and Exhibit B referred to therein is the deed of transfer from Ben. Holladay and wife to Weidler, of the trust property mentioned in said answer.

Under these various proceedings it is difficult to understand the legal status of the property Ben. Holladay had an interest in, at the time he commenced the suit against Joseph Holladay. Both parties concede that the appointment of a receiver in the out-set was regular, and that it had the effect to wrest the property from the control of the parties, and place it in the custody of such receiver, and that it remained in that condition until the decree was rendered in this court, and entered upon the journals of said circuit court. The respondent's counsel, however, claim that, when the decree was so entered, the circuit court had no authority, except to enforce its terms and conditions, and that when the 90 days expired, and no redemption of the property been had, the receiver must turn it over to the sheriffs referred to, and his authority was then terminated. But when the mandate was sent down, and the decree entered in the circuit court, it became the decree of that court, which was then invested with the same authority over it as though it had been an original decree of that court. No court has a right to alter its decrees after the expiration of the term at which they are pronounced, unless consented to by the parties in interest. A party in whose favor a decree is given may consent to its modification. He could cancel it if inclined to do so. Joseph Holladay had the same right to extend the time for redemption of the property he had to extend the time for payment of a promissory note owned by him. I know of no power whatever that could have prevented him from doing that, so long as it did not affect the rights of other parties. He had the right, of course, to rebate any portion of his claim, or lessen the rate of interest, or relinquish his lien upon the property or any part of it. Upon the other hand, Ben. Holladay had the same right to obtain as favorable terms in regard to the matter as he was able to. If, by conceding what Joseph Holladay claimed to have been an error against him, in the computation by the court of the indebtedness, and agreeing to rectify it, he could gain an extension of the time for the redemption of the property, a reduction of the rate of interest, and a release of a portion of it from the lien thereon, and thereby avoid a sacrifice of the property, what possible wrong could it be?

Counsel for the respondent contend that his rights and that of other creditors are greatly impaired in consequence of the property remaining so long in the custody of the court, and suggests that it operates to delay creditors in violation of the provisions of the statute of frauds. In the first place it does not delay creditors within the sense and meaning of that statute. They may bring and maintain suits against the receiver in his official capacity, almost as a matter of course, and obtain judgments against him binding the estate, subject to the equities of other parties interested in it. They are compelled, it is true, to obtain leave of the court having custody of the property, to bring their suits against the receiver, but that requirement is imposed to prevent vexation and confusion; and they may maintain suits against the debtor in any form as a matter of right; but the judgment recovered in such case will not bind the receiver or compel him to do anything in aid of its enforcement. In the second place the transaction was conducted mainly by attorneys of this court of established reputation and known integrity, it bears upon its face the impress of an honest, prudent, and intelligent affair, and was submitted to and received the sanction of the circuit court. To conclude, under such circumstances, that it was actually or constructively fraudulent, would be effrontery. I am not willing to listen to any suggestion indicating that the able and respectable counsel who managed the business might be knaves, or that the court that approved of it was possibly corrupt, unless the transaction itself bears unmistakable evidence that it was wrong—something about it tending to show that it was “conceived in sin and brought forth in iniquity.” It might have been impolitic to continue the receivership after the decree was entered in the circuit court, but it was just as necessary to have a receiver then as in the beginning; and, besides, this court, in this case, has nothing to do with the policy aspect of the question; we cannot review the matter in a collateral proceeding further than to determine whether or not it was a void act. If the circuit court had power to continue the receiver, and it did so, this court cannot interfere with the exercise of the power except in a direct proceeding to review it.

The respondent's counsel claim also that the part of the decree in *Ben. Holladay v. Joseph Holladay* which specified the time for the redemption of the property, and directed the sale of it in case it were not redeemed, should not have been made; that when the transaction in such a case is shown to be a mortgage, and the amount of indebtedness secured is ascertained, the parties should be left to pursue the usual remedy of foreclosure and sale provided by law in case of liens upon real and personal property. The suggestion is a very important one in view of the fact that we have no such rule in our practice as a strict foreclosure, and a sale does not affect the right of a subsequent incumbrancer unless he is made a party to the foreclosure proceeding. I do not believe that the specification of a definite time in which to redeem the property, affected the right to redeem thereafter. It only suspended proceedings to foreclose the lien during that period. Ben. Holladay did not obtain the right to redeem from the court but from the law. The court determined merely that the conveyances of the property were intended to secure the payment of the indebtedness, that they were mortgages,—consequently all the incidents of a mortgage applied to them. They simply constituted in law a lien or charge upon the property; and the statute points out the mode in which “a lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed.” Section 410 of the Civil Code. A sale of the property in accordance with the decree of the court, and the expiration of the statutory time for redemption, would probably have barred the right. I think this court has power to decree a sale in such a suit, and that it would have the effect, when enforced, to cut off the right of redemption, unless made within the period and in the manner provided in the Code. It seems to have been so held in Iowa where a similar statute

is in force. In *Herring v. Neely*, 43 Iowa, 157, the defendant set up as new matter: "That, being indebted to plaintiff, they conveyed to him certain land for security, which he obligated himself by bond to reconvey upon payment of the indebtedness secured, and prayed that a decree be entered declaring said deed to be a mortgage, and requiring plaintiff to treat it as such; and for such other and further relief as defendants might show themselves justly entitled." The district court of the state declared that the deed and bond for the land constituted a mortgage, and foreclosed the same, ordering the land to be sold upon special execution for the amount of the judgment. The supreme court upon appeal affirmed the judgment. BECK, J., in delivering the opinion of the court, said: "It is first insisted that the court erred in rendering the decree foreclosing the mortgage, because no such claim of relief is made in defendant's answer. But they do claim such relief as under the rules of equity they are entitled to recover. Their prayer for relief is general. After the court had found the deed and bond operated as a mortgage, it may have found that equity required, in order to protect the rights of one or both of the parties, the mortgage to be foreclosed. One ground for such an order would be the avoidance of a multiplicity of actions. Others based upon the evidence may have appeared. We cannot hold the decree to be erroneous in the absence of some positive showing of error. * * * The pleadings, as we have seen, authorized the court to foreclose the mortgage when the deed and bond were found to constitute such a security, if equity so required." The principle seems to be that the court having jurisdiction of the subject-matter for one purpose, will do complete justice in the case between the parties when equity requires it. I notice also that the same practice has been recognized in some of the other states. *Hoffman v. Ryan*, 21 W. Va. 415; *Loving v. Milliken*, 59 Tex. 423. I can see no objection to such a course where the parties, as they did in *Holladay v. Holladay*, consent to it. There can be no question, it seems to me, but that the court had jurisdiction to order a sale after finding that the transaction was a mortgage. If it had jurisdiction for the one purpose, it could certainly exercise it for the other. The court should no doubt have directed that an inquiry be made as to whether any other persons had liens upon the property, and, if so, to order them brought in, and that the amounts of their claims be ascertained so that they could be discharged from the proceeds of the fund. The suit was in the nature of a bill to redeem, but a strict foreclosure not being allowed, a sale being required by positive law in order to bar the equity of redemption, the remedy has to be changed so as to meet the new condition of affairs. Courts of equity have always been able to adapt their remedies so as to do justice, and I have no doubt but that they still are.

Under the views indicated it follows that the decision of this court in said case of *Holladay v. Holladay* concluded the rights of the parties in the decree no further than the law, as declared by the court in the case, established them, under the proof submitted at the hearing; that when the mandate was transmitted to the circuit court, and entered upon the journals thereof, the parties were not deprived of the right to agree upon an alteration of the terms and conditions of the decree, nor the court of the power to conform it to such agreement, unless the vested rights of other parties in the litigation were thereby affected and impaired; that the parties to the decree were left as free to contract in regard to that matter as to any other lawful thing, subject only to the qualification mentioned; that the change of the terms and conditions of the decree, rendering it in the opinion of the circuit court necessary for the continuance of the receivership, and the parties in interest having stipulated for the appointment of Joseph Holladay and George W. Weidler in the stead of the respondent, it was legal and proper for the circuit court to make the substitution, and the two persons so appointed have a lawful right to continue in the discharge of the duties imposed until their appointment is revoked by

the court that made it; that any person having a claim against Ben. Holladay, and desiring to affect his estate thereby, that is in the hands of the receivers, is entitled, upon obtaining leave of said circuit court for that purpose, to commence and maintain an action or suit against the receivers in their official capacity and enforce it by as ample a remedy as though the estate remained in said Holladay's hands, unaffected by any such relationship; or such person may proceed against Holladay directly upon such claim, without leave of any court, and affect any property belonging to him, or in which he has an interest, that is not subject to the control of said receivers.

The respondent's counsel appeared upon the argument to be somewhat exercised on account of the shape in which the agreement between the parties of July 10, 1886, and the action of the circuit court thereon, had placed the matters, and in consequence of the probable delay it would occasion in its adjustment. This is quite natural. Creditors long delayed in the collection of their claims are liable to be importunate and clamorous, and by a sort of attrition produce zeal and earnestness upon the part of their counsel. But in order to judge fairly the policy that was adopted by the parties to that agreement, the number and magnitude of the claims against Ben. Holladay, and his financial condition at the time, should be taken into consideration. The estate was large and valuable, and in the near future, by prudent management, could be made to liquidate all the claims, and leave Holladay a reasonable competency; or by a reckless course could have been sacrificed, and the creditors who were unsecured been compelled to accept a very small dividend, if able to obtain anything. The two ways were open, and it required no great sagacity or deep penetration to discover that one would lead to safe anchorage and the other to wreck and destruction. To have rushed in pell-mell, and seized and sequestered the property, would have benefited outside speculators at the expense of creditors and the debtor. The release of certain of the property from the control of the receivers, and conveying it to Weideler in trust, and charging it with the payment of the claims of Belmont and others, cannot upon the facts as presented in the case be deemed fraudulent. If the claims referred to had been fictitious, and the circuit court induced by fraudulent suggestions to make the order releasing the property, the case would present a different phase; but there is no such element as that in the transaction, it is to all appearances an honest effort to secure valid claims as economically to the estate as possible. More than \$280,000 was remitted from them; the time of their payment was extended to three years, a low rate of interest was fixed, and the parties charged with the management of the property required to serve without compensation. It left this property thus set apart, incumbered, it is true, to the extent of \$161,200, but any excess over and above the amount of the incumbrance is subject to the payment of the other indebtedness, without question; and from the statement made at the hearing I should judge that there would be quite sufficient to satisfy it. I am unable to discover anything that squints towards fraud in the affair, but that upon the contrary it bears the semblance of a prudent, fair, and honorable adjustment of the matter.

The effect of the decree of the circuit court of the United States in favor of George C. Hickox may be to charge the estate with the amount decreed to be due said Hickox; whether it does so or not depends upon whether said circuit court had jurisdiction of the parties and the subject-matter of the suit at the time of its rendition. It was claimed at the hearing that the suit in which the decree was obtained was not commenced until after the suit of *Ben. Holladay v. Joseph Holladay* was begun, and the receiver appointed, and was heard while the property which the decree purports to affect was in the hands of the receiver. If that is true I cannot see how the decree can have any force or be rendered operative. There is no principle better established than that, where property in litigation is taken into the custody of the court through the

intervention of a receiver, a party interested cannot go into another forum and establish any claim to it. The court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take possession and control of the subject-matter of the suit, to the exclusion of all interference from other courts of concurrent jurisdiction. The principle grows out of a spirit of comity which has the highest aim for the public good, and without the observance of which, conflicts of a serious nature would be likely to arise. Co-ordinate authority emanating from state and federal government, administered by their respective tribunals, can be exercised harmoniously only by conceding to the tribunal which first obtains jurisdiction over the thing the right to the exercise of it. The following language of Mr. Justice MATTHEWS, in *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 305, 5 Sup. Ct. Rep. 135, expresses fully my view upon this point: "It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where, as in the case here, it concerns those of a state and of the United States, constituted by the authority of district governments, though exercising jurisdiction over the same territory. That rule has no reference to the supremacy of one tribunal over another; nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and, therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction." It is further illustrated in *Attleborough Bank v. Northwestern Manuf'g & Car Co.*, 28 Fed. Rep. 113.

The respondent's claim is only partially affected by the foregoing matters. His suit is regularly in court, and not embarrassed in consequence of the continuance of the receivership, and if he acquired a lien upon the shares of stock as claimed, he is entitled to the relief demanded. Two grounds of objection to his right to such lien are interposed. The one is that he could not legally, while receiver of the property, become a mortgagee thereof; and the other, that the right of the two law firms attached under the assignment to them, and is superior to that of his. The main ground is the former one, and its determination depends upon whether or not the attempt to acquire the lien was compatible with the respondent's duties as receiver. The office of receiver is to take possession of the property and hold it subject to the order of the court appointing him. The property is in the custody of the law. The court has the management and disposal of it in accordance with the rules of law, and to answer the ends of justice, and the receiver is its officer to execute its authority in the matter. The powers of a receiver are in the nature of those of a guardian of a ward's estate, and his relations are of a fiduciary character. The property is held for whoever may ultimately establish a title to it, and the receiver has no power to make any contract regarding it, unless ratified by the court. It is laid down as an elementary principle in *High on Receivers*, § 193, that the courts will not permit a receiver any more than any other trustee to subject himself to the temptation arising from a conflict between the interest of the purchaser and the duty of a trustee, and the author there further says: "The rule has its foundation in grounds of public policy and in the peculiar relations sustained by a receiver to the fund or estate in his custody, which resembles in this respect that of a solicitor, trustees, or any other fiduciary relation of a like nature where the same rule of equity prevails." And, at section 194, says: "That the general rule, as above stated, denying receivers the privilege of becoming purchasers of property pertaining to their trust, is entirely independent of the question whether any fraud in fact has intervened." The principle here declared forbids a receiver from taking security upon the property intrusted to his care as decidedly as it does

from becoming a purchaser of it; his interest and duty would conflict as much in the one case as in the other; he holds the property not for himself but for those who may establish a title to it, and if he were allowed to acquire a claim upon it in his own favor, it would be very liable to occasion a conflict of interest between himself and the parties for whom it is held. In *Johnson v. Gunter*, 6 Bush, 534, where a receiver undertook to retain funds collected by him, and offset his own individual claims against the party to whom they were directed to be paid, the court said: "The money was received by appellee under a decretal order of the court, and his possession is deemed the possession of the court; no discretion is allowed him as to any application or disposition of it; but he holds it subject to the order of the court and to be paid to whom the court shall adjudge. If the mere agent or instrument of the court can be permitted, after receiving the funds under its order, to set up claims to them wholly foreign to the object of its appointment, the position of a receiver is perverted into that of a speculator in funds constructively, at least, in court, and their destiny becomes as uncertain after they enter the precincts of the court as before. The court will not thus permit itself to be made a *quasi* suitor." The same objection exists against allowing a receiver to take a mortgage upon the property to secure his private debt, and difficulty suggested would attend the practice. The respondent no doubt advanced the money in good faith, and that it should be repaid to him with interest, there is no question; but to hold that the mortgage executed to himself upon the shares of stock is operative under the circumstances would sanction a contravention of public policy, and tend to the establishment of a pernicious precedent. The respondent should not be allowed to claim such lien, nor the relief granted by the circuit court, though I think he is entitled to a decree against Ben. Holladay, and against the receivers, for the amount of his debt and interest, to be enforced against the former personally, and the latter in their official capacity out of the property in their custody, in the order of priority of payment of such claims, with his costs and disbursements herein; the amount realized from either party to operate as a satisfaction of the debt to the extent of such amount. The decree appealed from should be modified in accordance with this view.

LORD, C. J., (*specially concurring*.) The suit is to foreclose a chattel mortgage on certain shares of stock. The mortgage was executed to the plaintiff while receiver, and while he, as such, held the stock, for money advanced to the defendant Holladay, one of the parties, pending the litigation. It is admitted that the money was advanced as alleged, and that the defendant Holladay justly owes the same. The only question is, was the taking of the lien upon property thus in his custody as receiver, in contravention of public policy? I am inclined to think it was, and that the view expressed in the opinion in this particular is correct. And therefore, as to this matter, I concur in the result. But deeming the other subjects discussed in the opinion as not essential to the termination of the real question in controversy, I reserve my judgment as to them.

STATE v. BARNETT.

(Supreme Court of Oregon. April 13, 1887.)

1. CRIMINAL LAW—JURISDICTION—STOLEN PROPERTY BROUGHT INTO STATE.

The testimony showed that the defendant was intrusted in British Columbia with Canadian money for transportation; that he constantly represented to his bailor that the money had been stolen from him by the Indians; that afterwards he came into Oregon with the money in his possession, and sent the same by express into the county wherein he was indicted, to a bank to be exchanged into United States money, and returned by draft payable to him, which was done, and upon receipt of the draft he absconded. *Held*, under Criminal Code Or. § 16, which provides that "when property feloniously taken * * * without the state, by burglary, robbery, larceny, or embezzlement is brought within it, the action may be commenced and tried in any county therein into which such property may be brought," that this was such a bringing of the money into the county by the defendant as to give the court of the county wherein the money was exchanged jurisdiction over the offense.

2. SAME—PRINCIPAL AND AGENT.

The fact that the principal and the agent were in different counties in the state at the time of the commission of the offense does not affect the application of the rule.

Appeal from circuit court, Multnomah county.

John M. Gearin, for appellant. *Nathan D. Simon*, for respondent.

LORD, C. J. The defendant was indicted, tried, and convicted of the crime of larceny by bailee. On the trial of the cause it appeared in evidence that the money alleged to have been converted by the defendant to his own use was delivered to him by a witness of the name of De Wolf for safe-keeping, and to facilitate its transportation somewhere in British Columbia. That the money was brought by the defendant in person into Pendleton, Umatilla county, Oregon, and there placed by him with the Wells-Fargo Express Company for shipment to the Bank of British Columbia in the city of Portland, Multnomah county, and at the same time addressed the following letter to the bank:

"PENDLETON, October 17, 1886.

"*Bank of British Columbia, Portland, Oregon*—DEAR SIR: I have sent you \$2,000 Canadian money by Wells, Fargo & Co.'s Express, to exchange for U. S. money. Please send draft on your bank to First National Bank, Pendleton, Oregon, to me.

[Signed] E. T. BARNETT."

That the money and letter sent as above stated were received by the bank at the city of Portland, and, in accordance with the directions or instructions of the defendant, the Canadian money was converted into United States money, placed in a draft, and sent to the defendant at Pendleton, Umatilla county, Oregon; that he received the draft, and absconded with it to Dayton, Washington territory. It was also shown in evidence that, before he had shipped the money by Wells, Fargo & Co., he represented to the witness De Wolf that the money had been stolen out of the saddle bags, where he had placed it, and the defendant represented constantly that the money had been stolen by Indians. It is thus seen that the defendant came into Oregon with the property placed in his custody, denying his possession, and asserting that the Indians had stolen it, and sent it by his innocent agent into the county in which he was afterwards indicted, and by his directions had the money converted into United States money, and a draft made payable to him, for the purpose of appropriating it to his own use, and facilitating his escape with it.

Upon this state of facts, the counsel for the defendants claims that the court was without jurisdiction to try the defendant, and, as a consequence, that the judgment of conviction pronounced against him is void. Virtually, this is based on two propositions: (1) That the bringing into this state by the defendant money stolen in British Columbia does not constitute an offense

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against the laws of this state; and (2) that, not being personally present in Multnomah county with the stolen money in his possession, the defendant could not lawfully be subjected to a trial there.

The first objection raises the vexed question upon which there has been, and now is, much diversity of judicial opinion. For a collection of the authorities, and the holdings *pro* and *con* of the different states, by their courts of last resort, see Bish. Crim. Law, § 141. It was, however, at an early day, held in this state that the offense of larceny, committed without the state, continues and accompanies the stolen property, and that the offense may be tried, in any county within the state into which such stolen property may be brought by the offender. And since this decision it has been provided by law that, "when property feloniously taken * * * without the state, by burglary, robbery, larceny, or embezzlement, is brought within it, the action may be commenced and tried in any county therein into which such property may be brought." Crim. Code, § 16.

The argument that a completed offense was committed before the defendant came into the state, and that his subsequent acts here could not make another for which he would be liable within the jurisdiction of this state, is effectually disposed of by the statute declaring that, when property so taken without the state is brought within it, the action may be commenced and tried in any county therein into which such property may be brought. The offender, who has obtained a felonious possession without the state, cannot bring the property stolen or embezzled within the state, with the intent to appropriate or convert it to his own use, without violating the laws of this jurisdiction, and rendering him liable to its punishments. "Always," says Mr. Bishop, "when a man has with him property in the state, where any legal inquiry concerning it arises, the courts look into the legal relation he sustains to it there. If he stole it in another state, he has not even the right to its custody in the new locality. And the rule in larceny is that when a man, having in his mind the intent to steal, makes any removal or carrying of goods to the custody of which he has no title, he commits the crime." Bish. Crim. Law, § 138. "Our courts, indeed, have no occasion, neither have they jurisdiction, to try prisoners for larcenies committed abroad, against the laws of foreign governments. But they can inflict punishment for offenses against our laws; and, if a man has property in his hands here, they can inquire what legal relation he sustains here to this property, and, if it came with him from a foreign country, the relations he sustained to it there establishes his relation to it here." *Id.* § 139. "The proposition that a man is to escape punishment for the violation of our laws because he first violated the laws of a foreign country is absurd in itself, and mischievous in its practical application. Nothing is plainer than that, when a man is found here with property, our courts will inquire after the owner of it,—equally whether such owner is a foreigner or a citizen, present personally or absent. Nothing is plainer than that our courts will protect the rights of property,—equally whether the property is in the owner's grasp, or wrongfully found in the grasp of a felon." *Id.* § 140.

What was the legal relation which the defendant sustained to this property which he brought within the jurisdiction of this state? Upon the admitted facts, for the purposes of this case, the property was intrusted to his custody as a bailee. Before he reached this state, he declared to the owner of it, what in fact was false, that the Indians had stolen it, when the identical property was then in his possession, and had not been out of it. He brought that property or money into this state, still denying his possession, and asserting that falsehood, and, with intent to convert and appropriate it to his own use, placed it in the hands of Wells, Fargo & Co., with directions to deliver it to the Bank of British Columbia, and instructing the bank by letter to exchange or discount the Canadian money for United States money, and for the same "to send draft on your bank to the First National Bank, Pendleton, Oregon, to

me, [the defendant;]" all of which was done and performed, and the draft received according to his direction and authority.

Under this state of facts, can it be maintained that our laws have not been violated, and a crime committed, within their jurisdiction? It is conceded that it was the property of De Wolf, and that he was entitled to its possession, and that the defendant meant and intended to deprive him of its ownership, and to feloniously convert it to his own use. If these circumstances do not constitute the offense with which the defendant is charged, "then it is impossible for any man, under any circumstances, to do acts completely falling within the description and definitions given in the books of this offense." Bish. Crim. Law, § 140. But it is said that the court had no jurisdiction to try him, because he did not bring the money or property within that county. It is true, the defendant did not bring the property personally within the county in which he was indicted, tried, and convicted; but the property was brought within the county by his innocent agent, under his direction and authority, and for the purpose of facilitating and completing its conversion, and putting his crime beyond the reach of discovery. It was done by the hand of another, but that hand was directed and controlled by his mind. "He who does an act in this state by an agent," said HOSMER, C. J., "is considered as if he had done it in his own proper person." *Barkhamsted v. Parsons*, 3 Conn. 1. In judgment of the law, he who procures the act to be done is present at its commission, and will not be permitted to deny that he personally committed it at the place where it was done. In such case, the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been personally present.

In *Com. v. White*, 123 Mass. 434, the court say, by MORTON, J.: "The personal presence of the thief is not always necessary to make him guilty of larceny. If he does in this state, either personally, or by the hand of another who is not principal in the larceny, all the acts which constitute the essential elements of the crime, he may be indicted and punished in this state, if he can be apprehended within its jurisdiction. It is true that it has been held that, when the agent is a guilty actor in the commission of the felony, he is the principal offender, and the procurer is an accessory before the fact; but when the agent is not guilty of the crime the procurer is regarded as the principal, though absent. * * * He intrusted them to the hands of an agent, not an accomplice in the theft, and sent them into this commonwealth to be disposed of. While they were here in the hands of his agent, he had the same control and power over them as if he held them here in his own hands. His mind directed the disposition of them; he sold them to the defendant. We think the maxim *qui facit per alium facit per se* applies, and that he was liable, criminally as well as civilly, for the acts of his agent, to the same extent as if done by him in person."

In *People v. Adams*, 3 Denio, 210, BEARDSLEY, J., said: "The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. What he did in Ohio was not, nor can be, an infraction of our law, or a crime against this state. He was indicted for what was done here, and done by himself. True, the defendant was not personally within the state, but he was here in purpose and design, and acted by his authorized agents. The agents employed were innocent, and he alone was guilty. An offense was thus committed, and there must have been a guilty offender; for it would be somewhat worse than absurd to hold that any act could be a crime, if no one was criminal. Here the crime was perpetrated within this state, and over that our courts have undoubted jurisdiction. This necessarily gives them jurisdiction over the criminal. *Crimen trahit personam*."

Here both the principal and agent were in this state, but in different counties of it. But this does not affect the application of the rule. As said by BEARDSLEY, J., *supra*: "That such is the rule where both principal and agent

at the time the crime is perpetrated were in the same state, although in different counties, was not denied at the argument, nor does it admit of a question." It follows that the judgment must be affirmed, and it is so ordered.

NOTE. A very exhaustive and able argument for a rehearing in this case was duly filed, and, the court considering the same, it was allowed, and the case reargued orally before the court, and on the twenty-fifth of July, 1887, the court announced that it adhered to its original decision.—REP.

HOBSON and others v. MONTIETH and others.

(Supreme Court of Oregon. June 13, 1887.)

MUNICIPAL CORPORATIONS—STREETS—PLATS.

In an action by abutting property-holders to restrain building upon a certain strip of land alleged to be a street, and thereby obstructing the same, held that the act of the legislature of Oregon incorporating the city of Astoria, which provides that "the fee of all streets now within the city, recorded between high and low water of the Columbia river, is granted to the city, * * * and shall forever remain open as thoroughfares for the public," does not include a street laid out and designated on a recorded plat, where the land included in such plat has been relaid out and designated on a subsequent recorded plat, and lots made out of the former street, and such subsequent plat has been acquiesced in and the abutting property conveyed as designated thereon.

Appeal from circuit court, Clatsop county.

Geo. H. Williams, for appellants. *Fulton Bros. and Raleigh Stott*, for respondents.

THAYER, J. The respondents herein brought suit in said circuit court to restrain the appellants from building upon a certain strip of land alleged to be one of the streets in the city of Astoria, which they designate as "Hamilton Street," and from thereby obstructing the alleged street. They own certain lots in severally abutting upon the said strip of land, and base their right of suit upon the grounds that the threatened building upon and obstructing the pretended street will work a special injury to them differing from that suffered in consequence thereof by the general public. The appellants claim that the *locus in quo* is not a street but private property belonging to the appellant, R. S. Strahan, as assignee of the estate of the appellant Thomas Montieth.

The main question in controversy is whether the strip of land is such street or not; though the appellant's counsel contended at the hearing that the suit could not be maintained until the legal title to the property was settled in a court of law; and that the respondents had failed to show by the allegations and proofs that any such wrong to their rights was threatened as would authorize the interposition of a court of equity in their behalf. The latter question is by no means free from doubt, but I pass it over for the present in order to consider the general merits of the case.

The parties to the suit filed a written stipulation in the case in which, among other things, they stipulated: That the land embraced in the tract alleged in the complaint as "Hamilton Street" is tide land, and lies wholly below, and north of the line of ordinary high tide in the Columbia river; and south of the north line of the donation land claim of John McClure, as described in the patent from the United States to John McClure. The patent to the claim, it appears, was not issued until 1866; but the settlement upon it, and residence and cultivation, were had long prior thereto; that after such settlement, residence, and cultivation, the said John McClure laid out a town partly upon his claim and partly upon the tide land in front thereof, known as the town of Astoria, and constituting a part of the city of Astoria; that he made a plat thereof, which was filed in the then office of the recorder of the county of Clat-

sop, on the sixth day of February, 1854, and duly recorded in said office, and was, and is, known as "John McClure's Plat or Map" of the town of Astoria. That among the streets indicated upon the said plat, and dedicated thereby to the public, was a street designated as "Hamilton Street;" that in 1858 the said John McClure sold the said donation claim to Cyrus Olney, and conveyed to him all his right, title, and interest in the same, with the appurtenances thereunto belonging, by deed of conveyance duly executed and containing covenants of further assurance; that on the twenty-first day of December, 1863, the said Cyrus Olney executed to the appellant Thomas Montieth a deed of conveyance to real property described therein as "situate, lying, and being in the town of Astoria, county of Clatsop, and state of Oregon, and known and designated on John McClure's recorded plat of said town as all of block sixty-one, all of block fifty-eight, and all the land and wharfing privileges north of the east half of block fifty-eight; together with certain other lands, and all and singular the tenements, hereditaments, and appurtenances thereunto belonging," etc. Said Hamilton street, as designated on the McClure plat, extends from low water in the Columbia river, south, along the east side of blocks numbered thereon 58, 61, and 64; and between the same and a tier of blocks immediately east therefrom, numbered thereon 57, 62, and 63; each of said blocks, except No. 57, which is indicated as fractional, is represented as containing eight lots, of 50 by 100 feet each, fronting upon streets at right angles with Hamilton street, as 50 feet in width; that thereafter, and in 1867, the said Cyrus Olney prepared another plat of said town of Astoria, and extended the limits thereof south and west so as to include a large amount of additional territory in those directions; extended it east, so as to include two tiers of lots, and a 50-foot strip for a street; and, on the north, so as to make said block 57 a full block, and add thereto a street and fractional block, the latter being numbered 56½; that he represented said blocks 58, 61, and 64 as being seven lots in width from east to west, and two lots in length from north to south, which representation was so made by including said Hamilton street as two of such lots 5 and 10, in each of said blocks, and adding a tier of two lots adjoining the same on the east, and continuing a tier of blocks of the same width, and composing the same number of lots, south, across his entire plat; that he also represented to the east of the fourteen lot blocks another tier of blocks of the regular size, extending from north to south, a street between the same, of the regular width, and said fourteen blocks, and another street to the east of said tier of regular-sized blocks added, extending from north to south, and upon which the latter blocks abutted. That the said Olney on the first day of May, 1867, filed the said plat for record in the office of the clerk of said county of Clatsop, and the same was thereupon duly recorded therein, and designated as the "plat or map of McClure's Astoria as extended by Cyrus Olney."

It is not shown that any lots adjacent to said Hamilton street had been sold prior to the record of the Olney plat, except those sold to Montieth, and the appellants claim that he acquiesced in the change Olney made in the original plat. The respondents, however, insist that he strenuously objected to it in the outset, and which I have no doubt is the fact. But, however that may be, we find that on the fourteenth day of May, 1879, he conveyed to E. D. Heatley, J. W. Grace, and J. M. Ten Bosch, trustees of the estate of M. J. Kinney, among other property, certain of the lots in said blocks 58 and 61, as represented on the Olney plat, and described the same in the deed of conveyance as lying and being in the city of Astoria, "as laid out by John McClure, and extended by Cyrus Olney." It is evident from this that he had acquiesced in the Olney plat at that time. It also appears that one of the principal respondents, the Pythian Land Association, obtained the title to the lot claimed by that company, ostensibly from the said trustees of Kinney, by deed which bears date June 1, 1881, and which is a mere quitclaim and release in

form, and describes the premises conveyed as "lot numbered 4, in block numbered 61, in the city of Astoria, in the county of Clatsop, and in the state of Oregon; said city lot the same as laid off by John McClure, and extended by Cyrus Olney, according to the plats on file in the office of the county clerk."

The title of John Hobson, another of the principal respondents, is derived from Warren's heirs, by deed dated September 4, 1877. Their title came from the state by deed dated April 25, 1877. Said deed purports to convey lot 9 in block 58, "according to the plat or map made and recorded by John McClure and extended by Cyrus Olney." It is also stipulated in the written stipulation made and filed as before mentioned, "that the respondent, (plaintiff,) Theodore Broenser, is the owner of lot No. 4, block 64; and that his claim of title is from Cyrus Olney, subsequent to the second day of May, 1867, and that the conveyances described said lot as being lot No. 4 of block No. 64, according to the town of Astoria, as laid out and recorded by John McClure and extended by Cyrus Olney; and that the immediate grantors of said Broenser purchased said lot 4 of block 64 from the state of Oregon as tide land, April 28, 1879, and said lot is described in the deed as above."

These three lots,—lot 4 in block 61; lot 9 in block 58, and lot 4 in block 64,—are the only ones, as I understand, represented in this suit; and I am unable to ascertain how the present owners of them have any grounds to complain of the alleged street being used as private property. At the time the various owners purchased the several lots referred to, the Olney plat was on record, and they severally took under a conveyance recognizing it. The respondents' counsel contend that the latter plat was no more than an extension of the McClure plat, and not a change of it. The name given to it was "the plat or map of John McClure's Astoria, as extended by Cyrus Olney." That might indicate that it made no change in the original plat—only an extension of it; but whether it did or not must be determined by the plat itself and not from the name. A name may import a kind or quality quite different from that which the thing it is applied to possesses. Cyrus Olney, at the time he made and filed his plat of the town, was master of the situation. No one having any vested interest to be affected thereby had any right to object to his preparing and recording any kind of plat he might devise, or of his giving it any name he saw fit. And a person having an interest that might be affected in consequence, had full liberty to waive his objection thereto. Neither McClure nor Olney had any such title to the part of the town-site between high and low water mark as would enable them to grant an interest in it to any one. The public already had the *jus publicum* for passage and navigation, and the general title vested immediately in the state, as soon as that institution was formed and admitted into the Union. Neither the donation claimant nor his grantee had any interest in the land below high water mark, in front of the claim, to dispose of, except his riparian rights. Though he might, if he undertook to dedicate it to the public for a street, or other use, estop himself from diverting it from such use, as against one who had, in good faith, acted upon the dedication.

But the respondents' interest in the property did not attach until long after the Olney plat was recorded, and was acquired with a full knowledge of the fact. Their counsel claim, however, that Olney did not intend to discontinue said street and introduced his oral statements, made about the time the plat was prepared, to show that such was not his intention. The plat was duly acknowledged by Olney, and deliberately made by him and placed upon record, and is the best evidence as to what his intention was. It would hardly do to admit parol evidence to change its effect. It is as high proof as a deed, and cannot be varied by such testimony in a collateral suit without violating well-established rules of evidence. As to the evidence of what Montieth said, at the time said plat was made, about Olney having changed the plat, and that "there was a street all around his block when he bought it, and he didn't pro-

pose to have it changed," nothing can be claimed in aid of the respondents. It is immaterial what Montieth may have said at any time unless it was intended to induce the respondents to make purchase of their lots in question, and that upon the faith of what he said for that purpose they did make such purchase. If he had said enough to estop him from claiming the lots designated in the said strip of land represented on the McClure plat as a street, the respondents might be able to take advantage of it, but that is not pretended. It does not appear how long Montieth's dissatisfaction continued. He subsequently, in 1875, made application to the state board for the sale of school and university lands, to purchase under the swamp and tide land law the lots numbered 5 and 10 in block 61 and 58, and lot 10 in block 56½, as shown in Olney's plat, and which constituted a part of said Hamilton street, as shown on McClure's plat; and thereafter, and on the eleventh of June, 1877, said board executed to him, in the name of the state, a deed to the same.

The respondents' counsel further claim that the legislative assembly of the state, by the act incorporating the city of Astoria, passed in 1876, granting to said city the fee to all recorded streets therein below high water mark for the use of the public, granted the fee of Hamilton street as represented on the McClure plat as that was at the time as they claim a recorded street therein, coming within the description embraced in the grant. The language of the act relating to that subject, as set out in the respondents' brief, is as follows: "The fee of all streets now within the city, recorded, between high and low water of the Columbia river, is granted to the city, and all streets within the city limits, and at right angles to the Columbia river, are extended to the ship's channel for the use of the public, and the fee of the same is hereby vested in the city of Astoria, * * * and shall forever remain open as thoroughfares for the public."

Two questions are presented by this act. The first one is its construction. Unless the legislature intended by it to grant to the city of Astoria the land within the boundaries of every street therein as shown upon every recorded plat of the town that had ever been made, it did not necessarily assume to the city the fee of said Hamilton street as indicated on the McClure plat. The second one is whether the grant, however extensive or limited in its construction, vests the fee of any street in the city of Astoria until its terms relating to such streets are accepted by the city. Ordinarily a grant has no effect until accepted by the grantee. The counsel for the respondent maintain, however, that the one in question is distinguishable from an ordinary dedication of streets in a town; that the act of the legislature by its own force made what is known as Hamilton street a public street, to remain forever open "as a thoroughfare for the use of the public." I am inclined to think said counsel's view is correct as to streets coming within the purview of the act, but I doubt very much whether said Hamilton street, so called was included within such grant. The language of the granting clause, "all streets now within the city, recorded, between high and low water of the Columbia river," does not necessarily include it. It is true that the McClure plat represented it as such street, and that said plat was recorded, but Olney's plat superseded it as effectually as an amended pleading supersedes the original. At the date of the act, the latter plat had been recorded 19 years, and the legislature evidently intended by the act to grant the fee of streets then recognized as public streets within the town. Olney's plat added a large number of streets and blocks to the town. It was systematically devised, and made some changes in the former plat; but they were evidently made to carry out a general plan. Blocks 58, 61, and 64, instead of being left four lots wide, were made seven lots in width, and a tier of blocks was laid out across the entire plat in harmony therewith. Said plat was evidently recognized by the inhabitants of the town. Every deed under which the respondents claim title, coming from individuals or the state, refers to it as descriptive of the

property conveyed. To re-establish said Hamilton street would create a second tier of blocks, two lots in width, from off the east side of said blocks 56½, 58, 61, and 64, and destroy the harmony of those blocks with the tier extending south therefrom. The legislature had no intention, in my opinion, to so disarrange the affairs of the town, and never meant to grant the land designated, in said blocks 56½, 58, 61, and 64, as lots 5 and 10 in each block, to the city of Astoria, as a street, "to be forever open as a public thoroughfare," or to provide in regard to any of the streets, except such as were recognized at the date of the act as public streets in said city. It would not be a general thoroughfare if opened; would only extend across four blocks, and merely afford a local benefit. I am of the opinion, therefore, that the equities are with the appellants.

This view renders it unnecessary to consider the other point referred to in the outset of this opinion. The decree appealed from will be reversed, and the case remanded to the circuit court with directions to dismiss the complaint.

A petition for rehearing was denied by the court in the above case on July 25, 1887.

KELLEY v. HIGHFIELD.

(*Supreme Court of Oregon. June 14, 1887.*)

1. BREACH OF MARRIAGE PROMISE—DEFENSE OF WANT OF CHASTITY—DAMAGES.

In an action for a breach of promise of marriage, where the defendant alleged general want of chastity on the part of plaintiff as a defense, and testified that he himself had had frequent intercourse with her, this attempted defense and the failure to establish it is to be taken into consideration in assessing damages. If the defendant set up the defense knowing it to be untrue, and having no reasonable grounds for believing it to be true, and believing that no one had been having intercourse with her besides himself, the failure to prove the defense, and the fact of his own illicit intercourse, should go in aggravation of damages. If the defense was made in good faith by the defendant, believing it to be true, and the plaintiff's conduct furnished him reasonable grounds for such belief, and the contract was broken by reason of such conduct and the belief he entertained, these circumstances should mitigate the failure to prove the defense. But, in the absence of evidence tending to support defendant's claim of good faith, he is not entitled to an instruction that such good faith would bar the claim to damages.

2. SAME—REPUTATION FOR LEWDNESS.

Where there have been repeated renewals of the promise before the alleged breach, the defendant cannot avail himself of plaintiff's reputation for lewd conduct as a defense, unless such reputation came to his knowledge after the last renewal; but the fact of such reputation may be shown in mitigation of damages, when offered for that purpose.

3. SAME—EVIDENCE—ACTS AND FEELINGS OF PARTIES.

In an action for a breach of promise of marriage, it is proper to admit evidence explaining the relations between the parties, their acts and feelings towards each other during the entire engagement, as well as the circumstances attending the breaking off. Also declarations and admissions of the defendant which necessarily tended in any way to wound the feelings of plaintiff.

4. APPEAL—EXCLUSION OF EVIDENCE—MATERIALITY.

To make available an exception taken to the refusal of the court to allow a witness to answer a question, the bill of exceptions must show what fact was expected to be elicited by the question.

Appeal from circuit court.

W. Carey Johnson, for appellant. *John H. Mitchell*, for respondent.

STRAHAN, J. This is an action to recover damages for breach of a promise to marry. The complaint alleges mutual promises of marriage between the parties on or about December 17, 1877, the marriage to take place within a reasonable time thereafter. It is also alleged in the complaint that by the mutual consent of the parties the marriage ceremony was postponed from time to time during the subsequent years down to and until about the sixth

day of April, 1885, at which time it was mutually agreed that such marriage ceremony, which by previous consent of the parties had been postponed until that time, should be again postponed until on or about the last of the month of July, 1885, and that said marriage should then take place between said parties in pursuance of the original engagement to marry, made in December, 1877, the performance of which said marriage ceremony had been postponed as in complaint alleged. The complaint then alleges the breach on the part of the defendant, her demand that he perform his agreement at various times subsequent to the last day of July, 1885, and prayer for \$20,000 damages.

The defendant's amended answer denies specifically each material allegation of the complaint. The answer then sets up a number of separate defenses, in substance as follows: "Defendant for a further and separate answer and defense alleges that on or about the eighteenth day of September, 1885, the plaintiff voluntarily abandoned said alleged marriage contract, and voluntarily and wholly released the defendant from all obligation she claimed against him under said pretended contract before said date. And for further and separate answer and defense the defendant alleges that, *after* the date of the pretended contract alleged in the complaint, the plaintiff *became and was* a woman of bad reputation for chastity, and so conducted herself in her intercourse with men as to establish for herself the reputation of a common or lewd woman, and was so reputed to be for more than five years before the commencement of this action. And for a further and separate answer and defense the defendant alleges that, *after* the date of the pretended contract alleged in the complaint, the plaintiff became and was a common prostitute, and continued to deport herself as such, for more than five years before the commencement of this action, at and about buildings occupied, used, and controlled by her about the corner of B and First streets, in the city of Portland, Multnomah county, Oregon. And for a further and separate answer and defense the defendant alleges that, after the date of the pretended contract alleged in the complaint, the plaintiff committed the crime of adultery, and did have criminal sexual intercourse on or about the twenty-fifth day of April, 1885, at her residence near the corner of B and First streets, in the city of Portland, Multnomah county, Oregon, with a man whose name is to this defendant unknown, and as to whose identity he is unable to make any particular statements. And the defendant for a further and separate answer and defense alleges that, on or about the twenty-fifth day of December, 1884, at her place of residence near the corner of B and First streets, in the city of Portland, Multnomah county, Oregon, the plaintiff committed the crime of adultery, and did then and there have criminal sexual intercourse with a man whose name is to this defendant unknown, and as to whose identity he is unable to make any more particular statements. And the defendant for a further and separate answer and defense alleges that, *after* the dates of the pretended contract set out in the complaint, the plaintiff, at her place of dwelling near the corner of B and First streets, in the city of Portland, Oregon, did, for more than five years next preceding the commencement of this action, carry on the business of selling the use of her person in sexual intercourse with men for hire, and at divers and sundry times, and from time to time, during said five years, did commit the crime of adultery in carrying on such business, and did have criminal sexual intercourse with divers and sundry and numerous men, whose names are to this defendant unknown, which unlawful conduct of plaintiff came to the defendant's knowledge since December 17, 1877."

A reply was filed putting the new matter in the answer in issue. Upon this state of pleadings a trial was had before a jury, in Multnomah county, which resulted in a verdict for the plaintiff for \$14,000. The defendant's counsel moved to set the verdict aside, and for a new trial, and upon this motion the court put the plaintiff to her election to either consent to take a judgment for \$7,000 and remit the excess, otherwise a new trial was to be granted.

The plaintiff elected to take judgment for \$7,000, which was duly entered, from which judgment this appeal is taken. Numerous errors are assigned in the notice of appeal, to which a more particular reference will now be made in their order.

1. The plaintiff called one A. P. Butler as a witness, who testified, in substance, that on or about the first day of June, 1885, he had a barber shop in the plaintiff's premises, and near her dwelling. The defendant came to where the witness was standing near such barber shop. Plaintiff asked said witness this question: "State what he [Highfield] said, if anything, in reference to Mrs. Kelley, the plaintiff in this case, or about her,"—to which question an objection was made, but the court overruled the objection, and an exception was taken, and the witness answered: "Highfield came up to me, and I was turned,—had my back to him; he hit me on the shoulder and said, 'How do you do?' shook hands with me; talked with me for awhile about Mrs. Kelley. *Question.* State just what he said. *Answer.* Wanted to know if Mrs. Kelley was at home; I told him I didn't think she was; I saw Mrs. Kelley going up the street; he says, 'I think Johnny Pillsbury is down from Oregon City, and I think she has gone out to give Pillsbury a chance.' Mr. Highfield took some cigars out of his pocket and gave me a cigar, and kept looking up stairs all the time from the shop, and he says: 'I hear there is a nice-looking girl over my place in the hotel.' He said he had heard there was a nice-looking girl there, and he would like to go up and see her, but he was afraid Mrs. Kelley would see him; so I told him he need not be afraid,—he could go up if he wanted to. He said: 'I am afraid to go up there; but,' he says, 'I will go if you will go with me;' and I said, 'All right, I will go along with you;' I went up stairs ahead of him, and he followed me up; when I got to the head of the stairs I rapped on the door, and she came to the door, and I says: 'This is Mr. Brown.' *Q.* Do you know the girl's name? *A.* They call her Little Casino. *Q.* Was that her name? *A.* I don't know her name; I had seen her several times, but I don't know her name; I rapped at the door, and she came to the door; I says: 'This is Mr. Brown.' "

The introduction of all this evidence was excepted to, and it is now claimed that its reception was erroneous. This evidence was properly received. It was important for the jury to understand the relations between these parties; their acts and feelings towards each other during the entire existence of the contract, as well as the causes and circumstances attending the breaking off of the engagement. *Simmons v. Simmons*, 8 Mich. 318. Besides this, the declarations and admissions of the defendant which necessarily tended in any way to wound plaintiff's feelings were certainly proper for the consideration of the jury. Says a late author on this subject: "The jury may take into consideration all the facts and circumstances of the case, and the conduct of both parties towards each other, and particularly the conduct of the defendant in his whole intercourse with, and treatment of, the plaintiff, in connection with the making and breach of the contract, and afterwards, up to and including the defense and trial of the action." 3 *Suth. Dam.* 321; *Reed v. Clark*, 47 *Cal.* 199; *Grant v. Willey*, 101 *Mass.* 357; *Johnson v. Jenkins*, 24 *N. Y.* 252.

The exception taken to the refusal of the court to allow the witness Fred Meyer to answer the question propounded to him is not available. The witness did not answer, and it nowhere appears from the bill of exceptions what fact appellant expected to elicit by the question. To make this exception available the bill of exceptions ought to have gone further and shown what it was expected to prove by the answer to this question. And the same remark is applicable to the question propounded to the witness Dr. H. W. Ross, which was excluded. Defendant's counsel asked the witness W. H. Watkins, who was the defendant's witness, this question: "You have been asked about the character of the plaintiff before the commencement of this action; now you may state since when you have heard it more frequently discussed."

This question was also objected to, and the witness was not allowed to answer it, to which an exception was taken; but this exception presents no questions we can review, for the reasons already stated. But this question ought not to have been answered, for the reason that it is not so framed as to elicit any fact that would be competent evidence. If it were competent in such case to prove reputation, the proper question must be propounded to enable the witness to answer as to his knowledge of the plaintiff's *general* reputation; and it was wholly immaterial whether he had heard the plaintiff's character more frequently discussed before or after the action was commenced. *Page v. Finley*, 8 Or. 45; *State v. Clark*, 9 Or. 467. Dr. Saylor could not be required to disclose any facts which he learned in the course of his professional employment, nor could the plaintiff be prejudiced because he declined to answer those questions; and it was improper, on the argument before the jury, for the defendant's counsel to refer to the matter, or to animadvert upon the plaintiff's failure to consent or insist that Dr. Saylor should tell all he knew about the facts. No such duty or obligation was placed upon her by any law, and, unless it can be shown to exist, she could not be prejudiced by her silence. Nor is this all. It is upon the evidence which is admitted to go to the jury that a cause must be tried, and not upon that which is excluded. *Carne v. Litchfield*, 2 Mich. 343; *State v. Anderson*, 10 Or. 456. These exceptions cannot be sustained.

The defendant testified that he never at any time promised to marry the plaintiff, but had had sexual intercourse with her, for which he paid her money at the time or times of such intercourse; and there was evidence tending to show that the plaintiff was unchaste after December, 1877, and that the defendant had knowledge of it prior to the last alleged postponement of said marriage. Several witnesses on the part of the defendant were called, whose testimony tended to show that the general reputation of the plaintiff for chastity and virtue among her acquaintances, since December, 1877, and up to the commencement of this action, was bad. The defendant also introduced testimony tending to show that the plaintiff was a coarse and vulgar woman; that she rented her property for saloons, barber shops, and a variety theater; and that for several months in 1885 a part of her building near her dwelling was rented to an Italian, who rented rooms therein for women or girls for lewd purposes; and that she herself had asked one person where he got his "*skyring*" when he came to Portland, and that at times she used profane language.

The court, among other things, charged the jury as follows: "It is necessary, in order that the defense of lewd conduct on the part of the plaintiff may become available to the defendant, that it should have come to his knowledge after this last postponement. If not, it is not available to him." The court further charged the jury on the same subject as follows: "If he knew at the time of the last postponement of this marriage that she had such a character as he has attributed to her in his answer, and still repeated the promise, and agreed to marry her in July, or at any time after that date, he cannot avail himself of a want of chastity on her part (if it existed) as a defense." To each of these charges an exception was taken. By these charges the court, in effect, told the jury that if the plaintiff was a lewd woman, and the defendant knew it at the time of the promise or of any renewal thereof, then such fact would not constitute a defense to the action. There is no error in this. If a man knowingly will enter into a marriage contract with a lewd woman, he is bound to perform his agreement, or pay such damages as a jury may deem proper under all the circumstances of the case. To hold otherwise would be at variance with the settled rule of the law on that subject. *Espy v. Jones*, 37 Ala. 379; *Berry v. Bakeman*, 44 Me. 164; *Butler v. Eschleman*, 18 Ill. 44; *Clark v. Reese*, 35 Cal. 89; *Burnett v. Simpkins*, 24 Ill. 264; *Bell v. Eaton*, 28 Ind. 468; *Snowman v. Wardwell*, 32 Me. 275.

The appellant also excepted to the following portion of the charge to the jury: "And further than that, you should take into consideration this attempted defense and failure to establish it. But the manner in which this is to be taken into consideration, and the question by which you are to consider it, you will observe in assessing damages. If he made this charge against her knowing that it was untrue,—that is, the general want of chastity, and intercourse with other men, knowing that it was untrue, and having no reasonable ground to believe that it was true; or if he made the charge with the belief or supposition on his own part that nobody else had been having intercourse with her besides himself,—then the failure to prove the allegation, and the fact of his own intercourse with her, ought to be taken by you in aggravation of the charge, and in aggravation of the damages which should be assessed." And the appellant's counsel also excepted to the following portion of the court's charge to the jury: "If, however, he made the charge in good faith, believing that there were grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and the conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he had entertained, then you should not allow that circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously." Another exception on the same subject was made by the appellant to the refusal of the court to give certain instructions to the jury asked by him, which are as follows: "The court is asked by the defendant to charge the jury that the defendant is entitled to set up the bad character of the plaintiff as a defense to this action." "Such defense the law allows to be made, and to be made available must be spread upon the records; that is, it must be pleaded." "If the defendant sets up this defense in good faith, under circumstances which would warrant a cautious attorney in the belief and expectation that it can be established by testimony, and if on the trial evidence is produced of a character proper to be submitted to the jury in support of the defense, the jury should not, from sympathy with the plaintiff, in case you should find the weight of evidence in her favor, allow that circumstance to aggravate the damages. In other words, if, in making this defense, the defendant acts in good faith with probable cause, and with a reasonable expectation that he can establish it, he should not be punished even if he fail."

It is also proper in this connection to set out the entire charge of the court on this point: "Another matter of defense, that, after the date of the alleged contract of marriage between them, she became and was a lewd woman, and the substance of that charge, is repeated in several forms, to the effect that she committed adultery at a certain place, and at certain times, with persons to the defendant unknown. Another, that she kept a house of prostitution; another, that she habitually, for a considerable length of time, sold her person for hire,—the whole of these allegations, amounting to a charge of gross lewdness, he says, came to his knowledge after the alleged contract of marriage was made. Now, it is alleged in the complaint, and there is evidence tending to show it, that after December, 1877, this matter was in negotiation between the parties in the shape of postponements, repetitions of what the agreement was, and repetitions and promises that the marriage would be consummated at some future day after the date of the particular negotiations; and postponements were repeated and continued until April, 1885, at which time the matter was again talked about and assented to,—the contract assented to, and at the time postponed until some time in July of that year. These various postponements, if you believe that they took place, in the manner alleged, may be considered by you as renewals of the contract, repetitions of it, and confirmations of it. It is necessary, in order that the defense of lewd conduct on the part of the plaintiff may become available to the defendant,

that it should have come to his knowledge after this last postponement; if not, it is not available to him. But of that I will speak further hereafter. Consider first, now, the defense of the release. There are various ways in which a release from a contract of this kind may be made. One way would be a proposition or request to the party defendant by the plaintiff that the defendant should marry some other person; and if you believe from this testimony, and are satisfied, that this plaintiff, on or about that time in September, did request the defendant to marry her daughter,—proffered her daughter to him in marriage,—you are at liberty to conclude that a release was intended and made by the plaintiff of the defendant from the contract which she claimed before that to have existed with her. I say it would be a release if you find that fact, and are satisfied from the testimony that it existed. But the burden of proving that is on the defendant. He has alleged it, and he must make it out by testimony that is satisfactory to you. Proceeding to the other defense,—want of chastity,—the defendant has alleged it, and then the rule applies to him again. The burden is on him to establish it, to your satisfaction. If he knew, at the time of the last postponement of his marriage, that she had such a character as he has attributed to her in his answer, and still repeated the promise, and agreed to marry her in July, or at any time after that date, he cannot avail himself of the want of chastity on her part, if it existed, as a defense. Something has been said in the testimony concerning his having cohabited with her during that time. I instruct you that is no defense to him; if the promise of marriage existed. It is no release from its obligations, or from liability for its breach, if he himself, during the time subsequent to his promise, was cohabiting with her, or if he knew that other persons were cohabiting with her, and assented to it so far as to renew the promise with her. Now, as to the effect of this defense, you are to consider, (if you come to that,) if you find that the promise of marriage existed, and that this defense had not been made out—either of these defenses has not been made out—to your satisfaction, then it will become your duty to assess damages, and you are to take into consideration in assessing the damages all the circumstances that have been laid before you on the trial. Consider the parties, their ages, their standing in society, their pecuniary condition, the loss which the plaintiff sustains in worldly emoluments by the breach of the contract, if there has been a breach, the injury to her feelings, her prospects in life, the interruption which this contract has been, if any, to her business, by which she might have changed her affairs in life,—all these circumstances must be taken into consideration by you. And, further, you should take into consideration this attempted defense, and the failure to establish it. But the manner in which that is to be taken into consideration, and the question by which you will consider it, you will observe in assessing damages. If he made this charge against her knowing that it was untrue,—that is, the charge of general want of chastity and intercourse with other men, knowing that it was untrue, and having no reasonable grounds to believe that it was true; or if he made the charge with the belief or supposition on his own part that nobody else had been having intercourse with her besides himself,—then the failure to prove the allegation, and the fact of his own intercourse with her, ought to be taken by you in aggravation of the charge, and in aggravation of the damages which should be assessed. If, however, he made the charge in good faith, believing there were good grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after he had renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he had entertained, then you should not allow this circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but you will take the circumstances all into view, and inquire, if you come to that question, how has he

made the charge? Has it been a reckless, a wanton, malicious charge, or has it been made in good faith? You will determine the question of the manner and *animus* of this defense, as well as the question of the amount of damages. I allude to one thing further concerning the pleadings. It is admitted by these pleadings that the plaintiff was ready and willing in September, 1885, and since, up to the commencement of this suit, to marry the defendant, and it is admitted that she demanded marriage in September, 1885, and it is admitted that he refused; so that matter need not be inquired of, since it is admitted on the face of the record."

The court further instructed the jury on the subject of damages: "If you find the contract was made, has been broken, and consider the question of damages, you may take into consideration the character of the plaintiff, if it is subject to any criticism on your part; and if she is a woman of coarse manners, gross in her associations, and imprudent, careless, and reckless in regard to her conduct and demeanor, these circumstances you may take into consideration in assessing damages; such a woman is not injured to the same extent by a breach of promise of marriage that one more confiding, retiring, and modest would be. Understand, that I am passing no judgment upon the plaintiff, or suggesting that you shall pass any judgment upon her; but I wish you to understand that, if you think she deserves consideration of that kind, it is your privilege and duty to give such consideration to that phase of the matter as you think it deserves."

Counsel for the appellant now insist that the foregoing instructions given by the court do not present a correct view of the law to the jury, and they claim that the court should have told the jury explicitly that if the defendant set up his defense in good faith, believing it to be true, and having reasonable grounds to believe it to be true, they could not consider the fact in aggravation of damages. And to sustain their contention they cite *Powers v. Wheatley*, 45 Cal. 113; *Fidler v. McKinley*, 21 Ill. 308; *Burnett v. Simpkins*, 24 Ill. 265; *Denslow v. Van Horn*, 16 Iowa, 476; *Leavitt v. Cutler*, 37 Wis. 46; *White v. Thomas*, 12 Ohio St. 312; *Rayner v. Kinney*, 14 Ohio St. 286. Upon the other hand, counsel for respondent contend that, when a defendant attempts to justify his breach of promise of marriage by stating upon the record as the cause of his desertion of the plaintiff that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving it, this is a circumstance which ought to aggravate the damages. And to sustain this position counsel for respondent cite *Thorn v. Knapp*, 42 N. Y. 475; *Southard v. Rexford*, 6 Cow. 254; *Davis v. Slagle*, 27 Mo. 603; *Kniffen v. McConnell*, 30 N. Y. 285; *Johnson v. Jenkins*, 24 N. Y. 252; *Wells v. Padgett*, 8 Barb. 323; *Barnes v. Buck*, 1 Lans. 268; *Reed v. Clark*, 47 Cal. 203.

We do not feel called upon in this case to undertake to review or to attempt to reconcile any apparent conflict there may be in these cases. The court in its charge evidently might have gone further either way, and found language in these cases to have sustained it. The court told the jury, in effect, that "if the defendant made the charges set up in the answer in good faith, believing that there were grounds for it, and the conduct of the plaintiff had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he had entertained, then you should not allow the circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but you will take the circumstances all into view, and inquire, how has he made the charge? Has it been a reckless, a wanton, malicious charge, or has it been made in good faith? You will determine the questions of the manner and *animus* of this defense as well as the question of the amount of damages." This charge fairly submitted to the jury, on the one hand, the

nature and character of the imputations cast upon the plaintiff, and the manner and motives by which he was prompted; and, on the other, the question whether or not the charges were made in good faith. The jury were bound to understand from this instruction that, if there was no cause for making the charges, and the defendant was actuated by malice, wantonness, and recklessness, then they might add something to the damages on account thereof; but if otherwise—if good faith prompted the defendant—he was to have the benefit of it in estimating the damages. That is to say, the wrong which the plaintiff has suffered by having these groundless and most damaging charges spread upon the records of the court, where they must forever remain, is not wholly atoned for by the defendant's good faith, because good faith cannot atone for the wrong. Still, it must be considered by the jury in estimating how much the defendant ought to pay for that wrong.

In this class of actions the damages are so entirely in the discretion of the jury that nothing but the most general rules of law can be applied. Though in form an action founded on contract, it partakes more of an action growing out of a tort. There is no fixed rule of damages, and the jury may, in the exercise of a sound discretion, allow punitive damages; that is, such an amount over and above all actual damages as in their opinion are proper, by way of punishing the defendant, and such as may tend to deter others from being guilty of the like breaches of a legal and social duty. And for the purpose of enabling them to reach a proper conclusion as to the amount of damages, they have a right to consider the entire course of conduct of the parties towards each other, up to and including the time of the trial. There can be no doubt, if the defendant's desertion of the plaintiff was without cause, or his conduct at the time towards her, or afterwards, was harsh, cruel, or malicious, or if at any time, even upon the trial, he makes a wrongful attempt to blacken her name or reputation, the jury have a right to consider it, and may, if they think proper, add something to the amount of damages on account of such new or additional wrong. If the instruction asked by the appellant, and refused by the court, is good law,—as to which it is unnecessary to express an opinion in this case,—still, its refusal was not error, for the reason that it was inapplicable to the particular facts disclosed by the bill of exceptions. If the plaintiff was unchaste or her life was impure, after December, 1877, the testimony offered tended to show that the defendant knew it, and according to the defendant's own confession he was equally guilty with her. This instruction wholly ignores the effect of the defendant's knowledge of the plaintiff's want of chastity, and his admitted criminal indulgence with her, in its bearing upon the question of damages. If the defendant promised to marry the plaintiff, knowing her to be unchaste, and then refused to perform his agreement for that reason, this fact would not constitute a defense. It might mitigate the damages, but it could not defeat the action. On the other hand, if the defendant himself had for a long time been in the habit of having sexual intercourse with the plaintiff, it is difficult to see on what ground he could charge her, "in good faith," with a want of chastity. It is believed that under the authorities such conduct does not tend to mitigate, but greatly aggravates, the damages. The defendant, having testified upon the trial to his own improper conduct with the plaintiff, could not wholly ignore the possible effect such evidence might have on the minds of the jury. It was evidence tending to prove the defendant's allegations, or some of them, that the plaintiff had led an impure life, at least in the particular instances mentioned by the defendant. What effect that evidence might have on the amount of damages to be awarded to the plaintiff, if any, was entirely for the jury; but the necessary effect of the instruction asked was virtually withdrawing the consideration of these particular facts from the jury, and treating the case precisely as though no such evidence had been given. This, we think, the defendant was not at liberty to do. In ad-

dition to this there was no evidence offered upon the trial tending to prove any of the criminal conduct charged against the plaintiff in the defendant's answer, except her conduct with the defendant himself. In the absence of such proof, or some proof tending to establish the facts alleged, it is not perceived on what grounds the defendant could predicate his good faith. Those charges are of most serious import, and ought not to be lightly made; and, when made, a defendant ought to be able to show some cause for making them. In other words, he ought to be able to offer some evidence which would tend to prove the charge. Here there is no evidence whatever tending to prove these particular charges, except the defendant's evidence as to his own criminal conduct. In this respect, also, the refusal of the instruction was correct, because it was too broad. It included matters upon which no evidence had been offered.

It follows that the judgment appealed from must be affirmed

ON PETITION FOR REHEARING.

THAYER, J. The action in the court below was for a breach of marriage contract between the parties herein, alleged to have been made on the seventeenth day of December, 1877, and the celebration thereof to have been postponed at various times during the subsequent years, down to on or about the sixth day of April, 1885. That such contract was entered into by the appellant and respondent must, for the purposes of this appeal, be taken as true. The finding of the jury, in any view of the case, is conclusive upon that point. This court must assume that the appellant and respondent agreed to intermarry, and that the appellant violated the agreement as alleged in the complaint. There is no claim that the circuit court did not fairly submit that question to the jury; and that they found such to have been the fact, by their finding for the respondent, cannot be denied at this time. There are but two matters, therefore, which need be considered. The one is the matter of defense as a bar. The other, the matter of partial defense, or mitigating circumstances. The appellant alleged in his answer the following new matter: "Defendant for a further and separate answer and defense alleges that on or about the eighteenth day of September, 1885, the plaintiff voluntarily abandoned said alleged marriage contract, and voluntarily and wholly released the defendant from all obligation she claimed against him under said pretended alleged contract, before said date. And for a further and separate answer and defense the defendant alleges that, *after* the date of the pretended contract alleged in the complaint, the plaintiff *became and was* a woman of bad reputation for chastity, *and became and was* reputed to be an unchaste woman; and so conducted herself in intercourse with men as to establish for herself the reputation of a common or lewd woman, and was so reputed to be for more than five years before the commencement of this action. And for a further and separate answer and defense the defendant alleges that, *after* the date of the pretended contract alleged in the complaint, the plaintiff *became and was* a common prostitute, and continued to deport herself as such for more than five years before the commencement of this action, at and about buildings occupied, used, and controlled by her about the corner of B and First streets, in the city of Portland, Multnomah county, Oregon. And for a further and separate answer and defense the defendant alleges that, *after* the date of the pretended contract alleged in the complaint, the plaintiff committed the crime of adultery, and did have criminal sexual intercourse on or about the twenty-fifth day of April, 1885, at her residence near the corner of B and First streets, in the city of Portland, Multnomah county, Oregon, with a man whose name to this defendant is unknown, and as to whose identity he is unable to make any more particular statements. And the defendant for a further and separate answer and defense alleges that, on or about the twenty-fifth day of December, 1884, at her place of residence near the corner:

of B and First streets, in the city of Portland, Multnomah county, Oregon, the plaintiff committed the crime of adultery, and did then and there have criminal sexual intercourse with a man whose name is to this defendant unknown, and as to whose identity he is unable to make any more particular statements. And the defendant for further and separate answer and defense alleges that, after the dates of the pretended contracts set out in the complaint, the plaintiff, at her place of dwelling near the corner of B and First streets, in the city of Portland, Oregon, did, for more than five years next preceding the commencement of this action, carry on the business of selling the use of her person in sexual intercourse with men for hire, and at divers and sundry times, and from time to time, during said five years, did commit the crime of adultery, in carrying on such business, and did have criminal sexual intercourse with divers and sundry and numerous men, whose names are to this defendant unknown, *which unlawful conduct of claimant came to defendant's knowledge since December 17, 1877.*"

No attempt was made to plead a partial defense. Proof was submitted upon the part of the appellant tending to show that the respondent was coarse in her manner and conversation, gross in her associations, and imprudent in her conduct and demeanor; that she rented her property, consisting of buildings situated near her own residence, to persons of questionable reputation; that her character for chastity and virtue was not good in the community where she was known; and that upon one occasion she made a vulgar and lewd inquiry of a male acquaintance, whom she met upon the streets of Portland; but no proof was made tending directly to establish the charges of adultery and prostitution contained in the answer; nor does it appear that any evidence was offered by the appellant for the avowed purpose of mitigating the damages. All the proof upon his part seems to have been offered in view of the defenses set forth in the answer, and which was controverted by the respondent. In that condition of the controversy the case was submitted to the jury. It is evident to my mind that the defenses referred to were not only unproven, but that the evidence offered, standing by itself, was inadmissible for that purpose. It cannot, certainly, be maintained that the defense that the respondent, after the date of the alleged contract of marriage, became and was a woman of bad reputation for chastity, etc., could be established by proof that her reputation was bad in that respect, without showing that it became bad after the time alleged; nor that the defense "that, after the date of the pretended contract alleged in the complaint, the plaintiff committed the crime of adultery, and did have criminal sexual intercourse on or about the twenty-fifth day of April, 1885, at her residence, near the corner of B and First streets, in the city of Portland," was proved, by proving that she was a coarse woman, etc., as before mentioned. Such proof may have been material evidence in the case,—may have shown that the respondent was not entitled to damages beyond one cent,—but, clearly, it did not make out the defense alleged, and for that purpose was wholly futile. There is a wide difference in proof tending to show that the plaintiff, since the making of the contract of marriage, had done acts that legally absolved the defendant from observing it, and proof that tended to show that the plaintiff was such a coarse, vulgar woman that she had not been damaged in consequence of a breach of the contract; but in the trial of this case no such distinction seems to have been kept in view. In such a case, where a defendant has interposed a specific, full defense, and offers evidence generally, which is objected to as irrelevant and immaterial, and which is insufficient to prove such defense, but is relevant to prove mitigating circumstances, he should declare the purpose for which he offers the evidence, if he wants the benefit of it upon the latter ground, otherwise it would necessarily lead to confusion. The presiding judge at the trial usually announces in such cases that he will permit the evidence, though offered generally in the action, to be received in mitigation of damages, but

he may not always be able to make the discrimination, nor the defendant's counsel be willing to accept of such ruling. An exception, to be tenable in such a case, must be taken to the refusal to admit the evidence after the party producing it indicates the purpose for which it is offered. The mode here suggested is calculated to prevent the embarrassment to which the jury would be liable to be subjected if the evidence were admitted without specifying the object for which it is introduced, and the attention of the court will then be directed, in case of objection to its admission, to the particular point it is called upon to rule. The appellant, in my opinion, should not be heard to complain when evidence, that is inadmissible to prove the defense alleged, is excluded upon that ground, although admissible in mitigation of damages, where it does not appear that he sought to have it admitted upon the latter ground.

One of the questions in the case, which has raised some doubts in the mind of the court, relates to the charge to the jury in regard to their taking into consideration the attempted defense, and failure to establish it, in the assessment of damages. The court, in its instructions, told the jury,—told the jury in substance,—that, if the appellant made the charge against the respondent of general want of chastity, and intercourse with other men, knowing that it was untrue, and having no reasonable grounds to believe that it was true, then the failure to prove the allegation ought to be taken by them in aggravation of the charge, and in aggravation of damages which should be assessed. If, however, the appellant made the charge in good faith, believing that there were grounds for it, and the conduct of the respondent had been so imprudent as to furnish him grounds for it, and this conduct had come to his knowledge after he renewed the contract with her, and he repudiated the contract by reason of this conduct of hers, and of this belief that he entertained, then they should not allow that circumstance to weigh as much in the assessment of damages as if he had made the charge recklessly, wantonly, and maliciously; but that the jury should take the circumstances all into view, and inquire, if they came to that question, how had he made the charge? Had it been a reckless, a wanton, malicious charge, or had it been made in good faith? The appellant's counsel contend that the part of the instruction here referred to is erroneous, as it allowed the attempted defense, and failure to establish it, to weigh to some extent in the assessment of damages, even though the jury should find that the appellant made it in good faith. This seems to be the main ground of error in the case. The circuit court evidently entertained the view that the failure to establish such a defense, if interposed in bad faith, knowing that it was untrue, etc., would aggravate the damages; that if interposed in good faith, under the belief that it was true, it would have less weight in the assessment of damages; but the court did not indicate how it would affect the subject in the latter case. The inference, however, is that the failure to prove such defense might be considered by the jury as a circumstance, in connection with the other circumstances referred to them by the court, to be taken into consideration in fixing the amount of damages, in event the respondent was found entitled to damages. Said counsel insist that, if the defense is made in good faith, and upon probable cause, it is not to be considered by the jury in aggravation of damages at all. The instruction, however, does not include the hypothesis of there being probable cause for believing the defense to be true. The statement contained in the instruction is: "If the appellant made the charge in good faith, believing that there were grounds for it, and the conduct of the respondent had been so imprudent as to furnish him grounds for it," etc. And I think the supposition the court submitted contained a much broader statement than the facts in the case would justify. It would have required, it seems to me, a great amount of credulity upon the part of the jury to have believed that the charge was made in good faith. The appellant may have believed that the respondent was an unchaste

woman; but there is nothing in the evidence to justify his allegation that she committed adultery at particular times and places, and his making such allegations, without being able to produce any direct evidence of the fact, and making no attempt to prove specifically such charges, placed him in a very difficult position to claim that he made them in good faith. In view of the evidence, the jury were bound to conclude that those charges were false, and I am unable to discover how they could have found otherwise than that they were malicious. It was not pretended, as I understand the case, that, in making the charges, he acted upon any information he had obtained concerning the facts alleged. I refer to the specific facts concerning the adultery charged in the answer. He seems to have "just fired at random." Had there been probable cause for making the charges, the counsel's position might have been tenable; but I am unable to discover that there was any, and the court did not submit that question to the jury in the instruction. We must take the instruction as we find it; also the charge made by the appellant against the respondent's general want of chastity, and intercourse with other men; and the evidence in the case,—in testing the correctness of the instruction. The case before us is one in which the defendant has attempted to justify his breach of promise of marriage by alleging against the plaintiff, in his answer, that, since the time of the making of the promise, she became and was a common prostitute, and continued to deport herself as such for more than five years, before the commencement of the action, in and about a particular place; that she had been keeping a whore-house in fact, and been an out and out strumpet, and at particular times and places had carnal intercourse with men, had committed adultery, and been engaged in the business of selling the use of her person in sexual intercourse with men for hire. He spread upon the records of the court, in strong and unmistakable terms, a damaging libel, and, without proving its truth, attempted to shield himself from the entire consequences of his act by claiming that he published it in good faith, believing it to be true. What could be evidence of good faith upon his part, less than proof that the allegations were true; or, at least, that there was a good foundation for believing them true? And if he believed them to be true, honestly entertained such a belief, how does that compensate the wrong he has done the respondent by declaring such scandalous matter, and perpetuating forever the evidence of it? Such an act ought, it seems to me, to have some weight in the assessment of damages, even under the circumstances supposed by the court. Besides, it is perfectly evident that the appellant was not damaged by that qualification of the instruction. An alternative made to depend upon the jury finding that the appellant acted in good faith under the circumstances was wholly valueless.

Another important question in the case is the refusal of the court to give the following charge to the jury: "The court is asked by defendant to charge the jury that the defendant is entitled to set up the bad character of the plaintiff in defense to this action. Such defense the law allows to be made, and to be made available must be spread upon the records; that is, it must be pleaded. If the defendant sets up this defense in good faith, under circumstances which would warrant a cautious attorney in the belief and expectation that it can be established by testimony, and if on the trial evidence is produced of a character proper to be submitted to the jury in support of the defense, the jury shall not, from sympathy with the plaintiff, in case you should find the weight of evidence in her favor, allow that circumstance to aggravate the damages. In other words, if, in making this defense, the defendant acts in good faith, with probable cause, and with a reasonable expectation that he can establish it, he should not be punished even if he fail." Which instructions the court refused, as asked, but instructed the jury concerning those matters as set forth in the general charge, to which refusal counsel for appellant excepted. This proposed instruction, as an abstract proposition of law, I am inclined to think

is substantially correct. The grounds upon which the court refused it do not appear, but it is evident to my mind that the facts in the case, as I have before intimated, did not entitle the appellant to have it given.

There were six defenses interposed. The first one, a voluntary abandonment by the respondent of the marriage contract, and release of the appellant from the obligation thereof. The next two of them were alleged facts,—that after the date of the contract the respondent became and was a woman of bad reputation for chastity, etc., and that she became and was a common prostitute. The other three relate to the specific acts of adultery and prostitution with which the appellant charged her. There is no pretense but that the defenses that she abandoned the contract, or that she released the appellant from the obligation of it, were not fairly submitted to the jury. Nor any evidence that she became or was, after the date of the contract, a woman of bad repute, or after such date became or was a prostitute. Testimony was given on the part of the appellant tending to show that the general reputation of the respondent for chastity and virtue since the date of the contract was bad; and an offer made to show that it was bad before that time; but there was nothing showing that it became bad after the date of the contract, as alleged in the answer. This may not seem important—the time her reputation became bad—and yet it is so as a defense to the action. The fact that a woman has a bad reputation for virtue does not entitle a man to violate a contract of marriage he has entered into with her, if he knew what her reputation was when he made the contract; though the fact may be shown in mitigation of damages, where it is offered for that purpose. The appellant claimed that he was relieved from the obligation of the contract for the reasons set out in said two answers, and the evidence he offered was immaterial as a defense, unless in accordance with the allegations therein contained. He probably was not able to deny but that he knew what her reputation was, and had been, at the time of, and prior to, the contract of marriage, and hence it was necessary to allege that it became bad after that date. But, conceding that the evidence offered tended to establish those two defenses, what was there in the testimony to prove the other three? Evidence of her bad reputation, and that she was a coarse, vulgar woman, would have no tendency to prove that she committed adultery at some particular time and place, “or sold the use of her person.” It would be absurd to claim any such thing, and yet, as I understand, that is all there was in the case to establish said defenses. “Probable cause” is supported by evidence which inclines the mind to belief. It is not a mere suspicion; it is something that is proved, not fully, but has more evidence for than against it. What was there in this case to show that the respondent committed adultery on the twenty-fifth day of April, 1885, or the twenty-fifth day of December, 1884, or that she carried on the business of selling the use of her person? Not anything that could be called proof, certainly. If she had been prosecuted for adultery, or for keeping a house of ill-fame, would any court have allowed the case to have gone to the jury on such pretended evidence as the appellant introduced in this case? It is idle to consider such a question. The New York courts, by an unbroken series of decisions, from *Southard v. Rexford*, 6 Cow. 254, down to the present time, have held that, where the defendant attempts to justify his breach of promise of marriage by stating upon the record, as the cause of his desertion of the plaintiff, that she had repeatedly had criminal intercourse with various persons, and fails entirely in proving such justification, it is a circumstance which ought to aggravate the damages. This doctrine, counsel for the appellant claims, is subject to the qualification set out in the said instruction asked and refused, and I rather think he is right in that view; but I do not see how the distinction can be made in this case, for I do not think that three of the defenses, at least, were interposed with probable cause, or with a reasonable expectation that the appellant could establish them. To vilify and calumniate the re.

spondent by vile charges, which he must have known he could not maintain, ought not to be condoned by a plea that he did it innocently, and without intending harm. But he should make it appear, from evidence submitted upon his part, that he had reasonable grounds to suppose the charges could be established. I do not believe a party defendant, in such a case, should be prevented from setting up what he believed the facts would authorize him to, and that he had reasonable grounds to suppose he would be able to prove; but when he acts upon conjecture only, and alleges matters injurious to the credit and reputation of the plaintiff, upon a mere surmise that they might be true, he abuses the privilege the law confers upon him, of making a defense, and, as said in *Southard v. Rexford, supra*: "It would be a matter of regret, indeed, if a check upon a license of this description did not exist in the power of the jury to take it into consideration in aggravation of damages." In my opinion, a defense which charges scandalous matter, and is not sustained, in order to avoid the imputation of malice, or, at least, wantonness, which the law would presume, must be founded upon probable cause, supported by proof that distinctly or by necessary inference tends to establish its truth. Any less requirement would encourage an abuse of the privilege the law confers. No such proof having been submitted in this case, or facts shown from which it could legitimately be inferred, the assignment of error in regard to the charge of the court, and refusal to charge as requested, referred to herein, are not sustained. The other grounds of error I do not regard as tenable.

The petition for a rehearing should, therefore, be denied.

STRAHAN, J., (*concurring*.) In disposing of a question of practice which was presented in this case it is said in the prevailing opinion: "The exception taken to the refusal of the court to allow the witness Fred Meyer to answer the question propounded to him is not available. The witness did not answer, and it nowhere appears from the bill of exceptions what fact appellant expected to elicit by the question. To make this exception available, the bill of exceptions ought to have gone further, and shown what it was expected to prove by the answer to this question. And the same remark is applicable to the question propounded to the witness Dr. H. W. Ross, which was excluded." In his petition for a rehearing this statement of the law is questioned by counsel for appellant, which has led to a re-examination of the subject, the result of which is the affirmation of the ruling upon the authority of the following cases: *Bake v. Smiley*, 84 Ind. 212; *Whitehead v. Mathaway*, 85 Ind. 85; *Jordan v. D'Heur*, 71 Ind. 199; *Toledo & Wabash R. Co. v. Goddard*, 25 Ind. 185; *Watson v. Mathews*, 36 Tex. 278; *Small v. Sacramento Nav. & Min. Co.*, 40 Me. 274; *State v. Staley*, 14 Minn. 105, (Gil. 75); *Mathews v. State*, 44 Tex. 376; *Lewis v. Lewis*, 30 Ind. 257; *Stull v. Wilcox*, 2 Ohio St. 569; *Hollister v. Reznor*, 9 Ohio St. 1; *Gandolfo v. State*, 11 Ohio St. 114; *Gage Manuf'g Co. v. Parr*, 138 Mass. 462; *Graeter v. Williams*, 55 Ind. 461; *Mitchell v. Chambers*, Id. 289. The general rule of law which these authorities tend to sustain is thus stated in *Graeter v. Williams, supra*: "But where a party on the trial of a cause has propounded a question to a witness with a view of eliciting evidence, to which question objection has been sustained by the court, such party cannot, by simply saving an exception to the decision of the court, in sustaining such objection, get error into the record which will be available to him in this court. In such case the party must go further and state to the court in which his cause is being tried, clearly and explicitly, what the evidence is which he offers to adduce, and which he expects to elicit" by the answer of the witness to the question. And in *State v. Staley, supra*, the rule is thus stated: "To justify a reversal of judgment, the record must show affirmatively material error. When a question is asked which is objected to, and the objection sustained, in taking an exception it should be made to appear what it was proposed to

prove, which must be something material, and the rejection of which as evidence would be prejudicial to the party excepting." And the same principle is enunciated in *Gandolfo v. State*, *supra*, thus: "When a question is asked which is objected to, and the objection sustained, in taking an exception there should be a statement of what it was proposed to prove which must appear to be something material, and the rejection of which as evidence would be prejudicial to the party excepting."

We have given the appellant's petition for a rehearing a careful examination, and find no reasons for modifying the opinion already filed in this case. No new questions are suggested, and those already considered do not require a further examination. A rehearing would only lead to the result already reached by a majority of the court. It should be denied; and it is so ordered.

WOODS v. BERRY.

(*Supreme Court of Montana*. July 29, 1887.)

1. FRAUDULENT CONVEYANCES—SALE OF STOCK OF GOODS—COURT AND JURY.

Where, in action of claim and delivery against a sheriff, it appeared that plaintiff had bought the goods seized, valued at \$4,000, by surrendering to the debtor certain notes executed by him, and amounting to several thousand dollars, which notes he had bought for nine dollars, that he kept the goods in the same store, and retained the same clerks, but changed the sign; and the jury found specially (1) that there was no fraudulent intent; (2) that there was actual delivery and a continuous change of possession of the goods; and gave verdict for plaintiff: *held*, that such verdict would not be reviewed by the court; the facts being capable of an innocent interpretation.

2. PLEADING—COMPLAINT—AD DAMNUM CLAUSE—CLAIM AND DELIVERY.

In an action of claim and delivery, a complaint which alleges that the plaintiff was owner and in possession of certain goods "of the value of \$4,000" is not deficient for containing no *ad damnum* clause. *Loeb v. Kamak*, 1 Mont. 153, followed.

3. PARTIES—EVIDENCE AS TO PARTY IN INTEREST.

Where, in an action of claim and delivery, it is not denied in the answer that the plaintiff is the real party in interest, and there is no issue on that point, questions put by the defendant, in order to show that plaintiff was not the party in interest, are properly disallowed.

4. EXCEPTION TO INSTRUCTIONS—FORM OF.

An exception to instructions, in general terms, as "the instructions asked for by the plaintiff numbered 1 to 16, inclusive," is insufficient, being too indefinite; following *Griswold v. Boley*, 1 Mont. 545, and *Gum v. Murray*, 6 Mont. 10, 9 Pac. Rep. 447. Each instruction should be objected to separately by number. *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. Rep. 759, distinguished.

Appeal from district court, Missoula county.

Sanders, Cullen & Sanders, for appellant. *Sharp & Nopton*, for respondent.

BACH, J. This is an action of claim and delivery. The defendant, who was sheriff of Missoula county, in answer to the complaint, admits taking the property; and he seeks to justify the taking by alleging that he seized the property under and by certain writs of execution issued upon judgments in favor of several different parties plaintiff, and against Savage & Reed, defendants; that Savage & Reed were plaintiff's vendors; and that the sale between Savage & Reed and the plaintiff was made without any consideration whatever, and was so made for the purpose "of defrauding and cheating and swindling the creditors" of Savage & Reed.

The testimony shows that the plaintiff bought several notes executed by Savage & Reed, amounting to several thousand dollars; that he paid nine dollars for the same; that thereafter he bought from Savage & Reed the goods mentioned in the complaint, for the price of \$6,000, the payment being made by surrendering the notes of Savage & Reed for that amount; that after such purchase and sale the plaintiff kept the goods in the store formerly used by Savage & Reed; that at the time of the sale he removed from the store the sign of Sav-

age & Reed, and substituted therefor a sign bearing his own name; that he employed the clerks who were formerly in the employ of Savage & Reed. The plaintiff further testified: "There was no understanding that I was to pay any one any part of what I collected on the notes. I was not to pay anything more than I had paid for the notes. They were placed in my hands without reserve."

The case was tried by the court and jury. Verdict was for the plaintiff, and judgment was entered in favor of the plaintiff. Thereafter, motion for a new trial was heard and denied. The appeal is from the judgment, and from the order denying the motion for a new trial.

Is the evidence in this case insufficient to justify the verdict? The facts in the above summary of the evidence are such that the jury might have found fraudulent intent, or fraud in fact, and some of that evidence might have justified the jury in finding that there was no actual delivery of the property to the plaintiff, or a continuous possession thereof by the plaintiff. The purchase of notes to the amount of several thousand dollars for the sum of nine dollars may have been a cover for fraud in fact, or it may have been a *bona fide* purchase of the notes by the plaintiff, who took the risk of collecting; he declares that he was the owner, and that there was no agreement between him and the original holders of the notes, or with any one else, to account for the overplus, if any. In the one case it might be evidence of fraud; in the other, there could not be fraud inferred. The fact that he kept the goods in the same store is evidence tending to prove fraud in fact, and also that there was no actual change of possession. The change of the sign was a question for the jury to consider, as was also the employment of the former clerks of the vendors. But these are facts merely tending to prove fraud and want of actual delivery. The jury passed upon those facts; and the jury, by their special verdict in this case, find—*First*, that there was no fraudulent intent; *Second*, that there was an actual delivery, and a continuous change of possession, of the goods. This court cannot review that verdict, there being evidence to sustain it.

The complaint alleges that the plaintiff was the owner and in possession of certain goods "of the value of \$4,000." The complaint contains no *ad damnum* clause. For that reason the defendant claims that the complaint does not state facts sufficient to constitute a cause of action. The judgment asked for the return of the property, or, in case return could not be had, then for the value thereof. It has been held by this court that an *ad damnum* clause is not an essential allegation. *Loeb v. Kamak*, 1 Mont. 153.

The next point relied upon is the refusal of the court to allow defendant's counsel to ask certain questions for the purpose of showing that the plaintiff was not the real party in interest. It is not alleged in the answer that the plaintiff was not the real party in interest; there was no issue as to that, and the questions were properly disallowed. *Savage v. Insurance Co.*, 4 Bosw. 2.

To the instructions given by the court at the request of the plaintiff the defendant took the following exception: "Now comes the defendant, and objects and excepts to giving to the jury the instructions asked for by the plaintiff, numbered 1 to 16, inclusive, and objects and excepts to giving of each and every one of them, for the reason that the same, and every one of them, are contrary to law, and not warranted by the evidence." Is this exception of such a nature that this court can consider it? There have been many decisions upon this point in this court, some of which seem to be conflicting, while as matters of fact they are in harmony with one another, and the seeming inconsistency arises from this cause: that the reasons given for the decision were not distinctly specified. The three leading cases in this territory are *Griswold v. Boley*, 1 Mont. 545, which has been cited in many others; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. Rep. 759, which arises on a different question, and which, while it appears of the former case, still holds that the exceptions were

properly taken in that case; and *Gum v. Murray*, in 6 Mont. 10, 9 Pac. Rep. 447, which approves *Griswold v. Boley*.

While considering this proposition, care must be taken to distinguish between these two questions, to-wit: (1) What is the proper manner of taking exceptions to instructions? (2) To what extent must the error complained of be particularly stated in an exception to an instruction? To the first of these questions the case of *Griswold v. Boley* and *Gum v. Murray* are specific and direct answers. To the second of these questions the case of *McKinstry v. Clark* is also a specific and direct answer; and, while it approves the doctrine as stated in the other cases, it holds that the manner of taking the exceptions in that case were in compliance with the rule as stated by those cases, and it also states what is a sufficient pointing out of the error complained of.

Now, let us consider these cases more in detail, commencing with the case of *McKinstry v. Clark*, and examine the points actually decided in that case. In order to carefully ascertain and point out the distinction, the transcripts in the last two cases have been examined.

In the case of *McKinstry v. Clark* the appellant saved his exception in this manner: He copied the first instruction given by the court at the request of the respondent, and at the end thereof he took his exception by adding the following words: "To the giving of which instruction the plaintiff excepted." He then copied the second instruction, and took his exception in the same mode and manner. Every exception which he took was taken in that way; in other words, he took a separate exception to each separate instruction. It was decided by the court (1) that the exceptions were properly taken as to manner; (2) that there was a sufficient specification of the error. We will consider the first point further when we consider the other cases. As to the second point decided: Section 281 of our Code defines an exception, and declares what an exception shall contain; and, as far as that definition is concerned, our Code differs from that of California, and from that of every state to whose decisions our attention has been called. Therefore, the rule of practice in that respect must be found in our own Code, without resort to authorities decided upon different and dissimilar provisions.

Section 281 of the Code provides: "The point of the exception shall be particularly stated, except as provided in relation to instructions," etc. It is plain that the intent of the legislature was that, in an exception to an instruction, the point of the exception need not be particularly stated; and so the court declared in *McKinstry v. Clark*. The propriety of the intent of the legislature becomes manifest when we consider how nearly impossible it would be for counsel, at the end of a protracted trial, to point out particularly in what respect the instruction complained of was contrary to the law, as applied to the particular case, or in what respect it was contrary to the evidence, and to reduce the whole objection in each of its particulars to writing. In some states these difficulties resulted in a rule declaring that instructions will be deemed to have been excepted to. In this territory those difficulties resulted in the declaration contained in section 281, that the point of the exception need not be particularly stated in an exception to an instruction.

We will now consider the first question: "In what manner must an exception be taken to an instruction?" and in connection therewith the cases of *Griswold v. Boley* and *Gum v. Murray*.

The manner of taking the exception in those cases is almost identical with that in the case at bar; and the difference between the manner of taking the exception in those cases and that used in *McKinstry v. Clark* is manifest. In the former cases, including the case at bar, there was one, and only one, exception to several instructions in gross; while in *McKinstry v. Clark* there was a separate exception taken separately to each separate instruction objected to. The first form or manner of taking exception was declared to be of no

avail, by the cases of *Griswold v. Boley* and *Gum v. Murray*. The second form was held to be good, both as to the manner of taking exception, and as to the manner of pointing out the objection, by the case of *McKinstry v. Clark*.

It might be sufficient to say that *Griswold v. Boley* and *Gum v. Murray* had settled the practice in this territory; but we will add a few authorities which, because they are founded upon provisions similar in nature to ours, are directly in point. In *Caldwell v. Murphy*, 11 N. Y. 416, the exception taken was, "to each and every part" of the charge. Held, that the exception was insufficient. In *Walsh v. Kelly*, 40 N. Y. 556, the form of the exception was, "to the charge made by the court, and each and every part thereof." It was admitted that some of the propositions in the charge were correct. Held, that such an exception did not raise any question for review on an appeal. In *Ayrault v. Pacific Bank*, 47 N. Y. 576, the form of exception was, to "the refusal to charge each of the requests submitted, except so far as embraced in the charge delivered;" and also another exception, "to every part of the charge which is inconsistent with such requests." Held, that the exception did not present any question for review. In *Beaver v. Taylor*, 93 U. S. 46, these cases are cited with approval. Mr. Justice HUNT delivered the opinion of the court, and on page 54 of the case the learned judge says: "If the entire charge of the court is excepted to, or a series of propositions contained in it is excepted to in gross, and any portion of it thus excepted to is sound, the exception cannot be sustained." See, also, *Yates v. Bachley*, 33 Wis. 185, and *Hopkins Manuf'g Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148, 11 N. W. Rep. 846.

To state the principle to be deduced from the foregoing authorities, and to state distinctly the decision in this court, it is held—*First*, that in order to save his objection to any or all of a series of instructions, the party objecting must save his exception separately to each separate instruction objected to, and must designate, either by number or by any other certain method, each one of the instructions to which he objects; so that the court may definitely know which instructions are objected to, and may consider each exception separately. See *Griswold v. Boley*, 1 Mont. 545; *Gum v. Murray*, 6 Mont. 10, 9 Pac. Rep. 447. *Second*, in an exception to an instruction, it is not necessary to point out the particular error complained of, whether it be that the same is against the law, or that it is against the evidence. See section 281, Code; *McKinstry v. Clark*, 4 Mont. 370, 1 Pac. Rep. 759.

In the case on review, the exception stated the ground of objection, to-wit, that the instructions "are against the law and the evidence;" and in this respect the objection was pointed out more particularly than is required by the Code, and by the interpretation of the Code, as stated in *McKinstry v. Clark*. There was only one exception, and the form or manner of taking the exception was "to each and every" of the 16 instructions. It is therefore too general. *Griswold v. Boley*, *Gum v. Murray*, and the other cases cited. It is possible that in other cases in this court instructions have been considered when the exception was of the same general nature. If there are such, the respondents did not call the attention of the court to them; but in this case the respondent invokes the rule in his behalf, and it must be enforced.

There being no error, the judgment, and the order denying the motion for a new trial, are affirmed, with costs.

CLARK v. TATE and another.

(*Supreme Court of Montana*. July 29, 1887.)

1. INFANTS—DISAFFIRMANCE OF CONTRACT—RETURN OF CONSIDERATION—EJECTMENT.

In an action of ejectment, defendant answered that he had purchased the land from plaintiff while the latter was a minor, and had paid him the price agreed

upon, and taken a written obligation from him to make a deed when he came of age, and had also taken a written obligation from plaintiff's father, for a valuable consideration, binding him to have a deed made by his son when the latter came of age. No other consideration passed on either agreement than the price paid for the lot. Held that, under these peculiar facts, plaintiff was not obliged, in order to maintain the action, to allege a return of the consideration, or inability to return it.¹

2. SAME—NOTICE OF DISAFFIRMANCE.

In an action of ejectment, brought in respect of land which plaintiff had contracted, when a minor, to deed to defendant, no notice of disaffirmance is required to be given before commencing the action.¹

3. SAME—RECOVERY FOR IMPROVEMENTS.

In such a case, where the defendant has made some improvements on the land during minority, and there has been no fraud or concealment on the part of the plaintiff, the former cannot recover from the plaintiff therefor, but must look to the father.

Appeal from Third district, Gallatin county.

R. P. Vision and Geo. F. Shelton, for appellants. *Luce & Armstrong*, for respondent.

MCCONNELL, C. J. This is an action of ejectment. There was judgment upon the pleadings for the plaintiff, and the case is brought here for alleged errors of law apparent upon the judgment roll. The appellants disclose in their amended answer the fact that they purchased the land in controversy of the plaintiff when he was a minor, and they allege that they paid him the price agreed upon, took a written obligation from him, in which he pledges his honor that he will make them a deed when he becomes of age; and also took a written obligation from C. L. Clark, the father of respondent, binding him to have the deed made by his son, when he becomes of age.

1. The first error assigned is that the plaintiff, having received the consideration of \$150, must restore it before he can sue, or, if he spent the money, and cannot restore it, he must aver in his complaint this fact. While the authorities do not agree on this subject, we think that the sound rule is, as laid down by Chancellor Kent, as follows: "If an infant pay money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword." 2 Kent, Comm. 240. In this case the contract was executed, so far as the appellants are concerned, but executory on the part of the respondent. He was to make a conveyance when he became of age, and this he has never done. He now, after attaining his majority, disaffirms his contract, by suing for the possession of the land sold, and does not pay the consideration back, nor give any reason why he does not. Mr. Tyler, in his work on Infancy and Coverture, page 80, section 37, says: "If the contract has been executed by the adult, and the infant has the property or the consideration received, if, at the time he attains full age, he then repudiates the transaction, he must return such property or consideration, or its equivalent, to the adult party." *Bailey v. Barnberger*, 11 B. Mon. 113; *Womack v. Womack*, 8 Tex. 397; *Grace v. Hale*, 2 Humph. 27; *Smith v. Evans*, 5 Humph. 70.

But the facts set out in this case, in appellant's answer, are peculiar. In the original answer they allege that the consideration was paid to plaintiff, or his father. In their amended answer they allege it was paid to the father; and in their last amended answer,—which amendment was made after judgment,—they aver it was paid to plaintiff. But we can only look to the last amended answer in reviewing this case, and the exhibits thereto. But what ground is there for requiring return of the \$150? C. L. Clark, the father of

¹See note at end of case.

the respondent, entered into the obligation aforesaid, 'in consideration of said \$100 so paid as aforesaid.' Now, if this money was paid to the infant, as recited in the contract, and averred in the last answer, how was it a consideration inuring to the benefit of C. L. Clark? Or how was it for the benefit of Benj. L. Clark, if it inured to his father's benefit? But the defendants have sworn that C. L. Clark became guarantor for a valuable consideration. The \$150 was the only money paid. Hence it went to the father, and not to respondent; and respondent is not estopped to show, or say by the recital in the contract, that it was paid to him. Bigelow, 245, 246, and other authorities cited. Besides, the appellants knew they were dealing with a minor, and undertook to protect themselves by taking the obligation of the father, to see that his son should make the deed when he became of age. While we agree with the counsel for the appellants that a minor should restore the consideration, if he can, before he is heard to disaffirm his contract, yet, under the peculiar facts shown by the pleadings of the appellants, we do not think it ought to be required in this case.

The next error complained of is that the plaintiff below should have given notice of his intention to disaffirm before he brought his suit. We do not think any notice of disaffirmance necessary before bringing suit. It is said that the act of disaffirmance must be of such a character as to be as solemn and notorious as the original contract. Bac. Abr. 136; *Lessee of Tucker*, 10 Pet. 58. We do not know of any more solemn and notorious way to disaffirm than by bringing a suit to recover the property. Tyler, Inf. 73, § 31; *Walsh v. Young*, 110 Mass. 396.

It is claimed by appellants that "the judgment rendered in this case has failed to recognize the value of the improvements placed on the land by the defendants, or to permit any recoupment or set-off by them against the damages claimed by plaintiff." The respondent has not asked any damages; neither does the judgment give him any. It is a hardship upon the appellants to lose their improvements, but they acted with their eyes open, and dealt with respondent at arms-length. There was no fraud or concealment on his part, nor do the pleadings allege that any of the improvements were made after he became of age. They made a contract with him, which they knew he could disaffirm after he became of age. They must look to C. L. Clark for relief upon his undertaking.

Let the judgment be affirmed, with costs.

NOTE.

INFANCY—DISAFFIRMANCE OF CONTRACT. A warranty deed of certain premises, executed after the grantor becomes of age, is a disaffirmance of a deed for the same premises executed by him to another, while an infant. *Corbett v. Spencer*, (Mich.) 30 N. W. Rep. 385; *Haynes v. Bennett*, (Mich.) 18 N. W. Rep. 539; *Dawson v. Helmes*, (Minn.) 14 N. W. Rep. 462; *Vallandigham v. Johnson*, (Ky.) 3 S. W. Rep. 173. To give effect to the disaffirmance of an infant's deed of land, it is not necessary that his grantee should be placed *in statu quo* by the restoration of the consideration, or otherwise. *Dawson v. Helmes*, (Minn.) 14 N. W. Rep. 462; *Vallandigham v. Johnson*, (Ky.) 3 S. W. Rep. 173.

See, also, respecting restitution by an infant upon disaffirmance of his contract, *House v. Alexander*, (Ind.) 4 N. E. Rep. 891; *Miller v. Smith*, (Minn.) 2 N. W. Rep. 942; *Combs v. Hawes*, (Cal.) 8 Pac. Rep. 597.

In *Michigan*, no necessity exists for the infant to make entry before giving the deed of voidance, or before the bringing of the suit of ejectment. *Haynes v. Bennett*, 18 N. W. Rep. 559.

FIRST NAT. BANK OF HELENA v. MCANDREWS and others.

(*Supreme Court of Montana*. July 29, 1887.)

SALE—VESTING OF TITLE—DELIVERY TO CARRIER.

Where a mining company agreed with a bank, in consideration of advances, to ship to the bank its products of bullion, which were to be delivered to certain com-

mon carriers as the agents of the bank; the proceeds thereof, upon a sale being made, to be credited to the company on account: *held*, that a delivery to the common carrier in accordance with this agreement vested the title to the property in the consignee; and such property, while in the hands of the carrier, was not subject to attachment at the instance of creditors of the consignor.¹

Appeal from district court, Second district, Deer Lodge county.

Toole & Wallace and Sanders & Cullen, for appellant. *T. L. Napton and Robinson & Stapleton*, for respondents.

McLEARY, J. The complaint in this case was filed on the third day of June, 1879. It is an action of claim and delivery, which was brought to recover the possession of five boxes of silver bullion shipped to the bank by the Northwestern Company of Philipsburg, and seized, *en route*, by virtue of an attachment at the suit of Larrabee against the Northwestern Company. The case was once before brought to this court on appeal of the defendants, and will be found reported in 5 Mont. 325 *et seq.*, 5 Pac. Rep. 879.

The findings of the court on the first trial were as follows: "(1) That the bullion described in plaintiff's complaint was produced from the Northwestern Company, and shipped by it to Helena, consigned to plaintiff. (2) That the same was seized by defendants McAndrews and Smith, under a writ of attachment, while in transit, in an action by defendant Larrabee against the Northwestern Company, and that defendants McAndrews and Smith were, at said time, the sheriff and deputy-sheriff of Deer Lodge county, Montana, and that all proceedings to obtain said writ were regular, and that judgment was entered in favor of said Larrabee against said Northwestern Company, in said action, and defendants held said bullion by virtue of said writs of attachment. (3) That at and prior to the shipment of the bullion in controversy in this case there was an express contract between plaintiff and the Northwestern Company that, in consideration of advances to be made by plaintiff to said company, in carrying on its mining operations, said company would ship to plaintiff its products of bullion, which were to be credited to its account. (4) That at the time said bullion was shipped, said plaintiff had advanced to said company, upon the faith of said company's contract, about the sum of \$6,000, which stood as a charge against said company, and is yet unliquidated and unsettled. (5) That said bullion was, in accordance with the terms of said contract, billed, shipped, marked, and consigned to said plaintiff, and placed in possession of, and received by Gilmer & Salisbury, common carriers of freight and express matter, upon a contract at special rates, to be paid at Helena, Montana, by plaintiff, upon receipt of said bullion by it at said place; said charges for freight to be charged to the account of said company. (6) That said bullion was to be credited to the account of said company, upon a sale thereof to plaintiff, and that said account was a running account. (7) That after said bullion was so shipped and consigned to said plaintiff, and while in possession and custody of said carriers, *en route* to its destination, the same was attached at the suit of Larrabee, and levied upon by his co-defendants, as the officers charged with the execution of said process, on the thirty-first day of May, 1879, at Deer Lodge city, Montana. (8) That said property was, at said time, of the value of \$3,000, and was and still is detained by defendants."

On these findings, this court, at its January term, 1885, on the appeal of the present respondents, reversed the judgment of the court below, and remanded the case for a new trial. On the second trial in the district court, the same findings were made as the first, with these additional, to-wit: "(9) That said plaintiff had in no other way, by purchase or otherwise, become the owner of or acquired any interest in said property. (10) There was an ex-

¹ Respecting delivery to a carrier as vesting title on a sale of chattels, see *Billin v. Henkel*, (Colo.) 13 Pac. Rep. 420, and note.

press agreement between the Northwestern Company and the plaintiff (the First National Bank of Helena) that the bullion should be delivered to Gilmer & Salisbury, as agents for the bank, and that the First National Bank of Helena was to contract with Gilmer & Salisbury accordingly. (11) That such contract was made with said Gilmer and Salisbury, and the bullion delivered to them under it, and the First National Bank of Helena notified by mail of such delivery."

It will be observed, on an examination of this case in 5 Mont. 325 and 5 Pac. Rep. 879, that this court decided in substance as follows, (quoting from the syllabus:) "The transmission of a bill of lading by the consignor to the consignee is a delivery of the possession of the goods covered by it, and the title to the property shipped thereby passes from the former to the latter. But the mere shipment of goods, in pursuance of a contract between the consignor and consignee, whereby the former was to pay the freight, and the latter, after he had sold the goods, was to credit the proceeds to the account of the consignor, does not vest the title to the property shipped in the consignee, in the absence of a bill of lading, or notice of the shipment to him." *First Nat. Bank v. McAndrews*, 5 Mont. 325, 5 Pac. Rep. 879.

Let us notice the points of difference in the facts of this case as found by the court at those two trials. These can be readily seen from findings 9, 10, and 11, made at the second trial, in addition to the eight made at the first trial. The ninth finding is negative in its character, and may be noticed later on in the course of this discussion. The tenth finding adds a new feature to the case, in showing the express agreement between the mining company and the bank that the bullion should be delivered to the common carriers, Gilmer & Salisbury, *as the agents of the bank*, under a contract to be made between the bank and the carriers. The eleventh finding shows that such a contract was made between the bank and the carriers, *and the bullion delivered to them under it, and the bank was notified by mail of such delivery*. Do these additional facts, found by the court below, take the case out of the range of the opinion rendered and recorded in 5 Mont. 325 and 5 Pac. Rep. 879? That opinion proceeded on the following defects in the proof, as the case came up from the first trial: (1) No bill of lading was made and transmitted by the consignor to the consignee. (2) No notice of the shipment was given by the consignor to the consignee. (3) The advancements do not appear to have been made upon the faith of a particular consignment. (4) There was no acceptance and delivery of possession. (5) No sufficient authority appears in the carriers to accept the goods on behalf of the bank.

As to the two defects mentioned above, it clearly appears from the opinion of the court that the proof of either would suffice, as one is, for the purposes of this case, equivalent to the other. The opinion of Chief Justice WADE, in reference to these points, uses the following pertinent language: "If a bill of lading had evidenced the intent and purpose of the consignor in shipping the bullion, or if this intent had been evidenced by any other conclusive unconditional act, such as notice of shipment to the consignee, then a delivery to the carrier, in pursuance of such a bill of lading or notice, would have vested the title in the consignee." 5 Mont. 331, 5 Pac. Rep. 882. In the eleventh finding quoted above, we see that this notice was given by mail of the shipments or of the delivery by the consignor of the bullion to the carriers, under the contract constituting the carriers the agents of the bank. This certainly supplies the first and second defects in the proof pointed out by this court on the former appeal.

As to the third of those defects, it seems, by the first finding, that the mining company was, in consideration of the advancements, to ship to the bank *its products of bullion*. This was broad enough to cover this particular consignment; but, if it were not, on the second trial the court found, in its tenth finding, that the bullion was delivered to the carriers in accordance with the

contract made concerning the advancements; and surely it might be said that the advancements were made on this particular consignment as well as any other, or in connection with others; and it appears from the findings that the value of this cargo was worth about one-half of the money advanced. But the third defect was only incidentally alluded to in the opinion of the court on the former appeal, and it does not appear to have entered into the reversal. And it is also classed as an alternative to the first and second requisites mentioned; so that the finding of the second to exist dispenses, not only with the first, but the third also. So, for these various reasons, the failure to prove that the advancements were made upon the faith of this consignment, and no other, would not be fatal to the plaintiff's case.

As to the fourth defect in the proof pointed out by the former chief justice, it seems, from the tenth and eleventh findings, to have been amply supplied. There was a delivery by the consignor to the carriers *as agents for the bank*, under a contract made between the bank and the carrier, in pursuance of the contract made by the mining company and the bank. A delivery to a special agent appointed to receive the goods, and a taking and carrying away by such agent, is certainly not only a delivery to the principal, but an acceptance by the principal of the goods delivered. Were it not so, there would be an end to all transactions by agents; and the maxim of *qui facit per alium facit per se* would never have become household words in courts of justice.

The tenth and eleventh findings also supply the fifth and last defect in the proof appearing on the former appeal; for it seems that, on the second trial, a specific contract was shown between the plaintiff and Gilmer & Salisbury, under which the bullion was to be delivered to them *as agents for the bank*, and it was so delivered. If it was so delivered, it must, of course, have been accepted. The one implies the other; they are correlative terms. It seems that the plaintiff took counsel from the opinion in this case, and on the second trial conformed its proof to the requirements of this court.

As to the ninth finding quoted above, there is a seeming contradiction between it and the two following, which we must harmonize if we can. This can easily be done by reading the ninth with reference, not only to those preceding it, but also to those following it. And this is a proper method of construction, for the findings must be taken as a whole, in order to properly understand any one of them. The ninth finding would then mean that the plaintiff had not, by purchase or otherwise, become the owner of or acquired any interest in the bullion, except as pointed out in the other 10 findings made by the court. This construction makes this negative finding limit all the other affirmative findings, and is equivalent to saying that they express all that was proven on the subject of the interest or ownership of the plaintiff in the property involved in this controversy. Such seems to us the only legitimate and proper construction of the language used by the trial court.

Looking at this case in the light of the former opinion of this court, and the authorities quoted and cited therein, and taking into consideration the additional facts found by the court on the second trial, and applying these facts to the principles of law announced in those authorities, we must yield to the irresistible conclusion that the court below erred in rendering judgment for the defendants, who are here respondents, on the findings of fact made herein. It is objected by the respondents, however, that the findings of fact do not support the plaintiff's case as set out in its complaint; that the plaintiff brings this action as the absolute owner, and that the findings, construed in their most favorable light, only show a qualified ownership by the bank, in the nature of a lien for advances. Nothing is said about the proof on the trial, and we have nothing here to show us what the proof might have been, except what may be inferred from the findings made by the court. But it is provided in our statute that "a variance between the proof on the trial and the allegations in the pleadings shall be disregarded as immaterial, un-

less the court be satisfied that the adverse party has been misled to his prejudice thereby." Rev. St. p. 180, § 757, div. 1. To the same effect is section 110, p. 60, Rev. St. If, then, the variance were material, it will be disregarded, even in the trial court, unless the adverse party has been prejudiced thereby. We can see no prejudice to the respondents. Then, if we could inquire into the proofs, which are not before us, to see if there were a variance between them and the pleadings, we could not affirm this case on that ground alone. The objection should have been made in the court below, where the plaintiff could have had an opportunity to amend. The only similar objection that has ever been successfully taken for the first time in this court is where the complaint did not state facts sufficient to constitute a cause of action. Such is not the case with these pleadings. But the cause of action in this case is really as set out in this complaint, the wrongful taking and detention of the bullion described; and the findings are sufficient to justify and support a judgment rendered on this complaint. All that is necessary for the facts to show are the possession, and the right to the possession, in the plaintiff at the time of the wrongful taking by the defendants. So this objection avails nothing.

Then let us examine the case independently of the opinion rendered by this court on the former appeal, and apply the law to the facts set out in the findings, as if it were a case of first impression in this tribunal, and see what will be the result. The facts, as condensed from the findings into a narrative form, would be as follows: The First National Bank of Helena and the Northwestern Company made an express contract whereby the bank was to make advances to the mining company, in carrying on its mining operations, and, in consideration thereof, the mining company would ship to the bank its products of bullion, which were to be credited to its running account, upon a sale thereof being made, after payment of freight; and that the bullion was to be delivered to Gilmer & Salisbury as agents for the bank, and was so delivered under a contract made by the bank with them to that effect, and the bank was notified by mail of the delivery made to its agents; that these five boxes of silver bullion were produced by the Northwestern Company, and, in accordance with the contract, billed, shipped, marked, and consigned by the mining company to the bank, and placed in possession of the carriers and received by them, upon a contract at special rates, to be paid by the bank, and charged to the mining company; that up to the date of shipment the bank had advanced to the mining company \$6,000, and this cargo of bullion was worth \$3,000; that while the bullion was in possession of the carriers, under the contract stated above, and being transported from Philipsburg to Helena, it was attached at the suit of Larrabee, and levied upon by McAndrews at Deer Lodge; and the defendants hold the property under said writ of attachment.

Under this state of facts the title passed to the consignee, the appellant now before the court. *Gibson v. Stevens*, 17 Curt. 635. And certainly there is nothing lacking to complete the title of the plaintiff in the bullion. The price was prepaid; the delivery was complete. It is true, the exact amount which the particular shipment was to be valued at was not fixed. That remained to be determined by the price which the bank could obtain for it, after deducting the freight from Philipsburg, but this was easily ascertained, and the sale of the bullion by the bank, and the actual entry on the books of the price to the credit of the mining company, was not necessary to pass the title. Suppose the stage had been robbed in passing over the continental divide between Philipsburg and Helena, and the bullion carried off by the robbers, upon whom would the loss have to fall,—the bank, or the mining company? Inasmuch as the delivery was complete, made by the mining company to the carriers under a special contract between them and the bank making them its agents to receive the bullion, and the bank was notified of this, then the property was thenceforth at the risk of the bank, and all losses in transit would

have to be borne by it. A credit would have to be entered in favor of the mining company equal to the market value of the bullion, less the freight.

But it is not necessary to the reversal of this judgment that the appellant should have a perfect title to the bullion seized. If it had the possession, and the right to the possession, the seizure of the property by the respondents was wrongful, and cannot be maintained. Suppose the goods had been seized by respondents on a writ of attachment issued against some party not connected with this case, and the Northwestern Company had brought their action of claim and delivery, it could not have been maintained under the facts found by the court; for it has parted with all right to the bullion. It could not even stop it *in transitu* on the bankruptcy of the consignee. *Walsh v. Blakely*, 6 Mont. 199, 9 Pac. Rep. 809. It could not countermand the orders given to the carrier for its delivery. All it could do would be to demand that an amount of money equal to the value of the bullion, less the freight, should be placed to the company's credit on the books of the First National Bank.

This supposed case is entirely similar to the case of *Wetzel v. Power*, decided by this court at its January term, 1884, (5 Mont. 214, 2 Pac. Rep. 338,) in which it is held that "goods in the hands of a common carrier, sent by the consignor to the consignee, under an arrangement that the consignee shall receive the same, pay the freight thereon, and apply the proceeds of the same thereof in payment of advances already made, in the ordinary course of trade, are in the constructive possession of the consignee, and he alone can maintain an action for damages for any wrongful taking of the same from the hands of the common carrier." See, also, *Hutch. Carr.* § 135; *Halliday v. Hamilton*, 11 Wall. 563; *Gibson v. Stevens*, 8 How. 384. Then the Northwestern Company would have been consulted if it had brought such a suit, just as *Wetzel* was in the case cited. The consignee alone could bring such an action, and prevail therein. Then, certainly, the respondents here, having no better right to these goods than the attachment debtor, cannot recover on the strength of their writ and levy, when the alleged owner itself could fail.

But aside from all principles of the law applicable to common carriers and consignors and consignees, with or without bills of lading, this case can rest on the express contracts found by the court, the fact of the advances of the money and the delivery of the bullion to the agents of the appellant; and there is no escape from the conclusion that the respondents have no right to detain the property attached, and that the plaintiff should have prevailed in this action.

The court below erred in not rendering judgment in favor of the appellant on the findings of fact made herein; wherefore the judgment of the court below is reversed, and judgment here rendered on the findings of the court below, for the plaintiff, the First National Bank, against the defendants, who are the respondents hereinbefore named, for \$3,000 and interest from the thirty-first day of May, 1879, at the rate of 10 per cent. per annum, and all costs of this court and the court below.

TERRITORY v. HART.

(*Supreme Court of Montana. July 20, 1887.*)

1. GRAND JURY—IMPANELING—RIGHT TO APPEAR AND OBJECT.

Under Rev. St. Mont. §§ 119-122, div. 3, defendants who are in jail, or under bond to answer indictments, are permitted to be present in court on the organization of the grand jury, and to interpose challenges to the panel and to individual grand jurors. but, this right depending upon statute, a defendant cannot be permitted to ask individual grand jurors whether they had formed an unqualified opinion as to the guilt or innocence of the defendant, or whether they had any bias or prejudice against him, these questions not falling within the causes of challenge specified in the statute.

2. INDICTMENT—MOTION TO VACATE—EXAMINATION OF GRAND JURORS.

Under Rev. St. Mont. §§ 150-152, div. 3, providing that no indictment can be found except on the concurrence of at least 12 members of the grand jury, and requiring a bill so found, and not otherwise to be indorsed by the foreman, "a true bill," such indorsement is simply *prima facie* evidence of such concurrence, and the accused, on motion to vacate the indictment, has the right to ask the individual members of the grand jury as to whether or not 12 of their number had voted for the finding of the indictment.

3. JUROR—OBJECTION TO ALIENAGE—PEREMPTORY CHALLENGE.

When an accused, objecting to the alienage of a juror, fails to exercise the right of peremptory challenge, such disqualification is thereby waived.

4. HOMICIDE—INSANITY AS A DEFENSE—ARGUMENT OF COUNSEL.

On indictment for murder, where the defense is insanity, the court may in its discretion permit counsel for the prosecution to read to the jury decisions of English and American courts on such defense.¹

Appeal from district court, First district, Jefferson county.

Campbell & Duffy, for appellants. *Wm. H. Hunt* and *Jas. R. Joyce*, for respondents.

MCLEARY, J. This is a case of murder in the first degree, in which the defendant appeals from the sentence of death. He relies upon four alleged errors for a reversal of this judgment, which may be stated as follows: (1) The court refused to permit the defendant to interrogate the grand jurors, at the time they were being impaneled, as to whether they, or either of them, had formed an unqualified opinion of the guilt of the defendant, in regard to the killing of Pitts, and as to whether they, or either of them, had any bias or prejudice against the defendant. (2) The court should have permitted the defendant to inquire of the individual members of the grand jury, on a motion made to vacate and set aside the indictment, whether or not 12 of their number had voted for the finding of the indictment. (3) The court should have sustained the challenge of the defendant to the trial juror Julius Doniothy, on account of his being an alien, who had only declared his intention of becoming a citizen of the United States, and had not been admitted to citizenship. (4) The court erroneously permitted the counsel for the prosecution, in the course of his argument, to read decisions of the English and American courts to the jury, on the question of insanity. (5) Exceptions were taken to the instructions of the court in regard to the definition of murder and the reasonable doubt, but these were withdrawn by counsel in his argument.

These several alleged errors will be considered in their order as presented in the briefs.

1. The statutes of Montana permit defendants, who are in jail, or under bond to answer indictments, to be present in court on the organization of the grand jury, and to interpose challenges to the panel, or to individual grand jurors, who may be objectionable. Rev. St. Mont. §§ 121, 122, div. 3. But the causes of challenge are distinctly specified in the statute. A challenge to the panel must be based on the ground "that the same was not drawn in accordance with the essential provisions of the law of this territory." Rev. St. Mont. § 119, div. 3. A challenge to an individual grand juror may be interposed for any one of five causes, to-wit: "(1) That the juror is a minor; (2) that he is an alien; (3) that he is insane; (4) that he is the prosecutor on the charge against the defendant; (5) that he is a witness on the part of the prosecution, and has been served with process, or is bound by a recognizance as such." Rev. St. Mont. § 120, div. 3.

The questions which defendant proposed to ask the individual grand jurors do not fall within the causes of challenge specified by statute, and were properly excluded. The statute is liberal, fair, and just; and its provisions can-

¹See note at end of case.

not be extended by the court. In the absence of the statute permitting him to do so, the prisoner would not be allowed to inspect the grand jury before whom his case would have to be examined, much less to interrogate them as to their qualifications to act as such. The defendant has the right, when the questions have not already been put, to ask the questions falling within the scope of the statute, but no others. These questions might be necessary, in order to enable the defendant to interpose a proper challenge, but a question put with any other purpose is improper.

The question as to rights of persons to challenge individual grand jurors, on the grounds of personal bias, has been variously decided in different states, according to their several statutes; and an eminent text-writer uses the following pertinent language in regard thereto: "But as our grand juries are generally drawn and impaneled to serve in all cases which may require this sort of investigation during a specified period of time, there are reasons why this sort of challenge should not be permitted, growing out of the inconvenience it would produce, and why, therefore, the objection should be restricted to the plea in abatement, or even be disallowed altogether." 1 Bish. Crim. Proc. § 764, and note 5. This exposition of the law is virtually supported in the following well-considered cases: *State v. Chats*, 9 Baxt. 197; *Kemp v. State*, 11 Tex. App. 198, 199; *State v. Millain*, 3 Nev. 423, 424; *State v. Hughes*, 1 Ala. 655.

In Massachusetts, in 1811, a grand jury was being impaneled, and Story, as *amicus curiae*, stated that a certain person had been accused of the crime of murder, and that John Tucker was a neighbor of the accused, had originated the complaint against him, and had most probably formed a strong opinion of his guilt; and that it was therefore unsuitable that he should be sworn of the grand jury. The court, on consideration, said: "If objections of this nature were to be received, the cause of public justice would be greatly impeded. Those who live in the vicinity of persons accused are probably better knowing than others to the general character of the parties and of witnesses; and on this account are perhaps the more proper members of the grand jury, who will derive useful information from their knowledge. If, however, any individual juror should be sensible of such a bias upon his mind, that he could not give an impartial opinion, in any case under the discussion of the jury, such juror would feel it his duty, as it would be his right, to forbear giving an opinion, or perhaps to withdraw himself from the chamber while the discussion continued." *In re Tucker*, 8 Mass. 286.

In the trial of Aaron Burr, the right of challenging grand jurors, on account of bias, was claimed and allowed by Chief Justice MARSHALL, without opposition; but the practice does not seem to have been generally followed, even in the federal courts.

In a late work on Juries, after a very exhaustive discussion of the whole subject, the learned authors say: "In view of the fact that the right of challenge, either to the array or to the poll, did not exist at common law on the part of the prosecution or the accused, it plainly follows that challenges can be taken only for causes specified in the statutes, and by the persons therein named, and the statutes of some states expressly so provide." Thomp. & M. Juries, § 519.

We have quoted thus largely from the authorities, in order to show that the practice adopted in Montana, though it may differ from that of Pennsylvania and some other states, accords with that generally prevailing throughout the Union, and is supported by the great majority of authority.

2. As to the second alleged error presented by the appellant, there is no territorial statute which explicitly gives the defendant the right to question the grand jury as to how many of their number concurred in finding the indictment. It is provided in the statutes that "no indictment can be found without the concurrence of at least 12 grand jurors;" and it is enacted in the same

section that "when so found, and not otherwise, the foreman of the grand jury shall indorse it thus: '*A true bill.* ———, Foreman.'" Rev. St. Mont. § 150, div. 3. This indorsement is made, by the law itself, at least *prima facie* evidence that 12 or more of the grand jurors have concurred in finding the indictment. And it is further provided that, "where there is not a concurrence of twelve grand jurors in finding an indictment, the foreman shall certify, under his hand, that 'no true bill was found,' " (Rev. St. Mont. § 151, div. 3;) and, further, when indictments are found, the law requires that they should be brought into court by the grand jury, and in their presence presented to the court, and filed by the clerk in open court. Rev. St. Mont. § 152, div. 3.

It is certainly the plain requirement of the statute that at least 12 of the grand jury should concur in finding the indictment. A charge concurred in, and presented by a less number, is not a legal indictment, and no one should be held to answer for a felony thereupon. The statute law points out methods by which this concurrence shall be ascertained, but are these the only methods for ascertaining so important a fact? In some of the districts it is the practice for the trial judge to ask of the grand jury, when an indictment is presented, whether or not 12 or more of their number concurred in finding the same. In our view, this practice is proper and commendable. Unless the means pointed out by the statute are the only means by which the concurrence of the required number in the finding of the indictment can be ascertained, there certainly can be no objection to the prisoner interrogating the several grand jurors under oath as to this matter. It is not one of the things which they are sworn to keep secret. The fact is certified to by the foreman when he indorses the indictment "A true bill." It is publicly, though tacitly, declared by each individual grand juror, when the indictment is filed in his presence, and the filing thereof read by the clerk in open court. But it is possible, in spite of all these precautions, that mistakes may occur; for, unless the accused is in jail, the style of the case indorsed on the indictment is not read, and where several indictments are prepared and submitted to the grand jury at the same time, out of a dozen, one which has been ignored might accidentally be indorsed by the foreman, and presented to the court as a true bill. Such mistakes and accidents should be corrected. We are, then, after careful consideration and mature deliberation, of the opinion that the bringing into court of the indictment properly indorsed, and the filing of the same by the clerk in the presence of the grand jury, are only *prima facie* evidence of the concurrence of 12 or more of the grand jurors in the indictment, and that the accused has the right, before pleading thereto, on a motion to vacate the same, properly made, as in this case, to require the individual grand jurors to be interrogated, under oath, as to whether or not 12 or more of their number concurred in finding the indictment. This may be necessary, in capital cases, to prevent fatal errors, and we believe this position to be fully sustained by the preponderating weight of authority in the United States. It is laid down as an elementary principle, by Greenleaf in his excellent work on Evidence. He says: "Grand jurors may also be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact." 1 Greenl. Ev. p. 285, § 252.

More than 60 years ago the supreme court of Maine, in discussing this question, used the following language: "All the authorities concur that, unless twelve good and lawful men of the grand jury do agree in finding the bill, the indictment is void and erroneous. Now every grand jury consists of twelve men, at least; and, according to our practice, it never does appear whether a greater or less number concurred in finding the bill, because there is no reference to the number in the caption. That twelve did concur is matter of inference merely, from the fact that the bill is regularly signed by the foreman, and delivered into court in the usual manner. Now, for courts to be sol-

emly resolving, and legal writers of the first eminence to be gravely stating, as matter of settled law, that, if twelve at least of the grand jury do not concur in finding the bill, the indictment is void and erroneous, seems to be very idle, to say the least of it, if the party interested is not permitted to suggest the fact, and the court are precluded from inquiring into the subject, or allowing the party to avail himself of the error. * * * How any juror voted is a secret no juror is permitted to disclose; but whether twelve of their number concurred in finding a bill is not a secret of the state, their fellows, or their own. It is a fact they of necessity profess to disclose every time they promulgate their decision upon any bill laid before them. Accordingly we are of opinion that it is proper, under the circumstances of this case, and on the suggestion made by the defendant, for the court to inquire into the truth of the matter laid before them." *State v. Symonds*, 36 Me. 130; *People v. Shattuck*, 6 Abb. N. C. 35; *Low's Case*, 4 Me. 452, 453.

We do not believe that this right has ever been denied to the accused when properly demanded by him, though under various statutes different modes of presenting the objection have prevailed. It is true there is one case, decided in Texas during the stormy days of reconstruction, by the military supreme court, in which an accused person was denied this right; but the opinions of that court have ceased to be quoted as authority, and are said to be decisions only of the cases therein tried. The opinion does not quote a single authority to sustain it, and does not seem to us to be well founded in reason. We refer to the case of *State v. Oxford*, 30 Tex. 429. The following provisions are found in our criminal practice act, and are more or less applicable to the question under consideration:

"Sec. 204. At the time the defendant shall be required to answer the indictment he may move to set the same aside, or he may demur or plead thereto.

"Sec. 205. The indictment shall be set aside by the court in which the defendant is arraigned, upon his motion in either of the following cases: *First*, when it is not found indorsed, or has not been presented as prescribed by this act; *second*, when the names of the material witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed thereon; *third*, when any person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration, except those allowed by law."

"Sec. 207. The motion to set aside the indictment must be in writing, subscribed by the party defendant, or his attorney, and must specify clearly the ground of objection to the indictment. If such motion is not made before the defendant demurs or pleads, the grounds of objection to the indictment, which might be made in such manner, shall be deemed waived."

"Sec. 217. There may be three kinds of pleas to an indictment: A plea of —*First*, guilty; *second*, not guilty; *third*, a former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty."

It will be seen that this objection to the indictment cannot be presented by a plea thereto, for it does not fall within section 217, just quoted. Then it must be presented by motion. It is true that such a ground for setting aside an indictment is not mentioned in section 205, quoted above, but we do not conceive that the enumeration of the grounds made in that section is intended to be exclusive; and this objection being of the same general nature, though far more serious than any of those mentioned, may be made at the same stage of the proceedings, and in the same manner. This motion was properly made by defendant before he pleaded to the indictment, and in our opinion it should have been sustained. It may be that the motion could not have been supported by proof; but the defendant ought to have had an opportunity of making an effort to verify it by the evidence of the only persons who could testify in regard to the allegations therein contained, and these

were the grand jurors themselves. Such an opportunity was denied him by the ruling of the court, and we cannot say it has not operated to his prejudice; especially in capital cases, when he has been convicted and sentenced to the punishment of death.

If the defendant had omitted to make this motion until after he had demurred or pleaded to the indictment, then, under section 207, above quoted, he would have been deemed to have waived the objection, and the *prima facie* presumption that 12 grand jurors had concurred in finding the indictment would have become conclusive, and the question, if raised, could not have been considered. But such is not the case in the record here presented. A vital objection to the indictment (if sustained by evidence,) was presented at the proper time, and in the proper manner, and the court refused to hear evidence, and disregarded the objection, which is an error requiring the reversal of the judgment in this case.

8. In regard to the challenge interposed to the juror Doniothy, on account of alienage, we must again refer to the statute of this territory which prescribes the qualification of trial jurors. The statutory grounds of challenge are found in the Laws of the Twelfth Session, p. 54, amending section 286, div. 3, Rev. St. The qualifications of persons are found in section 780, div. 5, Rev. St., on page 571. This latter section (as amended by the Twelfth Session, p. 57,) reads as follows: "Any male person, of lawful age, who is a citizen of the United States, or who has declared his intention to become such, who is a tax-payer, and a *bona fide* resident of the county, shall be competent as a grand or trial juror." The appellant admits that the trial juror was qualified under the statute, but claims that the territorial statute is in contravention of the constitution and laws of the United States, and consequently void. Section 1851, Rev. St. U. S. provides that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. * * *" If the article quoted from the territorial statutes is inconsistent with the constitution of the United States, it must be with one of the following provisions, to-wit: "The trial of all crimes, except in cases of impeachment, shall be by jury." Article 3, § 2, Const. U. S. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of war or public danger." Article 5, Amends. Const. U. S. "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc. Article 6, Amends. Const. U. S.

These are the provisions of the federal constitution on the subject of juries in criminal cases. If there are any statutes of the United States inconsistent with the statute of Montana above quoted, they have not been called to our attention. But it is insisted that the word "jury," in the constitution of the United States, means such a jury as was required by the common law at the date of the ratification of the constitution by the nine states, which gave it the force and effect of fundamental and supreme law; and it is further contended that a jury at that date meant 12 men, possessing the necessary qualifications, properly selected, and sworn to try the case; and that at that time alienage was a disqualification at common law; and it is contended that as the statute permits a person who has not become a citizen of the United States to serve as a juror, it is, thus far at least, in contravention of the constitution of the United States, and void. In support of this view, we are referred to 3 Bl. Comm. 361; 4 Bl. Comm. 349, 350; *State v. McClellan*, 11 Nev. 42-69, and cases there cited, and other authorities.

Inasmuch as a court ought never to declare a statute unconstitutional, except in a clear case, where the point is absolutely necessary to the decision;

and, as already stated, the judgment in this case must be reversed for an error already discussed; and because we have not at hand many authorities which ought to be consulted before passing on so important a matter; and for a further reason, which will be presently stated,—we decline to enter into a further examination or discussion of the question presented.

The juror Doniothy, who was challenged on account of alienage, was permitted by the defendant to sit in this case, through a failure to exercise his right of peremptory challenge; the accused having two peremptory challenges unexhausted when he accepted the jury. He thereby waived the objection of alienage, if it were otherwise a good objection, and there was no error of which he could properly complain. It has been repeatedly decided that alienage is a disqualification of a juror which the defendant may waive, either expressly or by failure to object at the proper time. *Territory v. Harding*, 6 Mont. 326, 12 Pac. Rep. 750; *Lum v. State*, 11 Tex. App. 483; *Presbury v. Com.*, 9 Dana, 203; *State v. Elliott*, 45 Iowa, 487; *Benton v. State*, 30 Ark. 340-344; *Erwin v. State*, 29 Ohio St. 190; *People v. McGungill*, 41 Cal. 430.

4. The defendant, as already stated, also relies upon the ruling of the trial court, in permitting the prosecuting attorney to read to the jury decisions of the English and American courts on the question of insanity, as an error which requires the reversal of this cause. The practice is diverse, even in the several districts of this territory, and we have no statute directly regulating the subject. There is also great diversity among the courts of different states. In the states of Tennessee, Louisiana, Massachusetts, Connecticut, and perhaps others, the reading of law to the jury is permitted. Whart. Pl. & Pr. § 578, and notes; Abb. Tr. Ev. 140.

But in California, Georgia, Texas, Virginia, Illinois, Missouri, and other states, where the jury is required to receive the law from the court, this practice is not permitted. *People v. Anderson*, 44 Cal. 70; *McMath v. State*, 55 Ga. 303; *Davenport v. Com.*, 1 Leigh, 589; *Chicago v. McGiven*, 78 Ill. 347; *State v. Klinger*, 46 Mo. 224.

Perhaps the correct rule is laid down by ENGLISH, C. J., in an Arkansas case, as follows: "The court may, in its discretion, permit counsel to read law to the jury in a criminal case, but it is its province to determine whether the law proposed to be read is applicable to the facts of the case. The matter of reading law to the jury, as part of the argument, is under the discretion and control of the court, and its rulings in the matter are not subject to review, unless its discretion is abused to the prejudice of the accused." *Curtis v. State*, 36 Ark. 292.

In a California case, Mr. Justice CROCKETT used the following language, in delivering the opinion of the court: "As a general rule, the practice of allowing counsel, in either a civil or a criminal action, to read law to the jury, is objectionable, and ought not to be tolerated. Its usual effect is to confuse, rather than to enlighten, the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases, or extracts from text-books, subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court." *People v. Anderson*, 44 Cal. 70, 71.

The statutes of this territory require the court, in a criminal case, to deliver to the jury a written charge, stating to them all such matters of law as it shall think necessary for their information in giving their verdict. Rev. St. Mont. p. 331, § 325, div. 3, as amended by Laws 12th Sess. p. 56. Such being the statutory law, it is only in very rare cases that it would be proper for the court to permit law-books to be read to the jury; and in all cases the passages intended to be read should first be submitted to the court for its approval. A statute defining the crime for which the prisoner stands indicted, might properly be read by counsel to the jury preliminary to commenting

thereon, and there may be other rare cases in which such a practice might be proper. But as a general rule, counsel should be confined in their arguments to the law as given in charge to the jury by the court, and to the facts as testified to by the witness, and to such illustrations and arguments as properly and naturally arise therefrom; but any departure from such a line of discussion can serve no useful purpose in the administration of justice.

For the error then committed by the court to which the indictment was returned, in denying the prisoner the right, on motion properly made and presented, to inquire into the question of whether or not 12 or more of the grand jurors concurred in presenting the indictment, the judgment in this case is reversed, and the cause is remanded to be proceeded with in accordance with this opinion.

(August 9, 1887.)

BACH, J., (*concurring*.) While I concur in the result in this case, I am not to be understood as consenting to that portion of the opinion which declares that the defendant must make his motion to set aside the indictment because it was not found by 12 of the grand jury before he pleads to the indictment. As that question of practice does not arise in this case, I prefer to express no opinion upon that point.

With considerable reluctance, and only because of the overwhelming current of authorities, I concur with that portion of the opinion which holds that counsel may read to the jury citations from authorities as a part of their argument. It does not seem to me that it is in accordance with the logic of the law to say, that a practice which "is objectionable, and ought not to be tolerated," is still a question within the discretion of the presiding judge.

NOTE.

CRIMINAL PRACTICE—READING LAW-BOOKS TO JURY. In a trial before a jury, counsel should not be permitted to read law-books, or to make an argument on the law of the case, or to state what he claimed to be the law, to the jury, *Baker v. City of Madison*, (Wis.) 22 N. W. Rep. 142; *Sullivan v. Royer*, (Cal.) 13 Pac. Rep. 655; *People v. Forsythe*, (Cal.) 3 Pac. Rep. 402; *Crane v. Com.*, (Ky.) 1 S. W. Rep. 880; and it is not error for the court to refuse to permit it, *Baker v. City of Madison*, *supra*; *State v. Brooks*, (Mo.) 5 S. W. Rep. 257. While not correct practice, such reading was held not to be reversible error, *People v. Forsythe*, *supra*; *Crane v. Com.*, *supra*; and it has been said that the refusal of the court to stop the reading of the extracts from law-books to the jury by the people's counsel, in the course of his argument, is not reversible error, *People v. Treadwell*, (Cal.) 10 Pac. Rep. 502; and that it is allowable, in the discretion of the court, for counsel to read, during his argument before the jury, a law-book, not for the purpose of instructing the jury in the law, but in order to illustrate his remarks, *Gilbertson v. Smelting Co.*, (Utah.) 5 Pac. Rep. 699. It is in the discretion of the court to permit counsel to supplement an argument by reading to the jury from reports, and no appeal lies therefrom. *Railroad Co. v. Kean*, (Md.) 5 Atl. Rep. 325.

FRANKEL and others v. THEIR CREDITORS. (No. 1,262.)

(*Supreme Court of Nevada.* August 25, 1887.)

1. STATUTORY CONSTRUCTION—STATUTE RE-ENACTED FROM ANOTHER STATE.

Section 30 of the Nevada insolvent act, denying to certain persons the benefit of the act, was adopted from the insolvent law of California, where it had previously been construed as denying to the insolvency court jurisdiction over insolvents of the class therein specified. The California construction being based on the policy of its laws to procure the discharge of insolvent debtors, *held*, that the main purpose of the Nevada insolvency law being the ratable distribution of the insolvent's property among his creditors, and the reason for the California construction of section 30 not existing in Nevada, the adoption of the statute was not an adoption of this construction, and the court was not thereby denied jurisdiction over insolvents of the class named.

2. INSOLVENCY—ORDER TO SHOW CAUSE—APPEARANCE BY ATTORNEY.

The Nevada insolvency act, § 33, provides that "no person can apply for or receive the benefits of this act through an agent or attorney in fact." Section 43 provides for practice on the return of an order to show cause similar to that in civil

actions. *Held* that, on the return of an order to show cause why the debtor should not be adjudged insolvent, the appearance of respondent may be made and the subsequent proceedings conducted by an attorney at law.

3. SAME—VOLUNTARY APPEARANCE BY ATTORNEY.

Where a non-resident member of a partnership was ordered to show cause why he should not be adjudged insolvent, and he voluntarily appeared by an attorney, and consented to an adjudication of insolvency, *held*, that the court acquired jurisdiction over both his person and property.

Appeal from district court, Storey county; RICHARD RISING, Presiding Judge.

W. E. F. Deal, for plaintiffs. *R. M. Clarke*, for appellant Suize. *M. N. Stone* and *R. S. Mesick*, for the assignee.

BELKNAP, J. This is an appeal from orders of the district court, adjudging L. B. Frankel & Co. insolvents, appointing an assignee, and staying proceedings. Numerous reasons are assigned for the reversal of the orders, the prominent one being that "the court had no jurisdiction in the premises, because it appeared that L. B. Frankel & Co. were brokers, and the debts and liabilities from which they petition to be discharged were contracted by them in a fiduciary capacity and character." The determination of this point involves an examination of the statute concerning proceedings in insolvency. The act entitled "An act for the relief of insolvent debtors and protection of creditors," approved March 3, 1881, (Gen. St. § 3845 *et seq.*) under which the proceedings were taken, is substantially a copy of the California insolvency law of 1852; but after copying this law, which provides only for voluntary insolvency, provision was made in succeeding sections for cases in which creditors could institute proceedings to have their debtors adjudged insolvent and their estates administered. At section 30, which was a part of the California law, it declares: "All insolvent debtors owing, or accountable in any manner, for public funds or property, of whatever nature or kind, are unfaithful depositaries; all such as refuse or neglect to pay up all funds received by them as bankers, brokers, commission merchants, or for money, goods, or effects received by them in a fiduciary capacity, shall be denied the benefits of this act."

Before the adoption of this section by the legislature of this state, the supreme court of California had construed it as excluding bankers and brokers from the jurisdiction of the insolvency court. *Cohen v. Barrett*, 5 Cal. 195. It is claimed, under a familiar rule of statutory construction, that the interpretation was adopted as well as the terms of the statute. The views of the California court with reference to the general purpose of the law of 1852 deserve attention. Upon this subject it was said in *Cohen v. Barrett*, 5 Cal. 212: "If the power to discharge the insolvent is denied in this class of cases, [bankers,] jurisdiction for any other purpose would seem inharmonious to the general scheme or policy of the act, which looks to the final discharge as the object to be worked out, and cannot be said in these cases to be of any protection to the creditor, by simply permitting the debtor to throw his assets into insolvency for distribution, if he thinks proper to do so; for it must be borne in mind that the act makes no provision for an involuntary surrender, and the mere permission of an exercise of volition on the part of an insolvent debtor will be found to amount to no protection at all; particularly where the benefits of the act are denied, and the real incentive to an honest surrender of all his assets is thus removed."

In *Sanborn v. His Creditors*, 37 Cal. 610, the court said: "The statute, as its title imports, was intended for the relief of insolvent debtors and the protection of creditors. The 'relief' and the 'protection' for which it provides, proceed *pari passu*. If the debtor, for any cause, is entitled to no 'relief,' the creditors are entitled to no 'protection,' for they stand in need of none, except such as is afforded by the general laws for the collection of debts. Hence

if, upon the trial of an accusation of fraud, the debtor is found guilty, the final judgment is that his discharge be denied, and that he be forever denied the benefit of the laws passed for the relief of insolvent debtors in this state. Section 23. With this judgment the entire proceedings terminate, and the relation of the petitioner and his creditors in respect to each other, and to the estate of the former, remain as at the commencement, except that the petitioner becomes liable to the pains and penalties provided in the twenty-fifth section." *Appel v. His Creditors*, 57 Cal. 211, was an appeal from an order made in an insolvency proceeding under the law of 1852. The assignee had received from the sheriff certain moneys belonging to the insolvent. After a trial of issues, the debtor was denied the benefit of the insolvent law. Thereupon the court directed the assignee to return the money to the sheriff. The order was affirmed.

These decisions show the purpose of the California law to have been the discharge of the insolvent debtor; and it was accordingly held that if he could not have the benefit of the law he was excluded from its jurisdiction. The insolvency law of this state proceeds upon a different principle. It provides various cases in which creditors may have their debtor adjudged insolvent, and his estate ratably distributed, while under the California law the debtor alone could inaugurate the proceeding. This feature distinguishes the principle upon which the laws are founded. One has for its object the final discharge of the insolvent; the main purpose of the other is a ratable distribution of his property.

Our statute differs in many respects from the national bankrupt law of 1867, but its purpose is in the main similar. In construing certain provisions of that law, the supreme court of the United States in *Wilson v. City Bank* took occasion to consider its general spirit and purpose, employing language applicable in the present case. The court said: "In both classes of cases (voluntary and involuntary bankruptcy) undoubtedly the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors. But, in case of voluntary bankruptcy, the aid of the law is invoked by the bankrupt himself, with the purpose of being discharged from his debts as his principal motive; and in the other the movement is made by his creditors with the purpose of securing the appropriation of his property to their payment, the discharge being with them a matter of no weight, and often contested." 17 Wall. 480.

And that jurisdiction does not depend upon the right of the debtor to receive the benefits of the bankrupt law, we quote from *Van Nostrand v. Carr*, 30 Md. 128: "The jurisdiction of the bankrupt court does not depend upon the right of the party ultimately to obtain his discharge. This may be denied him for various causes enumerated in the law, and can be determined only by facts and circumstances disclosed in the progress of the cause, after the jurisdiction has attached. It is not essential to the jurisdiction that the party shall appear to be entitled to a discharge without the consent of his creditors."

If the objection urged to the jurisdiction be valid in the present case, and the California decisions followed, the objection would be good in every case where an insolvent would be denied a discharge, and the great purpose of the law—the distribution of the property of a debtor among his creditors—would thereby be defeated. The view that such a result was not contemplated by the legislature, and that the expression in section 30, "denied the benefits of the act," does not mean a denial of jurisdiction, is, we think, strengthened by the fortieth section of the statute, which, among other things, provides as follows:

"Sec. 40. An adjudication of insolvency may be made on the petition of five or more creditors, residents of this state, * * * setting forth that

* * * a bank or banker, agent, broker, factor, or commission merchant has failed for forty days to pay any moneys deposited with or received by him in a fiduciary capacity, upon demand of payment. * * *

This is an express grant of jurisdiction. If section 30 be construed as excluding jurisdiction of brokers, the legislature would have created an unreasonable distinction in permitting the creditors of this class of people to place them in insolvency, but excluding brokers themselves from invoking the aid of the law. Jurisdiction would thus be made to depend upon the form of the proceeding. There is no reason for such a distinction in our statute. It is a general rule of statutory construction that when a statute has received a judicial construction, and is afterwards adopted by another state, the construction, as well as the terms of the statute, will be deemed adopted. But the rule is not inflexible.

In *Tyler v. Tyler*, 19 Ill. 151, the supreme court of Illinois refused to follow the settled construction received by an English statute, prior to its adoption by the legislature of that state, because the construction was based upon a reason not existing in the state of Illinois. The reasoning of the California decisions is not applicable to our law. Section 30 was incorporated by our legislature into a law essentially different from that of California. The section stands in an entirely different connection than in the law from which it was taken, and the changed conditions require for it a different construction. See, also, *Little v. Smith*, 4 Scam. 402; *Lessee of Gray v. Asken*, 3 Ohio, 479; *Jamison v. Burton*, 43 Iowa, 282; *McCutcheon v. People*, 69 Ill. 601.

The firm of L. B. Frankel & Co. was composed of five members. The copartnership was adjudged insolvent upon the petition of two of the partners. The proceedings were instituted under section 47 of the insolvency law, which provides:

"Sec. 47. Two or more persons who are partners in business may be adjudged insolvent, either on the petition of such partners, or any one of them; * * * in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each partner, shall be taken. * * * If the petition be filed by less than all the partners of a copartnership, those partners who do not join in the petition shall be ordered to show cause why they should not be adjudged to be insolvent in the same manner as other debtors are required to show cause, upon a creditor's petition, as in this act provided."

The petition having been filed by less than all of the partners, the order required by the statute was directed to be issued. Before the return-day the partners to whom it was directed appeared by an attorney at law, and consented to an order of adjudication of insolvency. It is urged that the district court did not require jurisdiction of these partners upon the theory that there should have been an appearance in person of each of them. Section 33 of the law provides that "no person can apply for or receive the benefit of this act through an agent or attorney in fact." And section 5 requires the petitioner in insolvency to sign and verify the schedule of his property to be attached to the petition. But these provisions do not support the objection. The proceeding as to the three partners was compulsory in form. Section 43 provides that at the hearing of the order to show cause "the debtor may demur to the petition for the same causes as are provided for demurrer in other cases by the civil practice act. If the demurrer be overruled, the debtor shall have 10 days thereafter in which to answer the petition. If the debtor answers the petition, such answer shall contain a specific denial of the material allegations of the petition controverted by him, and shall be verified in the same manner as pleadings in civil actions, and the issues raised thereon may be tried with or without a jury, according to the practice provided by law for the trial of civil actions." These provisions evidently contemplate that the

appearance of respondents may be made and subsequent proceedings conducted by an attorney at law. It is also claimed that, as L. B. Frankel was not a resident of the state of Nevada, he was not within the provisions of the Insolvency law, and that the court had no jurisdiction of his person or property. Jurisdiction of his person was acquired by his voluntary appearance through his attorney, and jurisdiction of the property of the copartnership, and of the separate estate of each partner was acquired by virtue of the provisions of section 47 of the act, heretofore quoted.

In *McDaniel v. King*, 5 Cush. 469, insolvency proceedings were instituted by a creditor against a partnership, one of the members of which had resided in the state within a year,—the period fixed by the statute,—but had removed therefrom, although the other never had been resident within the state. The question was presented there as here whether insolvency proceedings could reach partnership affairs in such a case. The subject was fully considered under a statutory provision less comprehensive than ours, and the proceedings upheld. The court, speaking through Chief Justice SHAW, said: "Is it, then, a valid objection to these proceedings, under the insolvent law, against a resident of this state, that he has a partner not resident, who has not been a resident in this state, and who is not personally amenable to the laws of this state? A person may be a partner in several concerns, with persons in and out of the state; but this affords no reason why he and his separate property, and also that part of his property involved in partnership transactions, so far as such property can be reached, either directly or through him, should be screened from the operation of the insolvency law. This law proposes to take possession of his separate property, and of his separate interest in the joint property, which can be reached, and to administer these interests equitably, and nothing more. Nor, as personal property has no locality, would it defeat the operation of the assignment that such property is at the time out of the state. Whether the assignment would affect such property, either in right or possession, if in the possession or under the control of such foreign partner, is not now in question. The only question at present is whether the proceedings here are legal and regular, not what their effect and operation may be, here or elsewhere. "If it were otherwise,—if it were held that the insolvent laws do not apply to the case of a debtor, who is personally amenable to our laws, because there is a joint debtor, liable for the same debt, who is not personally amenable,—the result would be that creditors would be left, as before the act, to a race of diligence, in seizing and appropriating the debtor's property; and one great purpose of the act, an equal distribution of the debtor's property, would be defeated. The twenty-first section of the statute clearly contemplates the case where the debtor, who is amenable, has one or more partners in and out of the state. It is objected that this construction would make the act operate upon foreign citizens. We are not to presume that the legislature intended to exceed the just limits of legislative power, nor could such intention be carried into effect had they entertained it; but the purpose was to carry out the policy of an insolvent law, as far as from the nature of the case it was practicable to do it, as well against partners as individuals. The assignment will apply to property within reach of the assignee; and it is sufficient for the present purpose that there was partnership property within this state subject to the operation of its laws, that the commissioner had jurisdiction, and the proceedings were regularly instituted; and it is not necessary now to inquire whether the assignee can go into another state to reach property there, or how far the proceedings can operate in other states, or upon the rights of foreign residents."

We are of opinion that the orders appealed from should be affirmed. It is so ordered.

78 Cal. 211

HOGAN, Assignee, v. COWELL. (No. 11,854.)

(Supreme Court of California. August 22, 1887.)

1. SALE—DELIVERY AS AGAINST CREDITORS.

In an action by an assignee of an insolvent firm to recover a lot of horses sold by the firm prior to their insolvency to the defendant, the husband of one of the partners, and a creditor of the firm, it appearing that the horses at the time of the sale were being pastured on one of defendant's ranches, where they remained for five days after the sale, and were then moved by defendant to another ranch, held, that this was an immediate delivery, followed by an actual and continued change of possession, within the meaning of Civil Code Cal. § 3440, which makes transfers of personal property fraudulent and void against creditors unless accompanied by such delivery and possession of the thing transferred.¹

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the issue is constructive fraud, it is not prejudicial error to admit testimony tending to show that there was no actual fraud.

Department 2. Appeal from superior court, San Joaquin county; SWINERTON, Judge.

J. C. Campbell, for appellant. *J. A. Louttit*, (*S. D. Woods* and *A. L. Levinsky*, of counsel,) for respondent.

MCFARLAND, J. W. W. Cowell and Emma F. Sanders were carrying on business as copartners in the city of Stockton, and on August 1, 1884, came into ownership and possession of 40 head of wild, unbroken horses. Immediately thereafter the said horses were driven to a ranch owned by the defendant, Joshua Cowell, on the west side of the San Joaquin river, for pasturage, where they remained until November following. Defendant was authorized to sell any of such horses as he might find sale for, and a few head were so sold after consultation with their owners. On or about the first of November, 1884, the said W. W. Cowell and Emma F. Sanders, who in the mean time had intermarried with the defendant, Joshua Cowell, sold all of said horses remaining unsold to said defendant, for the consideration of certain amounts due for pasturage, and \$1,500, and interest due from them to the defendant for money formerly borrowed and used in their business. At the time of this sale the horses were on defendant's said ranch. Within five days thereafter he removed them from said west-side ranch to another ranch owned by him, called the Home ranch, about 15 miles distant. From the time of the sale defendant had full possession and control of the horses. At the time of said sale, said W. W. Cowell and Emma F. Sanders were indebted to two mercantile firms of San Francisco, who, in addition to defendant, were their main creditors; and, before said sale was made to defendant, they offered to give said horses to said two firms in payment or part payment of their debts, but said offer was by said firms refused. The sale to defendant was made in good faith and for a full consideration. Afterwards said W. W. Cowell and Sanders (then defendant's wife) filed their petition in insolvency, and plaintiff, having been appointed assignee, instituted this action to recover said horses. The sole ground of the action was the formal one that there was not an immediate delivery, and an actual and continued change of possession of the horses, within the meaning of section 3440 of the Civil Code.

The court below found that there was such delivery and possession, and we are satisfied with the finding. It seems to us that the delivery and possession were as complete as the nature of the case permitted. It can hardly be contended that the respondent should have driven the horses away from both his *ranchos*. That would be almost the equivalent of saying that

¹ Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is question for the jury, see *Stull v. Weigle*, (Pa.) 8 Atl. Rep. 578; *Dodge v. Jones*, (Mont.) ante 707; *Young v. Poole*, (Cal.) 13 Pac. Rep. 492; *Cook v. Rochford*, (Cal.) 12 Pac. Rep. 568, and note.

he should have put himself out of the actual possession in order to have kept himself within the legal possession. We do not see that the intermarriage of the respondent with one of his vendors materially alters the case, there being no charge of actual fraud.

Appellant assigns as error the admission of testimony showing that respondent's vendors offered the horses to certain creditors other than the respondent, and the refusal of such creditors to take them. That testimony, however, tended to show only that in the sale to respondent there was no actual fraud or intent to defraud; and, as appellant admitted expressly at the trial that there was no actual fraud, and that he relied solely on the constructive fraud which arose from deficient delivery and possession, we do not see how he could have been injured by such testimony.

Judgment and order denying motion for new trial affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

73 Cal. 206

REID v. REID. (No. 11,789.)

(Supreme Court of California. August 19, 1887.)

EVIDENCE—STENOGRAPHER'S TRANSCRIPT—TESTIMONY IN FORMER CASE.

The plaintiff was permitted, by virtue of Code Civil Proc. Cal. § 273, which provides that "the report of the official reporter, * * * when certified as being a correct transcript of the proceedings in the case, shall be *prima facie* a correct statement of such proceedings," to introduce the stenographer's transcript of evidence given by the defendant in another suit. *Held*, that this section did not make the transcript itself admissible in evidence.

Commissioners' decision. Department 2.

Appeal from superior court, San Joaquin county; SWINNERTON, Judge.

L. W. Elliott and *J. C. Campbell*, for appellant. *John H. Hall*, for respondent.

HAYNE, C. In order to contradict the defendant upon a material point, the plaintiff was permitted, against objection, to introduce the stenographer's transcript of evidence given by the defendant in a different suit. This transcript, which does not appear from the record to have ever been filed, was certified by the stenographer "to be a true and correct transcription from my short-hand notes taken in the trial of said cause." The stenographer was not examined as a witness, but the transcript was admitted on the faith of the certificate. The question is whether the paper was legal evidence of what the defendant said on the former trial.

So far as we have been able to ascertain, this precise question has not been decided in this state. In *People v. Woods*, 43 Cal. 176, it was sought to use the reporter's notes as a record on appeal. The decision was that they could not be so used, because a record on appeal imported absolute verity, and the notes were only *prima facie* evidence. In *Meyer v. Roth*, 51 Cal. 582, the notes were sought to be introduced, not as evidence of an admission, or in contradiction of what had been sworn to, but as original evidence of the fact in dispute; but the witness who had testified, being alive and within the state, this was not permitted; the decision did not touch the point that the notes were not evidence of what the witness had said, but was that what the witness had said was not evidence of the fact in dispute. In *People v. Lee Fat*, 54 Cal. 529, the witness whose testimony was sought to be introduced could not speak English, and the testimony was given through an interpreter. The decision was that what the reporter had taken down was not what the witness had said, but was what the interpreter had said he had said, and was therefore hearsay. And *People v. Ah Yute*, 56 Cal. 120, followed the preceding case, and laid down the same rule. In *People v. Chung Ah Chus*, 57 Cal.

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568, the decision turned on the construction of section 686 of the Penal Code, and is not applicable to cases to which that section does not apply. And *People v. Quirle*, 59 Cal. 344, simply followed the preceding case. In *Hicks v. Lovell*, 64 Cal. 22, the admission of the reporter's notes of what the witness had sworn to was sustained on the ground that "no objection was made to the transcript as evidence of his testimony." In *People v. Cunningham*, 66 Cal. 672, 4 Pac. Rep. 1144, and 6 Pac. Rep. 700, 846, only two justices concurred in the opinion, and they placed their opinion on the ground of "the admissions of the defendant's counsel." The decisions of the court, therefore, do not cover the precise question.

By the common law there can be no doubt but that the evidence was inadmissible; for the document amounts to a mere certificate of the reporter that the evidence had been given. It had not the sanction of an oath. The oath of office is not an oath in the cause. As said by TILGHMAN, C. J., in *Miles v. O'Hara*, 4 Bin. 110, concerning the notes of a judge: "It is refining too much to say that he takes his notes under the obligation; nor is that the oath which the law requires to verify a fact." Moreover, there was no opportunity for cross-examination. These principles have been applied in analogous cases. Thus it has been held that the judge's notes are not admissible. *Miles v. O'Hara*, above cited; *Schafer v. Schafer*, 93 Ind. 586. So of the minutes of a referee. *Mott v. Ramsay*, 92 N. C. 152. So of the notes of a committing magistrate. *State v. Collins*, 82 Iowa, 86. So of the notes of a coroner. *Bass v. State*, 29 Ark. 142. And so of the notes of a stenographer. *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. Rep. 731. Compare *Rounds v. State*, 57 Wis. 52, 14 N. W. Rep. 865.

If, therefore, the notes are admissible, it must be by virtue of some statute. The statute which is claimed to cover the case is section 273 of the Code of Civil Procedure, which is as follows:

"Sec. 273. The report of the official reporter or official reporter *pro tempore* of any court, duly appointed and sworn, when written out in long-hand writing, and certified as being a correct transcript of the testimony and proceedings in the case, shall be *prima facie* a correct statement of such testimony and proceedings."

But this statute does not say that the transcript shall be legal evidence of any fact. It simply says that it is *prima facie* correct. The two propositions do not seem to be identical. There are many things which are not only presumably but demonstrably correct, but which are, nevertheless, not legal evidence. Moreover, the notes are only *prima facie* correct. If the reporter had been called and had testified on his examination in chief that the transcript was correct, it would have to be taken at that stage as *prima facie* correct. But the opposite party would have had the right to cross-examine him, before proceeding further, to show its incorrectness, and possibly would have succeeded in eliciting something which would have shown such incorrectness. And to make the document itself admissible upon the faith of the certificate would deprive the party of this right of cross-examination, which the authorities agree is one of the most important tests of truth. But even if the reporter could have stood the test of cross-examination, and the result of his whole testimony had been that the transcript was correct, we do not think that the transcript would have been admissible except in connection with the testimony of the reporter. The unfiled transcript is certainly not a public record, but must be put upon the footing of a private memorandum; and, having been written up we do not know when, it was not admissible as part of the *res gestæ*; as to which see *Severance v. Lombardo*, 17 Cal. 57; *Still v. Reese*, 47 Cal. 842. This being the case, the transcript could at most have been used to refresh the memory of the witness. And the general rule with reference to the admissibility of papers used to refresh the memory of a witness is stated by Cowan & Hill in their notes to Phillips on Evidence as fol-

lows: "He will not be permitted to read his notes or *memoranda* to the jury, nor can they be admitted as evidence to the jury in any sense." 1 Phill. Ev. (4th Amer. Ed.) 586, note 170. This general rule seems to be embodied in the Code of Civil Procedure, for, after providing that *the adverse party* may read the memorandum to the jury, it has the following: "So, also, a witness *may testify from* such a writing, though he retain no recollection of the particular facts." Code Civil Proc. § 2047.

We think, therefore, that section 273 does not make the transcript itself admissible in evidence. Nor is this to be regretted. For the provision is so unlimited as to open the door to gross frauds if the construction contended for should be given to it. There is no requirement that the notes shall be filed. Either party to the action in which they are taken, or the judge, may require them to be filed. But in practice this option is hardly ever exercised. Consequently there is nothing by which their incorrectness may be shown. Moreover, there is no limit to the time within which the certificate may be given. From the absence of words of limitation in this regard, and from the fact that the official reporter is placed in the same category with the reporter *pro tempore*, it would seem that he may give his certificate after ceasing to be reporter, even 10 or 20 years after, and the result would be that a party might find himself confronted with a certificate as to what had been said in another cause, perhaps between other parties, a long time previously, and have nothing of record by which he could disprove it, and possibly be unable to find a trace of the person who had given the certificate. Part of the ground upon which public documents, or copies thereof, are admissible, is the publicity of the subject-matter. 1 Greenl. Ev. § 483. And where a certificate is admissible it is a material circumstance that it was not made long after the fact. *Gaines v. Relf*, 12 How. 585.

But what meaning is to be given to the statute? Speaking of the act of 1867-68, which went further than the Code, (because it provided that the notes should be *prima facie* evidence,) WALLACE, J., delivering the opinion in *People v. Woods*, above cited, said: "This proceeding evidently refers to the proceedings to be had in the court below upon settlement of statements, allowance of bills of exception, etc." If the framers of the section had any other purpose in view it cannot be gathered from their language.

We therefore advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 788

PEOPLE v. PARVIN and others. (No. 11,929.)
(*Supreme Court of California*. August 28, 1887.)

1. CONSTITUTIONAL LAW—TITLE OF STATUTE—AMENDING ACT—SUBJECT.

Under Const. Cal. § 24, art. 4, providing that "Every act shall embrace but one subject, which subject shall be expressed in its title," the act of 1880, entitled "An act to amend section 3481 of the Political Code," is constitutional, as a statute to be amended may be the "subject" of an amending act.

2. SWAMP LANDS—RECLAMATION DISTRICT—NEW DISTRICT.

Pol. Code Cal. § 3481, provides that the requisite number of owners of "lands within any reclamation or swamp-land district, and in which the lands have not been reclaimed, may have said body of lands set off from such district." *Held*, that this did not repeal the prior laws, or affect the assessment proceedings thereunder; and applied to all future cases, whether the existing district was organized under the Code or not.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; MCFARLAND, Judge.

Action by the people, in the nature of a *quo warranto*, against the defendants, for claiming the so-called reclamation district No. 366 to be a legal district. The defendants, prior to the suit, had procured a district known as district No. 366 to be carved out of and set off from district No. 3, which latter was organized under the act of March 28, 1868. By the judgment of the court below, the defendants were ousted from the franchise of governing as a legal district the lands within its limits; the effect of the decision being to replace those lands under the jurisdiction of district No. 3. The contest in the trial court hinged on section 3481, Pol. Code, and upon its amendment as enacted April 15, 1880; that is, whether the defendants could avail themselves of that section of the Political Code so as to disestablish and dismember a district formed prior to the Code, under a distinctive statute.

McKune & George, for appellants. *G. W. Gordon*, for respondents.

HAYNE, C. The main question argued in this case, and the one upon which we think the decision must turn, is whether the act of 1880, entitled "An act to amend section 3481 of the Political Code," is in violation of section 24 of article 4 of the constitution, which provides that "Every act shall embrace but one subject, which subject shall be expressed in its title. * * *" It is not contended that the act embraced more than one subject. The objection is that no subject is expressed; and the argument is that a section of the Political Code is not a subject, but is a mere reference to where the subject may be found.

The reason of the requirement that the subject shall be expressed is to prevent legislators being entrapped by false titles. *Kurtz v. People*, 33 Mich. 282; *Boyd v. State*, 53 Ala. 605; *Hannibal v. Marion*, 69 Mo. 575; *Robinson v. Skipworth*, 23 Ind. 317; *Commissioners of Marion v. Commissioners of Harvey*, 26 Kan. 197; *Howell v. State*, 71 Ga. 227. This reason does not require the title to give the substance of the bill. To give the substance of the bill would be to make the title almost as cumbrous as the bill itself, which would tend to defeat rather than to accomplish the purpose of the requirement. It would be to make the title an index, abstract, or catalogue of the contents of the bill, which has been held to be unnecessary. *Montclair v. Ramsdell*, 107 U. S. 155, 2 Sup. Ct. Rep. 391; *People v. Hazelwood*, 116 Ill. 327, 6 N. E. Rep. 480; *Hope v. Gainesville*, 72 Ga. 250; *Allegheny County Home's Appeal*, 77 Pa. St. 80; *Lockhart v. Troy*, 48 Ala. 584; *State v. Barrett*, 27 Kan. 218; *Brewster v. Syracuse*, 19 N. Y. 117. Now, if the purpose was not to apprise the legislators of the substance of the bill, it must have been to put them on inquiry as to what was sought to be done. And we think a title which shows that it is intended to change a specific section of a specified statute is sufficient to put the legislators on inquiry. This seems to us to be the reasonable construction. And it is generally agreed that the provision is to receive a liberal, and not a narrow and technical, construction; which latter would only serve to defeat and embarrass legislation. *Stone v. Brown*, 54 Tex. 342; *Breen v. Railroad Co.*, 44 Tex. 305; *State v. Ranson*, 73 Mo. 86; *In re Public Parks*, 86 N. Y. 439, 440; *Larned v. Tiernan*, 110 Ill. 177; *Mills v. Charleton*, 29 Wis. 410; *McAunich v. Railroad Co.*, 20 Iowa, 342; *Cooley*, Const. Lim. 146.

Nor does this construction do violence to the language of the provision. According to Webster, one of the meanings of the word "subject" is "that which is brought under thought or examination; that which is taken up for discussion." Now, is not the statute to be amended or repealed "that which is taken up for discussion?" When, for example, a scholar writes an essay upon some play of Shakespeare, suggesting an emendation of the text, is it not proper, and in accordance with usage, to say that the subject of the essay is the play in question, and not the plot, the scene, the characters, or the in-

idents of the play? If it be said that the statute to be amended is not the subject, such a rule would in some cases require an effect to be given to the provision beyond that which its language imports; for the provision does not require the title to express the subject of any previous act; it only requires an expression of the subject of the act to be passed. Now, in the case of a repealing act, what is the subject? It has no subject, unless the statute to be repealed is its subject, for it establishes nothing. So that, if the statute to be repealed is not a sufficient expression of its subject, it would be necessary to give the subject of the statute to be repealed, which would be going further than the language of the provision requires. Now, if the statute to be repealed is the subject of a repealing act, it would seem that the statute to be amended may be the subject of an amending act.

We think, therefore, that the construction which is suggested by reason of the provision does not do violence to its language, but accords with it. And this result is in accordance with the preponderance of authority. Thus, in *Fleischman v. Walker*, 91 Ill. 320, the following title: "An act to amend an act entitled 'An act in regard to practice in courts of record,'"—was held to be sufficient. Such a title is not substantially different from "An act to amend section — of the Code of Civil Procedure;" and the case is authority for the sufficiency of the latter title. So in *State v. McCracken*, 42 Tex. 384, the following title: "An act to amend an act entitled 'An act to adopt and establish a Penal Code for the State of Texas,' approved August 26, 1871,"—was held to be sufficient, although there was a mistake in giving the date of the passage of the Code. So in *Dunbar v. Frazer*, 78 Ala. 538, the following title: "An act to amend section 1544 of the Code except as to 'certain counties specified by name,'" was held to be sufficient. So in *Dogye v. State*, 17 Neb. 143, 22 N. W. Rep. 348, the following title: "An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska," was held to be sufficient. Compare also *State v. Garrett*, 39 La. Ann. 638; *Gatling v. Lane*, 17 Neb. 84, 22 N. W. Rep. 453; *John v. Reaser*, 31 Kan. 406, 2 Pac. Rep. 771; *Burroughs v. Commissioners of Norton*, 29 Kan. 197, 198; *Wheeler v. State*, 23 Ga. 10.

These cases are authority for the proposition that the statute to be amended or repealed may be the "subject" of an amending act, and that is all that is necessary to the present decision. In some of them the reference to the act to be repealed seems too vague, and in that respect we think they go too far. While in some cases the act might be such that a reference to its title would be sufficient, yet if the statute is multifarious the precise part to be amended should be pointed out. Compare *People v. Hills*, 35 N. Y. 452. In other words, the reference should be specific.

The other questions raised do not require extended notice. If section 3481 is a valid enactment, we think, if clear, that it applies to all future cases in which the requisite number of owners of "lands within any reclamation or swamp-land district, and in which the lands have not been reclaimed, desire to have said body of lands set off from such district," whether the existing district was organized under the Code or not. This does not repeal the prior laws, or affect the assessment proceedings thereunder. It merely relates to the creation of new districts of a certain character. The words "independent reclamation," in section 3481, seem to have no other meaning than "separate and distinct reclamation." This is apparent from section 3482, which provides for the liability of the new district for former work.

The foregoing being the only questions argued, and the findings setting forth all the facts, we think the case may be finally disposed of. We therefore advise that the judgment should be reversed, and the cause remanded, with directions to enter judgment in favor of the defendants.

We concur: BELCHER, C. C.; FOOTE, C.

v.14p.nos.13,14—50

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to enter judgment in favor of defendants.

78 Cal. 216

GOLD v. SUN INS. CO. (No. 11,901.)

(*Supreme Court of California.* August 24, 1887.)

1. FIRE INSURANCE—CONTRACT TO RENEW POLICY—ACTION FOR BREACH—COMPLAINT.

In an action for breach of a contract to renew a policy of insurance, the complaint alleged the execution of the former policy, its date, the amount and property insured, and that on a day named, for a valuable consideration, defendant agreed to renew the policy for the same amount and period, and on the same terms and conditions. *Held*, that it sufficiently set forth the contract of the parties, and that it need not allege the terms and conditions of the original policy, or the payment or satisfaction of the renewal premium.

2. SAME—PLEADING—CONDITIONS OF ORIGINAL POLICY—PRESUMPTIONS.

In such an action the court cannot presume, in the absence of allegation in the pleadings, that there were any terms or conditions in the original policy, a breach of which would defeat the plaintiff's right to recover.

3. SAME—PROOFS OF LOSS.

Where defendant entered into a contract to renew an insurance policy and repudiated it after a loss, the plaintiff is under no obligation to serve proofs of loss as required by the original policy.

Commissioners' decision. Department 2.

Appeal from superior court, Tehama county; BRAYNARD, Judge.

Rhodes & Barstow, for appellant. *John F. Ellison*, for plaintiff and respondent.

FOOTE, C. This was an action to recover from the defendant the sum of \$500 for failing to comply with a contract to issue to the plaintiff a fire insurance policy for the sum last mentioned. The complaint was demurred to, the demurrer overruled, and, the defendant having failed to answer over, judgment was rendered for the plaintiff as prayed for, and from that this appeal is prosecuted. The demurrer went to the point that the complaint did not show facts sufficient to constitute a cause of action.

The pleading in question alleges an agreement on the part of the defendant, a fire insurance company, upon a day certain to renew a policy of insurance upon a saloon, bar-room, fixtures, etc., belonging to the plaintiff. It states the date and amount of the original policy, and the property which was by it insured, its value, and that the contract was for a renewal of that policy, upon the same property and for a like amount. That relying on the promise to renew that policy, and the insurance company having received a valuable consideration for such promise from the plaintiff, the latter had not obtained any other insurance upon the property, and that at the time he suffered loss of it from fire, he was under the belief that the defendant had insured it by a renewal of the policy, and that he was not aware of the breach of the contract by the defendant until the loss had occurred. That by reason of that breach, and the loss occasioned by the fire, the plaintiff has been damaged in the sum of \$500, which was the amount of the policy agreed to be renewed, and that no part of that sum has been paid.

The defendant contends that the demurrer should have been sustained: (1) Because the terms and conditions of the policy originally issued, and for the renewal of which the contract was entered into, were not stated in the complaint. (2) That it was not averred that the premium for the renewal was paid, or satisfaction made therefor. (3) That no proof of loss was furnished as was required under the original policy.

In the first place we understand that a parol contract to issue a fire policy, made by an insurance company, authorized by its charter to issue policies of that kind, is valid, and that such a contract can be enforced by compelling a

specific performance by the company, or in an action for the breach of the agreement. And the question always is, whether, having agreed upon the terms of the insurance, and to issue a policy therefor, the company is liable for the failure to do so. *Ellis v. Fire Ins. Co.*, 50 N. Y. 405-408. The defendant was informed, by the language of the complaint, when the contract to *renew* a certain policy of insurance was made, what was its subject-matter, for what amount the property was to be insured, and that it was made and entered into for a valuable consideration; thus it seems to us that the terms of *the contract* as agreed upon were sufficiently stated. A sufficient contract having therefore been thus stated in the complaint, we cannot presume, in the absence of any such allegation in the pleadings, that there were any terms or conditions in the original policy, a breach of which would defeat the plaintiff's right to recover in this action.

There does not seem to have been any need to have stated that a premium was paid, or the amount of it, or that satisfactory arrangements had been made for its payment. That could have been proved under the allegation that a valuable consideration had moved to the defendant from the plaintiff, as the basis of the contract to renew the policy. And had it been denied in an answer that such consideration did so move, the defendant, under the issue thus made, could have introduced evidence to disprove the fact that any such consideration had thus moved.

There was no necessity to make a proof of loss as required by the terms of a policy, which had been agreed to be, but never was, renewed, and which the defendant, repudiating its contract, refused to renew. *Taylor v. Fire Ins. Co.*, 9 How. 890.

The demurrer was therefore properly overruled, and the judgment should be affirmed.

We concur: BELCHER, C. C., HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

72 Cal. 213

CROSSMORE v. PAGE and another. (No. 11,798.)

(Supreme Court of California. August 24, 1887.)

PROMISSORY NOTES—INTERPRETATION—DEFAULT.

A promissory note provided that "if default be made in the payment of the interest as above provided, then this note shall immediately become due at the option of the holder thereof." *Held*, that the holder was entitled only to a reasonable time after default in which to exercise his option, and that seven months was not a reasonable time.

Commissioners' decision. Department 2.

FOOTE, C. This is an action to foreclose a mortgage given to secure the payment of a promissory note executed by Page to Rhodes, and by the latter indorsed to the plaintiff. The court, sitting without a jury, rendered judgment as prayed for against both Page and Rhodes, but upon motion duly made granted a new trial as to Rhodes. From that order the plaintiff appeals. The note, to secure the payment of which the mortgage was executed, reads as follows:

"\$8,153.50.

STOCKTON, CAL., June 30, 1884.

"On or before three years after date, without grace, I promise to pay to Alonzo Rhodes, or order, the sum of eighty-one hundred and fifty-three and fifty one-hundredths dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin, at the rate of eight (8) per cent. per annum from date until paid, interest payable annually, and if not so paid as it becomes due to be added to the

principal and become a part thereof, and bear interest at the same rate; but if default be made in the payment of the interest, as above provided, then this note shall immediately become due, at the option of the holder thereof.

"C. A. PAGE."

The contract was that in case of default in the payment of interest "this note shall immediately become due, at the option of the holder thereof." This is not the same as saying that the note shall become due immediately upon the option of the holder. The meaning is that the note is to become due immediately upon the default, at the option of the holder. And this is a different thing from saying that it shall become due seven months after default at the option of the holder. The holder was entitled to a reasonable time to exercise his option; but this time was nothing like what elapsed before the election was made. To allow him to wait seven months before doing anything, would be to make the contract read that in case of default the holder has the option to make the note become due at an indefinite time after default, whereas, what it says is that it shall become due immediately upon the default, at the option of the holder, which is to be exercised at furthest within a reasonable time. In exercising a right like this, the holder must keep within the terms of his contract. Not having done this he had to wait until the next installment of interest should fall due and remain unpaid, which had not taken place when this action was brought. This being so, it may well be presumed that the court below came to the conclusion, after a re-examination of the evidence given upon this point, that it did not sustain the decision, and therefore granted a new trial; and it is our opinion that the order made in the premises was right, and should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

73 Cal. 323

PEOPLE v. GOSLAW. (No. 20,320.)

(Supreme Court of California. August 31, 1887.)

MURDER—EVIDENCE—DEADLY INTENT.

On the trial of an indictment for murder, it was shown that just previous to the assault defendant was enraged at deceased, and was making search for him; that immediately after defendant entered the house where deceased was, heavy blows were heard, and defendant was then pulled away from deceased, who had received on the head eight blows apparently with a heavy, blunt instrument, any one of which was sufficient to cause death. Defendant was young, large, and powerful, while deceased was old and feeble. Deceased made no resistance, and gave defendant no provocation. Held sufficient proof of deadly intent.

In bank. Appeal from superior court, Santa Clara county; BELDEN, Judge. *J. H. Campbell*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. The defendant was convicted of the crime of murder in the first degree, and adjudged to suffer the death penalty. The only point made is that there was no evidence which could justify a verdict of murder in the first degree. There can be no question as to the proof of malice. There was not the slightest provocation, either by word or deed, and the killing was most cruel and brutal, showing plainly an abandoned and malignant heart. The only contention open to the defendant is that he intended to inflict upon the deceased a cruel and unprovoked beating, but did not intend to take his life. On this appeal we can only examine the evidence to ascertain whether there was any testimony tending to show that the assault was with deadly intent.

We think there is an abundance of such proof. The deceased, Henry Grant, was a feeble old man, who had once been engaged with the defendant in the business of house-moving at Los Gatos. Grant had procured some tools from a contractor at San Jose, who had demanded their return. Defendant desired to get them from Grant, but was informed that the owner had sent for them. Defendant then went to San Jose and asked the owner to loan them to him, but was refused. At this he returned to Los Gatos, where, late in the evening, he was informed that deceased had sent the tools to the owner at San Jose. He became very angry, and started to hunt the deceased. He made inquiries at different places for him, and, not finding him, started for Grant's house, which was one-half mile distant. He was accompanied by his younger brother. Just as they reached the gate in front of Grant's house, defendant was heard to say: "I won't hurt him. Oh, no! I'll not hurt him." The remark was understood, not as indicating a peaceful intent, but as an ebullition of rage. The defendant, who is a large, powerful man, then went into the house, and immediately heavy blows were heard. Defendant's brother rushed into the house and pulled defendant away from the insensible form of the deceased, who had received eight crushing blows upon the head, apparently made with some heavy, blunt instrument, although no weapon was found. Defendant afterwards admitted, in reference to the assault: "He made no resistance; he had nothing in his hand; it was simply my damned temper that led me into it."

It is not true that there was no evidence of the use of a weapon; on the contrary, the character of the wounds indicated that the injuries were not inflicted with the naked fist. Here a feeble old man, assaulted by a young man, powerful beyond the average of men, was killed by eight cruel blows upon his head, from which he never recovers consciousness. And it appeared that any one of several of these blows would have been sufficient to produce death. The old man had given no provocation in the first place, did not at the time say or do anything to excite the anger of the defendant, and made no resistance. Under such circumstances we cannot say there was no evidence to satisfy the jury that the defendant intended the natural and probable consequences of his acts. The judgment is affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; THORNTON, J.; McFARLAND, J.; McKINSTRY, J.; SHARPSTEIN, J.

73 Cal. 307

SULLIVAN and another v. WALLACE and another. (No. 11,661.)

(*Supreme Court of California. August 31, 1887.*)

1. NEW TRIAL—INSUFFICIENT EVIDENCE—DISCRETION OF TRIAL COURT.

Where the court granted a motion for a new trial without stating its reasons, but one of the grounds of the motion was that the evidence was insufficient to justify the findings, and the record showed that there was a conflict in the evidence material to the issues, *held*, a proper exercise of the discretion of the court.

2. SAME—NOTICE OF MOTION—TIME OF FILING.

Where a notice of motion for a new trial was filed in the clerk's office on the eleventh day after the notice of decision was served by mail, and the record showed that the distance between the place of deposit and place of address of the notice of decision was over 70 miles, *held*, under Code Civil Proc. Cal. § 1013 giving an extension of time in certain cases of service by mail, that the notice of motion was filed in time.

3. SAME—POWER OF COURT TO SUSPEND RULES.

A court may, whenever the purposes of justice require it, suspend its rule requiring *ex parte* orders to be served, or except a particular case from its operation.

4. SAME—STATEMENT ON MOTION FOR—CERTIFICATE OF JUDGE.

The certificate of the judge who settled the statement on motion for new trial, carries with it the presumption that it was regularly and properly done.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, judge.

Ed. M. Martin, for appellants. *R. B. Wallace*, for respondents.

FOOTE, C. This is an action of ejectment; the plaintiffs had judgment, but upon motion duly made, the court below granted a new trial, and from the order made in the premises this appeal is taken.

The respondents' motion to dismiss the appeal should be denied, as the affidavit of the appellant's counsel shows that service of the notice of appeal was properly had on the attorney of the former.

The appellants contend that the notice of motion for a new trial was not filed in the clerk's office until the eleventh day after the notice of the decision had been deposited in the post-office at Sacramento, postage paid, and properly directed to the respondents' attorney of record, at his office in San Francisco. But it is shown that the distance from Sacramento to San Francisco is 70 miles, and section 1018, Code Civil Proc., with reference to the service of such a notice as that of the decision in a case is as follows: "In case of service by mail, the notice or other paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, *but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised, or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address*, such extension, however, not to exceed ninety days in all."

Here the act to be done by the adverse party, after the service of notice of decision, was the filing and serving of the notice of intention to move for a new trial, and as it appears by the record that the distance between the place of deposit and the place of address, as regards the first notice, was 70 miles, the attorney for the appellants had 12 days from date of the deposit of the first notice in the post-office at Sacramento, within which to file and serve the notice of motion; that is, until the twelfth day of January, 1885, and it was filed and served one day before that time.

The appellants also argue that the statement on motion for a new trial should not have been settled, because of the fact that it was not served as required by law. The certificate of the judge who settled the statement carries with it the presumption that it was regularly and properly done, for "in the absence of anything appearing to the contrary, the legal intendment would arise, from the fact of the bill being signed by the judge, that the same was done regularly." *People v. Martin*, 6 Cal. 477; *Hayne*, New Trials, § 146; *Valentine v. Stewart*, 15 Cal. 396; *Young v. Rosenbaum*, 39 Cal. 646. The statement contains nothing sufficient to overcome this presumption. It is claimed, however, in opposition to this view, that the trial judge illegally extended the time within which to settle the statement, because a copy of the order made in the premises was not served on the attorney of the opposite parties according to a rule of the court requiring that to be done in the case of the making of all *ex parte* orders. "Rules of court are but a means to accomplish the ends of justice, 'and it is always in the power of the court to suspend its own rules or to except a particular case from their operation, whenever the purposes of justice require it.'" *Pickett v. Wallace*, 54 Cal. 148. In this case the trial judge seems to have followed the rule thus laid down. The court below granted the motion for a new trial, and set aside the judgment, but did not state any reason for its action in the premises. One of the grounds, however, specified and relied on by the moving party, was that the evidence was insufficient to justify the findings, and the record shows that a conflict did exist in the evidence material to the issues raised by the pleadings, hence

we can see no abuse of the discretion vested in that tribunal in making the orders appealed from, and they should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the orders are affirmed.

73 Cal. 285

BELL, Adm'r, etc., v. HUDSON and others, Ex'rs, etc. (No. 12,041.)

(Supreme Court of California. August 30, 1887.)

1. PARTNERSHIP—ACCOUNTING—DELAY IN BRINGING SUIT.

Where, in a suit for an accounting brought by the administrator of a deceased partner, appointed 25 years after his decease, against the executors of the surviving partner, also deceased, the complaint shows that the surviving partner continued in the individual possession of all the real and personal property of the partnership, and managed and disposed of the same as he saw fit, for 25 years after his partner's decease, and fails to allege that the heirs of plaintiff's decedent had not knowledge of the proceedings of defendant's decedent, or that there was any impediment to their action, a demurrer to the complaint will be sustained on the ground of staleness.

2. SAME.

In such a case an allegation in the complaint that the real estate had at all times stood, and still did stand, in the name of the partners, will not avail to save the action as to the real estate, as the action cannot be regarded either as one for partition, ejectment, or for mesne profits.

Commissioners' decision. Department 2.

Appeal from superior court, Yuba county; KEYSER, Judge.

Hundley & Gale and *A. F. Jones*, for appellant. *W. G. Murphy* and *W. C. Belcher*, for respondents.

HAYNE, C. According to the complaint, the material facts are as follows: In 1849, John A. Bell and William M. Bell became partners "in the business of buying and selling stock and the purchase of real and personal property." The business was carried on until the death of John A. Bell, in 1859, at which time there was on hand belonging to the firm, "a large amount of personal property, consisting of stock cattle, beef cattle, horses and mares, of the estimated value, as plaintiff is informed and believes to be true, of \$50,000, real estate situated in the county of Sutter and state of California, and in the county of Westmoreland, state of Pennsylvania, of the estimated value, as plaintiff is informed and believes to be true, of \$10,000; which said real estate has at all times since the same was acquired and still does stand in the names of said partners, John A. and Wm. M. Bell, together with notes and other demands of the estimated value of over \$10,000, as plaintiff is likewise informed and believes to be true, besides other property to the plaintiff unknown." No administration was had upon the estate of John A. Bell until June 8, 1885, when the plaintiff was appointed administrator. In the mean time "and up to the third day of June, A. D. 1885, the said William M. Bell has continued, and did continue, individually in the possession of the whole of said real and personal property, and to manage and carry on said business, and dispose of said property, and to collect the debts and things in action, and to manage and control all the property in anywise belonging to said partnership, and during the time aforesaid used the said property in any manner he saw fit, and has sold and disposed of said property, and changed it into other property, and realized thereon large sums of money, the amount of which plaintiff does not know and cannot ascertain." It is not alleged that the heirs of John A. Bell were ignorant of these proceedings on the part of William M. Bell, or that there were any impediments to the prosecution of the

claims, or that they made any demand upon him, or in any way asserted their claims during his life-time. He died on June 3, 1885, and the defendants were appointed executors of his will. The complaint goes on to allege that "the said plaintiff has requested and demands of the said defendants a statement and account of said copartnership transactions, which the said defendants have neglected and refused to give; and that he demanded of the said defendants that they deliver over all property due and owing, belonging, or coming to him as administrator of the estate of John A. Bell, deceased, and that they pay over to him as such administrator, all sums of money as were due to the estate of John A. Bell, deceased, as his part of said partnership assets and property, which they have likewise failed to do." The prayer is for an accounting and for general relief.

The court below sustained a demurrer to the complaint, and, the plaintiff not amending, final judgment was entered in favor of the defendants. Two grounds are urged in support of the judgment. It is argued, in the first place, that the claim is barred by the statute of limitations, and in the second place that the claim is so stale that a court of equity will refuse to enforce it.

1. In the view we take of the case, it is unnecessary to pass upon the first question. Assuming in favor of the plaintiff what we are inclined to think is true, viz., that the trust is not one of those implied trusts against which the statute runs, we think that so far as the claim for relief is founded upon the partnership transaction it is stale, and that a court of equity will not aid its enforcement. This is a defense peculiar to courts of equity, and applies although no statute of limitations governs the case. *Harwood v. Railroad Co.*, 17 Wall. 81; *Sullivan v. Portland*, 94 U. S. 811; *Godden v. Kimmell*, 99 U. S. 201; *Sheldon v. Rockwell*, 9 Wis. 181; *Harrison v. Gibson*, 23 Grat. 224; *Stout v. Seabrook*, 30 N. J. Eq. 189, 190; *In re Neilley*, 95 N. Y. 390; *Groenendyke v. Coffeen*, 109 Ill. 329; 2 Story Eq. Jur. § 1520. It is not the same thing as equitable estoppel, although it has been termed a *quasi* estoppel, (2 Pom. Eq. Jur. §§ 816, 817,) and hence the rules governing equitable estoppel (see *Boggs v. Mining Co.*, 14 Cal. 279) do not apply. The ground of the doctrine was stated by TANEY, C. J., delivering the opinion of the supreme court of the United States in *McKnight v. Taylor*, 1 How. 168, as follows: "We do not found our judgment upon the presumption of payment, for it is not merely on presumption of payment, or in analogy to the statute of limitations, that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost."

The principal foundations of the doctrine are acquiescence and lapse of time. But other circumstances will be taken into consideration. Thus it is a material circumstance that the claim was not made until after the death of those who could have explained the transaction. See *Mooers v. White*, 6 Johns. Ch. 368; *Barnes v. Taylor*, 27 N. J. Eq. 259; *German Seminary v. Kiefer*, 43 Mich. 111, 4 N. W. Rep. 636; *Bolton v. Dickens*, 4 Lea, 577; *Hatcher v. Hall*, 77 Va. 578. So it has been held that a change in the value and character of the property may be material. *Bliss v. Prichard*, 67 Mo. 187; *Allen v. Allen*, 47 Mich. 79, 10 N. W. Rep. 113. But as stated by DAVIS, J., in *McQuiddy v. Ware*, 20 Wall. 19: "There is no artificial rule on such a subject, but each case as it arises must be determined by its own particular circumstances." In other words, the question is addressed to the sound discretion of the chancellor in each case. *Brown v. Buena Vista*, 95 U. S. 160; *Rayner v. Pearsall*, 3 Johns. Ch. 586; *Landrum v. Union Bank*, 63 Mo. 56.

The following decisions are instances of the application of the rule to facts similar to the facts of the case under consideration. In *Groenendyke v. Coffeen*, 109 Ill. 339, which was a suit by the heirs of the deceased partner for an accounting, it was held that a delay of 16 years rendered the claim stale. In *Codman v. Rogers*, 10 Pick. 119, which was a suit for an accounting brought by the representatives of the deceased partner against the representatives of the surviving partner, it was held that a delay of 17 years rendered the claim stale. In *Harris v. Hillegass*, 66 Cal. 79, 4 Pac. Rep. 987, which was a similar case, it was held that a delay of somewhat over 20 years rendered the claim stale. And like decisions were made in *Ray v. Bogart*, 2 Johns. Cas. 432, and *Harlow v. Lake Superior Co.*, 41 Mich. 584, 2 N. W. Rep. 913. And in *McEwen v. Gillespie*, 3 Lea, 205, which was a similar case, it was held that a delay of 21 years rendered the claim stale.

Now, in the present case, the complaint does not allege that the heirs of John A. Bell had not knowledge of the proceedings of William M. Bell, or that there was any impediment to their action, and consequently it must be presumed that they had such knowledge, and that there were no such impediments. *Marsh v. Whitmore*, 21 Wall. 184, 185; *McQuiddy v. Ware*, 20 Wall. 19; *Harwood v. Railroad Co.*, 17 Wall. 81. Such being the case, we think that the fact that they delayed the assertion of their claim until the death of the surviving partner, a period of 25 years, is sufficient to make their claim stale.

It is contended, however, that this question cannot be raised on demurrer. But the preponderance of authority (and we think the better reason) is to the effect that it can. *Lansdale v. Smith*, 106 U. S. 392, 1 Sup. Ct. Rep. 350; *Bliss v. Prichard*, 67 Mo. 189, 190; *Shorter v. Smith*, 56 Ala. 210. The defense is, in substance, that the bill does not show equity; or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. This was one of the grounds of the demurrer; and if it had not been it would not have been waived, but could be taken at any time. Code Civil Proc. § 434. We think, therefore, that so far as the claim for relief is founded on the partnership transactions a court of equity will not enforce it.

2. But the complaint alleges that the real property "has at all times since the same was acquired and still does stand in the names of said partners, John A. and William M. Bell." Does this, in connection with the other allegations, state a cause of action of any kind? We think not. The action cannot be considered as for partition between co-tenants, because the administrator is not a co-tenant, and cannot bring such an action. *Freem. Co-Tenancy*, § 454. It cannot be treated as an action of ejectment between co-tenants, because what is alleged does not amount to an averment of ouster, (*Carpentier v. Webster*, 27 Cal. 561; *Carpentier v. Mendenhall*, 28 Cal. 487;) and it cannot be treated as an action for mesne profits, because (if for no other reason) there is no averment that the use of the land was of any value.

We see no aspect in which the complaint states a cause of action, and we therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 299

TURNER v. WHITE and another.*(Supreme Court of California. August 31, 1887.)***1. PLEADING—COMPLAINT—CONCLUSIONS OF LAW—ALLEGATION OF OWNERSHIP.**

The complaint in an action to quiet title alleged that the property in controversy belonged to one of the defendants at a certain date; that execution proceedings were had against him and the property sold and conveyed by the constable; "that by virtue of the deed of conveyance from said constable, plaintiff became seized of and ever since has been seized of and the owner of said premises, and entitled to the possession thereof." *Held*, that this was not an averment of unqualified ownership in the plaintiff, but a mere conclusion of law, upon which no issue could be based.

2. QUIETING TITLE—EVIDENCE OF OWNERSHIP—ADMISSIONS IN PLEADINGS.

In an action to quiet title, where the ownership of one of the defendants to the property in controversy at a certain date stood admitted by the pleadings, it was error to permit such defendant to testify that the property had never belonged to him.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; WALLING, Judge.

Thos. Ford, for appellant. *Frank Power*, for respondent.

HAYNE, C. The action was brought to set aside a deed from the defendant James White to the defendant Martha White, as being in fraud of creditors. But at the trial the plaintiff abandoned his charge of fraud; and both court and counsel seem to have come to the conclusion that the property was not really included in it; and the action appears to have proceeded as an action to quiet the plaintiff's title. The plaintiff's theory was that he acquired the title through a sale under execution against the defendant James White. The defendant's theory, as developed by the evidence, was that James White never had any interest in the property. The validity of the execution proceedings not being questioned, it will be seen that the ownership of James White, at the time of the execution sale, was a central point in the case. But this point must be resolved in favor of the plaintiff upon the pleadings. The complaint alleges that at the time of the levy James White was the owner. The only thing approaching to a denial is the following: "Defendants deny that the plaintiff is the owner or in possession of the property in his complaint described, but aver that it is the property of the defendant Martha S. White; deny that the plaintiff ever was the owner of any of said property." With reference to the averment that "it is the property of the defendant Martha S. White," it is sufficient to say that at most it speaks only from the time of the commencement of the action, and is not at all inconsistent with the allegation that at some prior time James White was the owner.

With reference to the remainder of the paragraph quoted, we were at first inclined to treat it as sufficient, upon the ground that the allegation of the plaintiff's ownership was the ultimate fact alleged, and that the averments of how he acquired the title were averments of mere evidence which need not be denied. But after consideration we do not think the allegation in the complaint can be so treated. It is perfectly true that, in general, an allegation that a party is the owner of real property is an allegation of an ultimate fact, and not of a conclusion of law. *Payne v. Treadwell*, 16 Cal. 242; *Garwood v. Hastings*, 38 Cal. 217; *Ferrer v. Insurance Co.*, 47 Cal. 431. But as held in *Levins v. Rovegno*, 12 Pac. Rep. 161, the same averment or statement may be of a fact or of a conclusion, according to the context. Now, in the present case the complaint first avers the ownership of James White at a certain date, and then sets out the execution proceedings against him, and then has the following: "That by virtue of the deed of conveyance from said constable, plaintiff became seized of, and ever since has been seized of, and the owner of, said premises, and entitled to the possession thereof." This we think is

not the averment of unqualified ownership in the plaintiff, but only of the consequence resulting from the derangement set forth. In other words, it is a mere conclusion, and its denial raises no issue. The allegation of the ownership of James White at the time of the levy, therefore, stands admitted. In this condition of the pleadings, it was error to allow James White to testify, against a proper objection, that the property had never belonged to him; and the findings to that effect is against the admissions of the pleadings.

The deed from James to Martha White does not help the defendants' case in this regard, because they seem to have exerted themselves to show that the property was not included in it. We therefore advise that the judgment be reversed, and the cause remanded for a new trial, with leave to the defendants to amend their answer.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion, the judgment is reversed and cause remanded for a new trial, with leave to the defendants to amend their answer.

73 Cal. 310

PRITCHETT v. STANISLAUS Co. (No. 11,710.)

(*Supreme Court of California.* August 31, 1887.)

1. MUNICIPAL CORPORATIONS—ACTION BY MARSHAL FOR SERVICES—PLEADING ORDINANCE FIXING COMPENSATION.

By St. Cal. 1883, p. 24, municipal corporations are divided into classes, and by section 881 of the same act, the board of trustees of cities of the fifth and sixth classes are authorized to fix by ordinance the compensation of city marshals. In an action by the marshal of a city (of the sixth class) to recover for services rendered, the complaint failed to state that the board of trustees of such city had passed any ordinance fixing the compensation of the marshal, or to state to what class of municipal corporations such city belonged. *Held*, that the complaint was demurrable.

2. CONSTITUTIONAL LAW—ACT CAL. 1883 CLASSIFYING MUNICIPAL CORPORATIONS, VALID.

The California act of March 2, 1883, (St. 1883, p. 24,) providing for the classification of municipal corporations, is a general law, and constitutional.

Department 2. Appeal from superior court, Stanislaus county; MINOR, Judge.

Schell & Bond, for appellant. *J. R. Kittrell*, Dist. Atty., for appellee.

THORNTON, J. This action was brought by the plaintiff to recover for services rendered by him as marshal of the city of Modesto, of the county above named. The services for which a recovery is claimed are for the execution of process—such as warrants of arrest and subpoenas issued out of a justice's court of the county aforesaid, in criminal cases,—for a period extending from the fourth of May, 1885, to the ninth of January, 1886. The demurrer was sustained, and we think properly. By the act of March 2, 1883, entitled "An act to provide for the classification of municipal corporations," (St. 1883, p. 24,) it was provided as follows: "All municipal corporations within the state are hereby classified as follows: Those having a population of more than one hundred thousand shall constitute the first class; those having a population of more than thirty thousand, and not exceeding one hundred thousand, shall constitute the second class; those having a population of more than fifteen thousand, and not exceeding thirty thousand, shall constitute the third class; those having a population of more than ten thousand, and not exceeding fifteen thousand, shall constitute the fourth class; those having a population of more than three thousand, and not exceeding ten thousand, shall constitute the fifth class; those having a population of not exceeding three thousand, shall constitute the sixth class." We think this act is constitutional, as it is a general law. Const. art. 11, § 6; *Thomason v. Ashworth*, (opinion filed July 2, 1887,) *ante*. 615.

It is said that the city of Modesto is a municipal corporation of the sixth class, and the board of trustees of the city are authorized by law to fix by ordinance the compensation of the marshal, which compensation shall not be increased or diminished during his term of office. Such is the provision made by statute. See St. 1883, § 855, p. 268. It is further provided by section 881 of the same act (St. 1883, p. 278) that the board of trustees shall, by ordinances not inconsistent with the provisions of this chapter, prescribe the additional duties of officers and fix their compensation. The compensation fixed by the board of trustees under section 855 is to be for all duties imposed on the marshal by the act. These duties are set forth in section 880 (St. 1883, p. 277) and include the duty to execute and return all process issued and directed to him by any legal authority, and, by the same section, for the service of any process he is to receive the same fees as constables.

It may be that we cannot take judicial notice as to what class the city of Modesto belongs. But to whatever class it belongs, the marshal is not entitled to the compensation claimed from the county of Stanislaus for the services performed and set forth in the complaint in this case. The compensation allowed the marshal in the fifth and sixth classes (and there is no such officer in the other classes, first, second, third, and fourth) is to be fixed as stated above; that is to say, the same provision is as to the compensation of the marshal in municipal corporations of the fifth class as in this of the sixth. St. 1883, p. 251, § 755. It does not appear that the board of trustees of the city of Modesto has passed any ordinance fixing the compensation of the marshal, but we presume it has. If it has passed such ordinance, the marshal is only entitled to the compensation so fixed. If no such ordinance has been passed by it, then the marshal can recover nothing.

It should have been set forth in the complaint, to entitle the plaintiff to recover, to what class of municipal corporations the city of Modesto belongs, and what compensation to the marshal had been fixed by an ordinance passed by the board, and it should further appear that the claim of plaintiff accorded with such ordinance. In this view, the complaint of plaintiff is fatally defective, and the demurrer to it was properly sustained.

The judgment must be affirmed. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 253

PEOPLE v. WHEELER and another. (No. 20,270.)

(*Supreme Court of California.* August 30, 1887.)

1. FALSE IMPRISONMENT.

A tract of land was claimed without right by the defendant W., and, while at work on a part not inclosed, cleared, or cultivated by W., complainant was seized, thrown down, bound, and carried away by the defendants. *Held*, that the defendants were properly convicted of false imprisonment.

2. CRIMINAL PRACTICE—COMMITMENT—FICTITIOUS NAME.

In California, a defendant charged with crime may be held by the examining magistrate to answer, although in the complaint he was given a fictitious name.

3. SAME—COMMITMENT FOR FALSE IMPRISONMENT UNDER WARRANT FOR ROBBERY.

Under Pen. Code Cal. § 872, providing for commitment to answer, the defendant may be held, after examination before the magistrate, to answer a charge of false imprisonment, the evidence being sufficient, although arrested on a warrant issued upon a complaint for robbery.

Commissioners' decision. Department 1.

Appeal from superior court, Lake county; HUDSON, Judge.

Hunsaker & Britt, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BELCHER, C. C. The defendants were tried upon an information charging them with the crime of false imprisonment, and convicted. They moved for

a new trial, and have appealed from the judgment, and order denying their motion. The facts of the case may be briefly stated as follows: In 1884 the defendant Wheeler made application to purchase from the University of California a tract of land bordering on Clear lake, in Lake county, and made a preliminary payment therefor. The land sought to be purchased was at that time unsurveyed public land of the United States. Afterwards, in February, 1885, the township embracing the land was surveyed, and on the nineteenth of April, 1886, the map of the survey was filed in the local land-office. From the time of this attempted purchase Wheeler claimed the land, and soon after the map was filed made application to have it listed over to the state. There were two cabins on the tract,—one near what is called "Chappall Bay," and the other about a mile and a half away, and situate near the lake shore. In October, 1885, Wheeler employed the complainant, John Standley, to work on this tract, chopping brush; and he continued to so work until the thirteenth of March, 1886, when he was discharged. During the time he was so employed he lived in the cabin near Chappall Bay, and cleared off one and three-fifths acres, for which he was paid by the acre. Wheeler lived in the other cabin, having in it a bed, books, cooking utensils, etc., and was there most of the time. Early in March he went away, leaving in the cabin a young man named Hall, who was also employed by him. On the nineteenth day of April, 1886, Standley went to the United States land-office, and filed there his declaratory statement to pre-empt a quarter section of the tract, and received the usual certificate and receipt from the register and receiver. The cabin then occupied by Hall was on this quarter section. On the twenty-first of April, Standley saw Hall, and told him he had a bill of sale of the cabin, and he would like to have him move Wheeler's things out as soon as possible. In compliance with this request, Hall moved Wheeler's things out of the cabin, and surrendered possession of it to Standley, who went to living in it, and commenced at once to build a new cabin for himself, some 200 yards away, and was engaged working upon it on the fourth of May following. On the twenty-third of April, Hall wrote to Wheeler, telling him of Standley's attempted location and entry upon the land. On the fourth of May, Wheeler returned, with the avowed purpose of removing Standley from the premises, forcibly if necessary. He was accompanied by four other persons, one of whom was the defendant Mooney. Wheeler and Mooney came to a point near where Standley was at work on his cabin, in a boat. They went up to him, and after some conversation Wheeler said: "You have no legal right here, and I desire you to get away." After some further conversation Mooney laid his hand on Standley's shoulder and said: "There is your boat, and I advise you to get into it." The parties then clinched, and Standley was thrown down. The other three persons then came up and assisted in holding him. Wheeler ran to the boat and got a rope, and with that Standley's hands and feet were tied. He was then placed in the boat and taken round to Chappall Bay. There he was taken from the boat and made to get into a wagon, in which he was driven away. At Chappall Bay he asked the names of the four persons who had assisted Wheeler in removing him to that point, and each one of them gave him a false name.

Before pleading to the information, the defendants moved the court to set it aside, upon the ground that they had not been legally committed by a magistrate. In support of their motion it was shown that Standley, on the fourth of May, 1886, made a complaint before a justice of the peace of Lake county, charging A. A. Wheeler, John Doe, Richard Roe, John Brown, and Richard Williams with the crime of robbery, committed in the forcibly and feloniously taking from his person a certain key. On this complaint a warrant was issued, and the proper officer made return thereon that he had arrested "the within-named defendants." An examination was had before the magistrate, and an order of commitment was indorsed by him upon the complaint as fol-

lows: "It appearing to me that the offense of robbery has not been committed, but that the crime of false imprisonment has been committed, and that there is sufficient cause to believe that the within-named A. A. Wheeler, Cornelius Mooney, J. B. Lewis, C. Stanton, and C. Harkort are guilty thereof, I order that they and each of them be held to answer the same," etc. Upon this showing, we think the court properly denied the motion. The committing magistrate was authorized to hold the defendants to answer for any offense which the evidence showed them to have committed, (section 872, Pen. Code,) and his power was not limited to such offenses as were embraced within the crime charged in the complaint. Nor was it material that all the defendants except Wheeler were given fictitious names in the complaint. The regularity of the proceeding by information did not depend in any manner upon the affidavit on which the warrant of arrest was issued, and had no connection with it. *People v. Velarde*, 59 Cal. 458.

At the trial the defendants sought to justify their action upon the ground that Wheeler had had the actual possession of the disputed premises for more than a year, and was entitled to retain that possession; that Standley induced Hall to surrender to him the possession of the cabin by fraudulent misrepresentations, and became a naked trespasser upon the land, and that under the law, as declared in *Atherton v. Fowler*, 96 U. S. 519, and *McBrown v. Morris*, 59 Cal. 65, he could acquire no rights to the land by his attempted pre-emption; and that Wheeler was therefore authorized to remove him, and to use so much force as was necessary to accomplish that end. The court below did not adopt defendants' theory, and therefore nearly all of its rulings were excepted to, and are now assigned as errors.

We do not think it necessary to consider separately all of the points presented. For the purpose of the case it may be conceded that Standley obtained no rightful possession of the Wheeler cabin, and that his pre-emption filing was wholly invalid. Still the question remains, were the defendants justified in removing him from the land in the manner they did remove him? In considering this question it must be observed that the land was uninclosed public land. Wheeler acquired no title to it, or right to its possession, by his application to purchase it from the university. He had a cabin upon it, and had cleared a small area, and planted some vegetables upon it. But all this evidently gave him no possession of the portions not actually occupied by him. Standley had commenced building a cabin for himself, some 200 yards distant from Wheeler's cabin. This new cabin was upon ground which had not been inclosed, cleared, or cultivated by Wheeler. While at work upon his cabin he was seized, thrown down, tied, and carried away by defendants. Upon these facts it seems to us that no plausible pretense of justification can be put forth. False imprisonment is the unlawful violation of the personal liberty of another, (section 236, Pen. Code,) and every element of the offense seems to have been fully and clearly shown.

It is enough to say of the errors alleged to have been committed by that court in the admission and exclusion of evidence, and in the refusal to give the jury certain instructions asked by defendants, that we have carefully examined the record, and are of the opinion that the rulings are proper. The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

HOOPER v. STUMP and others.

(Supreme Court of Arizona. August 25, 1887.)

MORTGAGE—POWER OF SALE.

Where a mortgage contains a power of sale in case of default in the payment of principal or interest, and directs that out of the proceeds of the sale the principal and interest shall be paid, default of interest before maturity of principal authorizes the exercise of the power.

(Syllabus by the Court.)

Appeal from county court, Cochise county; STREET, Judge.

Thomas Mitchell, for appellant. Goodrich & Smith, for appellee.

PORTER, J. This is an action on a note, and to foreclose a mortgage, upon non-payment of the interest on the note before the principal sum was due, the terms of which note and the mortgage in part are as follows:

"This conveyance is intended as a mortgage to secure payment of a certain promissory note of even date herewith, in words and figures as follows, to-wit: \$3,387.20.

JULY 1, 1885.

"On or before two years after date we promise to pay J. W. Hooper or order at Los Angeles, California, three thousand three hundred eighty-seven twenty one-hundredths dollars, gold coin of the United States, for value received, with interest at the rate of one per cent. per month, payable semi-annually in like gold coin.

J. W. STUMP.

"E. W. STUMP."

"And these presents shall be void if such payments be made according to the tenor and effect hereof; but, in case default be made in the payment of the principal or the interest as provided, then the said party of the second part, his executors, administrators, and assigns, is hereby empowered to sell the said premises, and all and every of the appurtenances, or any part thereof, in the manner prescribed by law; and, out of the moneys arising from such sale, to retain the said principal and interest, together with the costs and charges of making such sale, and ten per cent. for attorney's fees; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns."

The language is plain and can mean nothing else than, on failure to pay the principal or interest, power is given to sell the premises and retain such principal and interest. If it were only to cover interest in default of payment of interest, why say to retain the principal? Such is the contract, and by it the parties must stand. We see no need of referring to authorities. In Jones on Mortgages, § 1177, it is said: "Default in the payment of the yearly or half-yearly interest at the times stipulated in the mortgage is held by high authority to give the right to foreclose immediately, although the period for payment of the principal sum has not arrived, and there is no provision specifically making a forfeiture of the principal upon a default in the payment of the interest." In the same section reference is made to *Gladwyn v. Hitchman*, 2 Vern. 135, which says: "In this case a mortgage was made for £450, payable at the end of five years, with interest at the rate of 5 per cent. in the mean time. The interest not being paid as stipulated, the mortgage was treated as forfeited."

The right became absolute by non-payment of the interest, the condition not being fulfilled. *Dictum* of Lord Chancellor SUGDEN, Jones Mortg. § 1178.

The right to foreclose on non-payment of interest was fully considered in *Brickell v. Batchelder*, 62 Cal. 623, and is conclusive of this case. Section 728, Code Civil Proc. Cal., is the same as section 2686 of our Compiled Laws, and was the law of that state when *Brickell v. Batchelder* was decided. There may be notes payable at different dates, and no provision made for

foreclosing all upon the others not being paid, and so the sections invoked (page 448, Comp. Laws) provide for sales for paying the amounts due. This is not the case before us, for, as said, the principal and interest shall be retained from proceeds of the sale.

Counsel for appellants rely on *Williams v. Townsend*, 31 N. Y. 411. There a provision was made for the payment of taxes by the mortgagor, and in default there was a power to sell. Payment was not made by the mortgagor, but a purchase at tax sale was made for the mortgagee. The mortgagee commenced a foreclosure under the statute, by advertisement in one of the Buffalo papers. There was no part of the principal or of the interest due and unpaid, and before the day of sale mentioned in the advertisement the mortgagee paid to the proper officer the amount necessary for the redemption of the premises. The court says: "But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes. To give that right it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax; otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this; for it provides that 'such assessments, taxes, and charges as shall have been paid by them' may be retained." It seems that if the mortgagor had paid the taxes, which was at his own option, according to the mortgage, he could have foreclosed; but, as purchaser at the tax sale, the court says: "When, however, he purchases at a tax sale, and takes a certificate as purchaser, that is an election on his part to occupy the relation of purchaser with all the rights and incidents which the law attaches to it. He becomes then the owner of an undischarged lien, which the owner of the land may discharge in the manner provided by law."

The case of *Railway Co. v. Sprague*, 103 U. S. 756, cited by counsel, does not contravene *Brickell v. Batchelder*. The mortgage in the former case provided that, upon non-payment of interest for six months, the principal of the bonds should become due, whether *demanded* or *not*. The bonds declared, in case of non-payment of interest which had become due and *had been demanded*, if such default should continue six months after demand, the principal should become due. The court holds that the bonds being the principal obligation of the company, and the mortgage a mere security to insure its performance, the terms of the bonds should prevail. In the case at bar there is no conflict. The note says, when interest shall be due. The mortgage says, in addition, if interest be not paid when due, it shall be collected, and also the principal on such failure to pay the interest. The judgment is affirmed.

PEOPLE v. DOUGLASS.

(Supreme Court of Utah. September 2, 1887.)

JUSTICE OF THE PEACE—JURISDICTION OF BATTERY—ORGANIC ACT UTAH.

Under section 4 of the organic act of Utah, (Comp. Laws Utah 1876, p. 31,) providing that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be limited by law: provided, that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars,"—the statutes of the territory giving to justices of the peace jurisdiction "of petty larceny, of assault and battery, * * * and all misdemeanors punishable by a fine less than \$300, or imprisonment * * * not exceeding six months, or both," are valid, and confer upon justices the power to try a person charged with the crime of battery, the punishment provided for, which is a fine not exceeding \$300, or by imprisonment not exceeding six months, or both; overruling *Yearian v. Speirs*, 10 Pac. Rep. 603. BOREMAN, J., dissenting.

C. C. Richards, for the People. W. R. White, for defendant.

ZANE, C. J. This prosecution was instituted before a justice of the peace of Ogden precinct, in Weber county. The complainant charged the defendant with the crime of battery. The defendant demurred to the complaint for the reason that a justice of the peace had no jurisdiction to try a person charged with the offense of battery. The demurrer was overruled, the defendant was tried, found guilty, and sentenced to pay a fine of \$25; in default of such payment, to be imprisoned at the rate of one day to each dollar of the fine. From that judgment the defendant appealed to the First district court, wherein the demurrer to the complaint was sustained, and judgment rendered accordingly. This appeal is from the latter judgment.

The question presented for our consideration and decision is, have justices of the peace in this territory authority to try a person accused of the crime of battery? That offense may be punished in this territory by a fine in any sum not exceeding \$300, or by imprisonment for any time not exceeding six months, or by both. The statutes of the territory declare that justices of the peace shall have jurisdiction of petit larceny, of assault and battery not charged to have been committed upon a public officer in the discharge of his duty, of breaches of the peace committing a willful injury to property, and all misdemeanors punishable by a fine less than \$300, or imprisonment in the county jail or city prison not exceeding six months, or by both such fine and imprisonment. Jurisdiction is given in express terms to justices of the peace to try battery cases. But the defendant denies the power of the territorial legislature to confer such jurisdiction on justices' courts.

The authority to pass such a law, if possessed by the territorial legislature, is given by the following provisions of the organic act, and in the acts amendatory thereof.

Section 4 of the organic act provides that "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be limited by law: provided that justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundaries of land may be in dispute, or when the debt or sum claimed shall exceed one hundred dollars." Comp. Laws Utah 1876, p. 31.

Section 3 of a subsequent act of congress extends the civil jurisdiction of these courts to all cases in which the debt or sum claimed shall be less than \$300, and gives the right of appeal from all judgments of these courts. Id. 54.

The foregoing provisions limit the jurisdiction of justices of the peace to cases in which the debt or sum claimed is less than \$300, and exclude cases involving the title or boundary of land. These limitations do not apply to criminal cases.

Section 1866, Rev. St. U. S. 1878, declares that the jurisdiction of justices of the peace, as well as the jurisdiction of other courts referred to, "shall be limited by law." This is equivalent to a declaration that justices of the peace shall have jurisdiction to try all causes of action that might arise within the limits fixed by law; it extends their authority to such limits. By the above provision congress imposed the duty upon the law-making power of passing laws limiting the jurisdiction of justices of the peace. And, inasmuch as congress has not enacted such laws, the intention must have been to impose the duty on the law-making body for which it made provision in section 6 of the organic act, in the following terms: "That the legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and if disapproved shall be null and of no effect." The territorial act in question has not been disapproved by congress.

The language of the section quoted is: "The legislative power of said territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act." The territorial enactment in question appears to be consistent with the constitution and the laws of congress. The jurisdiction of justices' courts to try cases is a rightful subject of legislation, because it is always conferred by legislation. "At common law a justice of the peace had no power to try any offenses whatever. He was no more than an examining magistrate, to inquire into offenses with a view to holding parties for trial on indictment elsewhere, if sufficient cause was shown to commit the accused. But the power of trying and convicting petty offenders is entirely statutory, and must be conducted as the law prescribes." *Way's Case*, 41 Mich. 300. To the same effect is the case of *Martin v. Fales*, 36 Amer. Dec. 693.

The jurisdiction of justices of the peace has been extended latterly both in England and in the United States. In the various states of this country the jurisdiction, both civil and criminal, differs, and has been changed as to its extent in some of the states. Increasing intelligence has expanded the capacities of men, and advancing enterprise has widened the field of their duties, and accordingly the respective states have extended the labors of their magistrates in obedience to the conceived demands of the public good. There is no uniform limit to their jurisdiction common to the states. In a number of the states and territories the jurisdiction of justices of the peace at the present time extends to six months' imprisonment, and a fine ranging from \$100 to \$500. In California the limitation is not to exceed six months' imprisonment, or a fine of \$500, or both. In Nevada, justices may imprison for six months or impose a fine of \$500, or both. In other states and in the territories the jurisdiction of justices' courts varies.

In construing the provisions of the organic act under consideration, the supreme court of the United States said: "When congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, local legislatures have been intrusted with the enactment of the entire system of municipal law, subject also, however, to the right of congress to revise, alter, and revoke at its dis-

cretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature." *Hornbuckle v. Toombs*, 18 Wall. 648.

Again, in the case of *Westray v. U. S.*, Id. 322, referring to the same legislative power, the same court said: "The power given to the legislature is extremely broad." To the same effect are the cases of *Chumaseo v. Potts*, 2 Mont. 242; *Bray v. U. S.*, 1 N. M. 1; *Territory v. Valdez*, Id. 548; and *Clin-ton v. Englebrecht*, 13 Wall. 434.

Counsel for the defendant relies on *Ferris v. Higley*, 20 Wall. 375. In that case an act of the legislature of the territory of Utah, conferring general jurisdiction on probate courts, was held to be inconsistent with the organic law of the territory. It was held not to be the intention of congress by the organic act to convert the probate court into a court in which all causes, whether civil or criminal, whether of common law or chancery cognizance, whether involving life, liberty, or property, should be tried and determined. The court held, however, that the power to define the jurisdiction of the territorial courts might be included within the meaning of the phrase "rightful subject of legislation," and that the territorial act in question in that case was not inconsistent with the constitution of the United States, but that it was inconsistent with the organic act itself. In considering that act, the court pointed out the provisions with which the territorial act was inconsistent. Among them were the following: The act declared that the supreme and district courts, respectively, should possess chancery as well as common-law jurisdiction, while the probate courts were left with such powers as their title indicated; that their name described their functions; that they were such as had been united under the name and had been exercised by those courts in England and in this country. They were such as it had been necessary for them to use in the settlement of the estates of deceased persons, the estates of infants and persons of unsound mind, and in adjudications as to dower and the appointment of guardians and conservators. The organic act provided that the judges of district courts should be appointed by the president by and with the advice and consent of the senate, while the election or appointment of probate judges was left to be provided for by the territorial legislature. The court said: "Looking, then, to the purpose of the organic act to establish a general system of government, and its obvious purpose to say what courts shall exist in the territory, and how the judicial power shall be distributed among them, and especially to the fact that all ordinary and necessary jurisdiction is provided for in the supreme and district courts, and that of justices of the peace, and that the jurisdiction of the probate court is left to rest in the general nature and character of such courts as they are recognized in our system of jurisprudence, is it not a fair inference that it was not intended that that court should be made one of general jurisdiction?" And finally the court said: "The fact that the judges of these latter courts are appointed by the federal power and paid by that power; that other officers of these courts are appointed and paid in like manner,—strongly repels the idea that congress, in conferring on these courts all powers of courts of general jurisdiction, both civil and criminal, intended to leave to the territorial legislature the power to practically evade or obstruct the exercise of those powers by confer-ring precisely the same jurisdiction of courts created and appointed by the territory."

It is clear that the case cited is not analogous to the one in hand. No such inconsistencies exist between the act in hand and the organic law as was pointed out between the act held to be invalid in the case cited and the organic law. It is conceded that justices of the peace in this country have usually had jurisdiction of assaults and batteries, and other misdemeanors of like grade; but counsel urge that the maximum punishments for these offenses are fixed so high in this territory that justices' courts ought not to be intrusted

with their infliction. The answer to this is that before the enactment in question justices of the peace had jurisdiction of the same class of offenses in states and territories in which the punishment inflicted was as great as in this territory. And the history of such jurisdiction shows that it has no common and abiding limits. The mention of the office of justice of the peace in the organic act indicated jurisdiction of the offense of battery and other like misdemeanors. In many of the states, however, the term did not indicate the power to inflict punishment to the same extent as authorized by the act under consideration; while in others it indicated power to impose even greater punishment.

To hold that the prosecution of assaults, batteries, breaches of the peace, and other misdemeanors of like character must be commenced by indictment in the district courts, would cause great inconvenience, hardship, and delay in many cases, because that court holds but four terms during the year, and because the offenses are often committed at a distance from the place of sitting. In such cases the defendant and all the witnesses would be compelled to travel a greater distance and at considerable expense. The hardship, delay, inconvenience, and expense would be greatly lessened by a trial near the place where the offense was committed. The public good demands that such petty offenses shall be tried before a magistrate in the neighborhood of the place of their committal, if at that place such an officer with the requisite qualifications can be found. The public welfare demands as little delay and hardship in the prosecution of persons charged with crime as is consistent with a faithful enforcement of the law.

We are disposed to hold that the territorial act in question, conferring jurisdiction on justices of the peace to try persons accused of the crime of battery and other misdemeanors of the same grade, is valid. We have been referred to the case of *Yearian v. Speirs*, 10 Pac. Rep. 609. That case was decided under the impression that no precedent existed for conferring such extended jurisdiction on justices of the peace. After hearing further argument upon the question involved, and upon more mature deliberation, we are of the opinion that that case, so far as it conflicts with this, should be overruled.

The judgment of the court below sustaining the demurrer to the complaint is reversed, and the case is remanded for further proceedings in that court.

BOREMAN, J., dissents.

HENDERSON, J., (*concurring*.) Sitting in the district court, I sustained the demurrer in this case on the authority of *Yearian v. Speirs*, 10 Pac. Rep. 609, decided by this court, which is directly in point. I have carefully examined the learned and able opinion of my brother BOREMAN in that case; and, I agree with him that in conferring upon the territorial legislature the power to fix the jurisdiction of justices of the peace it was meant only to confer the right to give such jurisdiction as the title "justice of the peace" implied, having reference to the judicial history and customs of the country; but within this limit all questions of public policy and propriety are for the legislature. I do not think that the act under consideration exceeds this limit, as is shown by the authorities referred to in the opinion of the chief justice. I therefore concur in the opinion of the chief justice that the judgment of the district court should be reversed.

KELLY and Wife v. KERSHAW and Wife.

(*Supreme Court of Utah. September 2, 1887.*)

1. EQUITY—RESCISSION OF CONTRACT.

In an action to foreclose a mortgage given by defendants, husband and wife, on three tracts of land, one of which was the property of the wife, to secure the pur-

chase price of the two tracts belonging to the husband, and a loan to him made at the time of the purchase, the defendants have no right to a rescission of the contract of sale as to one of the tracts, it appearing that they had conveyed away the other without returning or offering to return either the proceeds thereof or the borrowed money.¹

2. PLEADING—AMENDMENT ON THE TRIAL.

In an action to foreclose a purchase-money mortgage, where the defendant filed a cross-complaint asking damages for a portion of the land from which he claims to have been ousted, but fails to show that the land taken from him was a part of that described in the conveyance, he has no right on the trial to amend his complaint by setting up a mistake in description in the deed so as to include the land shown to have been taken.

3. MORTGAGE—FORECLOSURE—EVIDENCE.

When, in an action to foreclose a purchase-money mortgage, the defendant asks damages for a portion of the land from which he claims to have been ousted, the record of a case which does not show that any of the land described in the conveyance has been taken from him, is not competent evidence.

4. SAME—WHEN DUE.

A note secured by mortgage was given for a year, with a proviso that the interest was to be paid monthly, the whole to become due upon default of the monthly payment of interest. The time of payment of principal was extended a year, the proviso remaining unchanged. An action to foreclose the mortgage begun after a default in payment of interest, but before the expiration of the extension, is not premature.

Appeal from district court, First district; H. P. HENDERSON, Justice.

R. K. Williams, for appellants and defendants. *Dickson & Varian*, for respondents and plaintiffs.

BOREMAN, J. The respondent John J. Kelly sold and conveyed to appellant Andrew J. Kershaw, a parcel of land 18 1-4 feet front by 50 feet back, on Main street, in the city of Ogden, and a quarter-acre parcel in another part of the same city, all for the sum of \$3,150. No part of this sum was paid down at the time of the purchase, but on the contrary, said J. J. Kelly loaned said A. J. Kershaw the sum of \$850. Thereupon said Kershaw and his wife executed their note to said Kelly and wife, for the sum of \$4,000, that being the amount of said purchase money and of said loan together; and the appellants, as security for said note, executed and delivered to the respondents a mortgage upon the two parcels of ground above referred to, and described in the deed of Kelly to Kershaw, and also upon another parcel of ground, situate also in the city of Ogden, but belonging to the wife of said Kershaw. This action is brought to enforce the collection of said note of \$4,000, by the foreclosure of the mortgage given to secure it. The defendants in the action (the appellants herein) filed their answer and cross-complaint. Judgment having been rendered for the plaintiffs, the defendants moved for a new trial, which was denied. Thereupon the defendants appealed to this court, from the order overruling the motion for a new trial.

1. The first point to which our attention has been called is the alleged right of the appellant, A. J. Kershaw, to have the purchase and sale of the parcel of ground 18x50 feet, on Main street, in Ogden, rescinded. It is a general rule that a party to a contract is not entitled to have it rescinded, unless both parties can be restored to the condition in which they were before the contract was made. It is also a general rule that a part of a contract cannot, without mutual consent, be rescinded, unless the whole be rescinded. The purchase of that one parcel of ground, 18x50 feet, was not a contract by itself. It was but part of a transaction which embraced other property. The quarter-acre tract was bought at the same time, and was a part of the same transaction. The quarter-acre tract was disposed of by Kershaw, before the institution of this action. He had deeded it away, and it could not be returned to Kelly, nor was there any offer to do so. Kershaw received the money for

¹See note at end of case.

the quarter-acre tract, and retained it. Kelly received no benefit whatever from such sale. It is inequitable that Kershaw should, while retaining the benefits arising from one part of the contract, be allowed to rescind the other part. The fact that Kelly consented to such sale would not affect his right to be placed *in statu quo* before a rescission takes place. He may have consented to such sale upon the assumption that Kershaw, by such sale, was waiving, and intending to waive, all claim or right to a rescission. It does not appear, however, that at that time Kershaw claimed any right to rescind; nor does it appear that, prior to the sale of the quarter-acre by Kershaw, any notice was given to respondent, J. J. Kelly, that after the sale the appellants would seek to escape any responsibility on the residue of the transaction by their claiming, as to A. J. Kershaw, a rescission, and as to Sarah Kershaw, a release. Justice and fair dealing would require that such notice should have been given. Had this been done, it is not probable that Kelly would have given his consent to the sale; but had he done so, there would have been some show of reason why he should not now complain of it.

The cross-complaint says that the loan of \$850 was also a part of the same transaction in which the purchase and sale of the two parcels of ground took place. This money had not been paid back, nor offered to be paid back. The appellants claim that the purchase and sale, the loan of \$850, and the giving of the note and mortgage, were all one contract. All these parts of one transaction would have to be rescinded, or none of it be rescinded. As the appellants are not in a position to put the parties *in statu quo*, and do not offer to do so, they are not in a position entitling them to a rescission of a part of the contract. There is nothing in the record to show that this case presents any exception to the general rules which we have referred to, or to either of them. But if there were grounds for the rescission of the contract as between J. J. Kelly and A. J. Kershaw, a proceeding for that purpose, or a relief of that kind, would not be proper in this action. It would not affect all the parties to the action. This is an action by two parties against two other parties, to foreclose a mortgage, which was executed by the two on the one side, to and for the two on the other side.

2. The appellant, A. J. Kershaw, contends that he lost $3\frac{1}{2}$ feet front off the 18 feet conveyed to him by Kelly, at the suit of one J. L. Dee, of which said Kelly had full knowledge; and he, Kershaw, asks damages therefor. In support of this claim for damages the appellants offered in evidence the record of the case of *Dee v. Kershaw*. The respondents objected to its introduction, and it was excluded. Its exclusion is assigned for error. That record does not show that three and one-half feet, or any other amount, of the land conveyed by Kelly to Kershaw was taken from Kershaw. The descriptions in the deed and in that record do not in any manner conflict, but represent totally distinct parcels of ground. If the record had been admitted in evidence, the face of the case would in no respect have been changed. It does not appear that there was any error in the exclusion of the record.

But appellants asked in the lower court, on the trial, for leave to amend the cross-complaint, to show the deed transaction; that Kelly and Kershaw both thought the south-west corner of lot 6, in block 26, was at what is known as the Woodmansee corner, a point three and a half feet north of where the district court, in the case of *Dee v. Kershaw*, found it to be; that that suit developed that the block in which that ground was situated was from seven to nine feet too large; that the three and a half feet, immediately south of that which the appellant was put in possession of, was held by other parties, and had been so held for over seven years before Kelly made the deed to Kershaw. This proposed amendment, had it been allowed, would have changed the issues. It would have set up a totally new claim in the cross-complaint, if it set up anything. It would have changed the issue from one upon a warranty to one of mistake in description. The cross-complaint would have been

a proceeding to reform a deed. This would have been a very important and vital change in the issues. There does not appear to be any reason why this new matter, thus sought to be incorporated into the cross-complaint, could not have been embraced in the original cross-complaint, if entitled to be in it at all; and no reason is offered for its not having been done, nor for the long delay in its not having been asked to be done before the trial. If a vital change in the issues can be made, at the trial, in one case, without any reasonable ground therefor, it can be done in all cases. Parties must use reasonable diligence in such matters, or offer some excuse for not having done so. In this case no proper diligence is shown, and no excuse is offered for the want of it. We cannot say that the district court failed to exercise a sound discretion in refusing to allow the amendment at the trial.

3. It is contended that Sarah Kershaw was a surety only and not a principal, and that this fact was known to Kelly when she signed the note, and that the giving of one year's additional time to Kershaw was a release of Sarah. From the evidence, the court was authorized to find that Sarah Kershaw was a principal. If, however, she were simply a surety, there was evidence sufficient for the court to find that she desired, consented to, and sought, the extension of time.

4. The appellants claim that the action was prematurely begun. The note was to fall due on the third of August, 1884, but it was provided in the note that the interest was to be paid monthly, and, if not so paid, the whole of the principal could be declared due and payable. The day of payment of the principal was extended from the third of August, 1884, to the third of August, 1885, one year. The other conditions of the note, however, were to remain the same as before. The appellant failed to pay the interest as required by the terms of the note, and it followed that the whole of the note became due before the end of the year, and suit was authorized to be brought to enforce its collection. We do not see that the action was prematurely brought.

Upon an examination of the whole case, we do not find any reason for disturbing the action of the court below. The order overruling the motion for a new trial is affirmed.

ZANE, C. J., and HENDERSON, J., concur.

NOTE.

A party seeking to be relieved from a contract, whether on the ground of having been fraudulently induced to enter into it, or for any other reason, must return or offer to return the consideration actually received, and restore the other party to all his rights as they previously existed. *Schneider v. Foote*, 27 Fed. Rep. 581; *Physio-Medical College v. Wilkinson*, (Ind.) 9 N. E. Rep. 167; *Farwell v. Hanchett*, (Ill.) Id. 58; *Dillman v. Nadlehoffer*, (Ill.) 7 N. E. Rep. 88; *Doane v. Lockwood*, (Ill.) 4 N. E. Rep. 501; *Turner v. Cruzen*, (Iowa.) 30 N. W. Rep. 483; *Potter v. Taggart*, (Wis.) 16 N. W. Rep. 632; *Bank of Barnesville v. Yocum*, (N.C.) 9 N. W. Rep. 84; *Wells v. Neff*, (Or.) 12 Pac. Rep. 84; *Gates v. McLean*, (Cal.) 11 Pac. Rep. 489; *Potter v. Roeth*, (Cal.) 7 Pac. Rep. 762; *Benton v. Marshall*, (Ark.) 1 S. W. Rep. 201; *Dean v. Robertson*, (Miss.) 1 South. Rep. 159. A corporation will not be relieved in equity from an *ultra vires* contract without a restoration by it of the consideration received, if it can be restored, *Turner v. Cruzen*, (Iowa.) 30 N. W. Rep. 483. Where the vendee is under legal disability to perform the provisions of the contracts as to the time or mode of payment, the vendor is entitled to a rescission, on condition of surrendering what he has received. *Chapman v. County of Douglas*, 2 Sup. Ct. Rep. 62.

Where plaintiff offers in the complaint to return the consideration received, the objection that he did not, before bringing the action, tender such money, cannot be sustained. The court can protect the rights of all parties, and the failure to make such tender can affect only the question of costs. *O'Dell v. Burnham*, (Wis.) 21 N. W. Rep. 635. Where a plaintiff comes into a court of equity asking for the rescission of a contract, and a judicial inquiry is necessary for the ascertainment of the sum to be repaid, an offer to refund such sum as shall be decreed is sufficient. *Sutter Street R. Co. v. Baum*, (Cal.) 4 Pac. Rep. 916. Under the Illinois statute a vendor who rescinds a contract for fraud will be permitted to return the consideration after bringing an action of replevin for the goods, if the fraud is admitted. *Farwell v. Hanchett*, 9 N. E.

Rep. 58; *Doane v. Lockwood*, 4 N. E. Rep. 501; but if the fraud is denied his action is prematurely brought unless he has previously returned or offered to return the consideration. *Farwell v. Hanchett*, *supra*. The consideration need not be returned when such return is impossible, or where the party guilty of the fraud has put it out of the power of the other party to make such return. *Faulkner v. Klamp*, (Neb.) 20 N. W. Rep. 220.

Where a sale of land and personal property is set aside in equity on the ground that the vendee was incapable of contracting at the time of the sale, the land and personalty also, or its value, will be restored to the vendor, and the vendee held to account for the actual annual rental value of the land, whether rented or not, from the time he came into possession of the same, deducting therefrom such of the costs of suit as he may be equitably entitled to receive. *Worthington v. Campbell*, (Ky.) 1 S. W. Rep. 714.

KELLY and another v. KERSHAW and another.

(*Supreme Court of Utah*. September 2, 1887.)

APPEAL—APPEALABLE ORDERS.

Under Laws Utah 1884, p. 303, § 828, an appeal may be taken from a judgment in a case, although an appeal has been taken from the order denying the motion for a new trial, which brought up the entire case for consideration by the court.

Dickson & Varian, for plaintiffs and respondents. *R. K. Williams*, for defendants and appellants.

BOREMAN, J. This is a motion to dismiss an appeal from a judgment, and to affirm the judgment. The ground of the motion is that on an appeal from an order denying a motion for a new trial, the entire record in the action was brought to this court, and the subject-matter of the present appeal was fully before this court, and subject to its consideration and determination, and that the present appeal is frivolous and for delay merely. When this motion was filed in this court, there had been no decision in this court upon the appeal from the order denying the motion for a new trial.

Our statute expressly authorizes appeals to be taken from both the judgment and the order denying the motion for a new trial. Laws 1884, p. 303, § 828. If we should hold the appeal from the judgment to be invalid, we negate the statute, or ignore it. Its validity is not in question, and we are not authorized to negate it, or to ignore it. If the argument, that because the whole record was before the court for consideration in the appeal from the order denying the motion for a new trial, this appeal from the judgment should be dismissed, be held good, when the appeals were taken at different times, it would be just as valid when the appeals are taken at the same time. It is equivalent to saying that, if a party take an appeal from an order overruling or granting a motion for a new trial, he is precluded from taking an appeal from the judgment in the case, when the statute asserts the reverse. The statute is not ambiguous, nor of doubtful meaning; but, on the contrary, it is express and clear. The court is not prepared to hold that the appeal from the judgment was unauthorized. In this territory an appeal from a judgment is of more importance to an appellant, sometimes, than an appeal from an order denying a motion for a new trial. Where the appeal is from the judgment, the appellant, if the amount be of sufficient size, can take the case to the supreme court of the United States. But where the appeal is from an order, this cannot be done. The fact that the amount in this case might not be sufficient to authorize an appeal to the supreme court of the United States, does not change the principle.

The argument against our entertaining an appeal from the judgment when there had been an appeal denying a motion for a new trial, might be of weight in regard to the propriety of this court hearing a second argument of the same

points, on different appeals, in the same case; but it certainly could not go further.

The motion to dismiss the appeal and affirm the judgment is overruled.

ZANE, C. J., and HENDERSON, J., concur.

TERRITORY v. CUTINOLA.

(*Supreme Court of New Mexico. 1887.*)

1. STATUTORY CONSTRUCTION—REPEAL OF REPUGNANT PROVISIONS.

Comp. Laws N. M. 1884, § 881, makes it a misdemeanor for the proprietor or superintendent of a public house where liquor is sold to permit games of cards, dice, etc., to be played on his premises. Section 884 provides for the prosecution of such offenses by indictment. Section 2490, enacted subsequently, authorizes the prosecution of all misdemeanors by information. *Held*, that sections 881 and 884 are general, and not special, statutes, and that the effect of section 2490 is to repeal so much of section 884 as is repugnant to its provisions, and that consequently the offense created by section 881 may be prosecuted by information.

2. INFORMATION—FILED *EX OFFICIO* BY PROSECUTING ATTORNEY—AFFIDAVIT.

Under the rules of the common law, as adopted in the various states, it is not essential that an information filed *ex officio* by a prosecuting attorney, in the prosecution of a misdemeanor, should be supported by affidavit.

3. SAME—OATH OF OFFICE—CONSTITUTIONAL LAW.

Under Const. U. S. 4th Amend., protecting the people against unreasonable searches and seizures, and providing that no warrant shall issue but upon probable cause, supported by oath or affirmation, it is not essential that an information, filed *ex officio* by a prosecuting attorney in the prosecution of a misdemeanor, should be sustained by affidavit other than his oath of office.

Appeal from district court, Bernalillo county.

E. A. Fiske and *H. L. Warren*, for appellant. *William Breeden*, for appellee.

HENDERSON, J. Appellant was prosecuted by information in the court below for permitting gaming in a public house of which he was proprietor, under section 881, Comp. Laws. He was tried by a jury and fined \$50. From this judgment of conviction defendant appealed. The only question presented is, can crimes of the class charged be lawfully prosecuted by information? This question was fully argued and elaborately considered by the district judge, on motion to quash the information. His opinion was reduced to writing, and is a very clear and, we think, correct determination of the question, and we adopt it as the opinion of this court. The opinion is as follows:

"This is a motion filed by defendant to quash the information for two reasons: (1) Because the offense cannot be prosecuted by information in the district court, but must be by indictment. (2) Because the information is not made upon oath or affirmation showing probable cause for the prosecution.

"The information is filed by the district attorney, *ex officio*, and is supported by an affidavit made by himself, stating the facts to be true according to his information and belief.

"Counsel have exhibited great zeal, learning, and research, in the preparation and presentation of the questions arising upon this motion, and have fairly overwhelmed the court with arguments, briefs, and books in support of their respective positions. I have listened to the arguments attentively and patiently, read the briefs carefully, and examined the authorities as thoroughly as time and the press of other business would permit. It is but a just recognition of the ability, labor, and diligence of counsel to say that I am satisfied the whole ground has been covered, and all the law bearing upon the case in any manner has been found, examined, and presented at this hearing.

"The first ground of the motion proceeds upon the theory that the section of the statute upon which this prosecution arises is a special statute with a lim-

ited application, and that the latter act authorizing the prosecution of all misdemeanors by information does not affect it. Section 881, Comp. Laws 1884, provides that if any proprietor or superintendent of any public house where spirituous or malt liquors are sold, shall permit any games to be played with cards, dice, etc., such person on conviction shall be fined. Section 882 prohibits all persons from frequenting or keeping any gaming table under the penalty of a fine. Section 883 prohibits all persons from betting at any gaming table, etc. Section 884 provides that for any violation of the provisions of the foregoing sections the person so offending shall be presented before some justice of the peace, or by indictment by a grand jury, etc. These sections are copied from the Compiled Laws of 1865, into the compilation of 1884.

"In 1872 the legislature passed an act authorizing the prosecution of all misdemeanors by information. In 1874 this act was amended, giving justices concurrent jurisdiction, and as amended it is found in the Compiled Laws of 1884 as section 2490.

"That section 881, defining the offense for which this prosecution is instituted, is a general statute, is very clear. It affects all persons alike who by their conduct bring themselves within its provisions. A general statute is defined to be one which affects all the people, or all of a particular class. Bish. Writ. Law, § 42. When it concerns a class in distinction from individuals it is treated as general. Sedg. St. & Const. Law, 24, 25. Bish. Writ. Law, § 42c. A private or special statute (and these words appear to be used interchangeably) is one which affects only particular individuals or things. Bish. Writ. Law, § 42d. The section under consideration does not refer to any particular individual, but to all that class of persons who permit games to be played with cards, etc., in their houses where spirituous or malt liquors are sold. Section 884 is a general statute also, and provides a mode of procedure for the trial and punishment of all persons of the class mentioned in section 881. It says that such persons shall be indicted by the grand jury. But section 2490, passed long after the passage of section 884, provides that all misdemeanors may be prosecuted by information. This is a misdemeanor. Section 2490 is later in time of enactment, and is repugnant to the provisions of section 884, and under a fundamental rule of construction, works a repeal of section 884, to the extent of the repugnancy, or, at least, it works an amendment of that section, so that both, taken together, provide for the prosecution of misdemeanors of the kind mentioned in the sections preceding section 884, by indictment and information, as concurrent remedies. Sedg. St. & Const. Law, 104. It follows from what has been said, that an information may be resorted to in this class of cases.

"The second ground of the motion presents a question of greater difficulty. It resolves itself into two questions: *First*. Must an information be supported by an affidavit? And, *second*, if so, is the affidavit in this case sufficient?

"It was conceded in the argument that if the first proposition should be answered in the affirmative, the second must be answered in the negative, *i. e.*, if it should be held that an affidavit was necessary, then the affidavit filed in support of the information in this case must be held insufficient. The statute does not undertake to define an information, or prescribe its form or contents. We must therefore look to the common law to ascertain what it is and what its requisites, in the particular in question, are. At common law an information is defined to be an accusation or complaint exhibited against a person for some criminal offense, either immediately against the king, or against a private person, which from its enormity or dangerous tendency the public good required should be restrained and punished, and differs principally from an indictment in this: that an indictment is an accusation found by the oath of 12 men, whereas an information is only the allegation of the officer who exhibits it. 3 Bac. Abr. 635, tit. 'Informations.' Bacon says

there were two kinds of criminal informations in use in England under the common-law procedure. The first was for offenses more immediately against the king, and was filed by the attorney general, *ex officio*, and without leave of court. The second was for offenses against private individuals, and was exhibited by the masters of the crown. Prior to the adoption of the statute of 4 and 5 Wm. & Mary, c. 18, informations of this class were filed as a matter of course; but under the provisions of this statute such informations could not be filed by masters of the crown, except upon leave of court, and were required to be supported by the affidavit of the person at whose suit the same was filed, and such person was also required to give security for costs. 3 Bac. Abr. 635.

"It is contended here that the second class has been adopted in this country; that in England the first class could only be filed in cases where the misdemeanor was committed against the king's person, his prerogative, his revenue, his officers, or the public safety, and that as we have no king, nor any person exercising kingly powers and prerogatives, the first class of informations has no application here. In support of this position counsel cite: 4 Bl. Comm. 307-309; 1 Chit. Crim. Law, 848-506; *Ex parte Burford*, 3 Cranch, 448; *State v. Gleason*, 32 Kan. 245, 4 Pac. Rep. 363; Arch. Crim. Pl. & Pr. 69, 70. Is this position sound? It may be admitted that, for the misdemeanors of the kind mentioned, the attorney general could, and did, file informations, but was he limited to that class? Could he not file an information *ex officio* upon the commission of a misdemeanor of either class? Blackstone, p. 309, *supra*, (after stating the two kinds of informations, and that the first are properly and truly the king's own suits,) says: 'The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are probably such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his functions.' Coke, Chitty, and Bacon, as cited above, sustain this statement of the power of the attorney general, and that it was the practice for all other informations to be filed by the master of the crown. But it may be doubted whether these authors state the whole law on the subject on the pages cited. Blackstone seems to think that the attorney general was limited to the filing of informations for offenses against the king. But Chitty says (1 Crim. Law, 884:) 'Informations may be filed by the attorney general for any offense below the dignity of felony, which tends, in his opinion, to disturb the government, or immediately interfere with the interests of the public, or the safety of the crown. He most frequently exercises this power in cases of libels on governments or high officers of the crown, etc. He seems, indeed, at his option to exert it when any offense occurs which may thus be prosecuted in the crown office. The attorney general is the sole judge of what public misdemeanors he will prosecute. He may file an information against any one whom he thinks proper to select, without oath, without motion or opportunity for the defendant to show cause against the proceeding.' Lord Bacon says, upon the authority of Mr. Sergeant Hawkins, that it was 'every day's practice, agreeable to numberless precedents, to exhibit informations, either in the name of the king's attorney general, or of the master of the crown office, for batteries; cheats; seducing a young man or woman from their parents in order to marry them against their consent, or for other wicked purpose; spiriting away a child; rescuing persons from legal arrest; perjuries; subornation of perjuries; forgery; conspiracies, and other like crimes done principally to a private person, as well as for offenses done principally to the king. * * * and in general, or any other offenses against the public good, or against the first and obvious principles of justice and common honesty.' 3 Bac. Abr. tit. 'Informations,' B; 2 Hawk. P. C. c. 26, § 1. Mr. Cole, in his work upon Criminal Informations, at page 9, says: 'The attorney general may exhibit an *ex officio* information for any misdemeanor whatever,' and cites, in support

of this statement, Com. Dig. tit. 'Information,' A; Bac. Abr. tit. 'Information,' A; 2 Hawk. c. 26; Arch. Pl. & Ev. 69. On page 10, the author continues: 'In cases of misdemeanor the law has intrusted the attorney general, on behalf of the crown, with a discretionary power of filing informations; and for that reason the court of queen's bench will never give leave to the attorney general on behalf of the crown to exhibit criminal information. He has the right to exhibit one *ex officio*, on his own responsibility and discretion.' 'But although the attorney general may, if he think fit, exhibit a criminal information, *ex officio*, for any misdemeanor whatever, yet in practice he seldom does so except when directed to do so by the house of lords, the house of commons, etc., when the case is of a very serious nature. The usual objects of an *ex officio* information are properly such enormous misdemeanors as tend to disturb or endanger the queen's government, or affront her in the discharge of her royal functions.' Cole, Crim. Inf. 10, found in 46 Law Lib. 29, 30.

"This is sufficient to show that Blackstone stopped short of stating the full power of the attorney general in this particular, at common law, and sufficient, I think, to show that the right of the attorney general to file informations for misdemeanors was unlimited, although the practice was not to call the right into exercise, except in cases of high misdemeanor. In *State v. Gleason*, 32 Kan. 245, 4 Pac. Rep. 363, the court says that, 'at common law, an information might be filed against persons charged with misdemeanors, yet no rule was granted in such cases except upon evidence sufficient to make out the offense beyond doubt.' The court, evidently, had in mind the second class of informations, because Arch. Pl. & Ev. 76, and 1 Chit. Crim. Law, 856, are cited where the statute of 4 and 5 Wm. & Mary, c. 18, concerning that class of informations, is discussed. The court discusses the essentials of a common-law information in passing upon a statute of that state which required informations to be verified by affidavit, but which authorized an affidavit on information and belief. They hold the statute void, because it is in conflict with their constitution, and then decide, in effect, that the kind of information meant by the Kansas statute was the kind in use in England by the masters of the crown subsequent to the adoption of the statute of Wm. & Mary, *supra*.

"This case seems to stand alone on the position that the second class of informations was adopted in this country. In *State v. Kelm*, 79 Mo. 515, it is said, quoting from Bishop: 'In our states the criminal information should be deemed to be such, and such only, as in England is presented by the attorney or solicitor general. This part of the English common law has plainly become common law with us. As with us the powers which in England were exercised by the attorney or solicitor general, are largely distributed among our district attorneys, whose office does not exist in England, the latter officers would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office, and without leave of court.' Citing 1 Bish. Crim. Proc. § 144; Whart. Crim. Pl. & Pr. (8th Ed.) § 87. See, also, 1 Bish. Crim. Proc. § 604. The second class of informations seems not to have been adopted in this country. 1 Bish. Crim. Proc. § 606; *State v. Moore*, 19 Ala. 514. I am unwilling to adopt the view of the Kansas court when opposed by such standard authorities upon criminal law and procedure as Bishop and Wharton.

"But it is said that, even if the information adopted in this country be the kind exhibited by the attorney general in England, and even if our district attorneys have the same power under our system as at the common law, yet the fourth amendment to the constitution of the United States requires that all accusations upon which warrants of arrest are to issue shall be supported by affidavit. The amendment is as follows: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but

upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.' In the case of *U. S. v. Tureaud*, 20 Fed. Rep. 621, it was held that this amendment changed the common-law information, by introducing into it a new element, viz., an affidavit, thus making the informations in this country partake of the requisites of both classes of criminal informations in England. The facts of that case show that an information had been filed before a commissioner of the United States, that it was supported by an affidavit of a private person, stating that such person believed the matters and things stated in the information to be true. Whether the information containing the facts which the affiant believed to be true was filed by an officer authorized to do so, does not appear, and can only be gathered inferentially from the opinion. But conceding that the information was filed by the proper officer, the question, and the only question, properly before the court for decision, was the sufficiency of the affidavit, and not, as in this case, whether an information could in any court be filed without an affidavit. The court argues at some length to show that the fourth amendment acted upon the procedure by information, and created a new rule requiring something more than the mere *ipse dixit* of the attorney general, to authorize the issuance of a warrant, and concludes that there is no officer in the federal government analogous to the British attorney general, and that, therefore, all informations should be supported by affidavit. All of this decision, except that which holds an affidavit upon belief insufficient, is the mere *dictum* of the judge, and cannot be regarded as authority.

"It is insisted by the district attorney that the fourth amendment is not in force in this territory; that it is only a limitation upon the power of the United States courts. No authorities have been cited to sustain this position, and I am persuaded that it is not tenable. I am inclined to adopt the view of counsel for the motion, that this amendment is operative here, and is a limitation upon our legislation and courts, because, as was said by counsel, to hold this amendment a restriction upon congress, and yet not a restriction upon a government created by congress, would be a contradiction of terms. But while believing that this amendment is operative here, I by no means admit the position of counsel for the motion, backed by the decision in 20 Fed. Rep. *supra*, that it introduces a new rule in these cases, or that it requires anything more, in order to the prosecution of misdemeanors by information, than was required at common law. Judge Story says that 'this amendment seems indispensable to the full enjoyment of the rights of personal security, personal liberty, and private property,' and that 'it is little more than the affirmance of a great constitutional doctrine of the common law.' 2 Story, Const. § 1902. From the reasoning which follows in the same section, it is manifest that he thought it was nothing more than an affirmance of the doctrines of the common law; for he says: 'Although special warrants upon complaints under oath, stating the crime and the party by name, against whom the accusation is made, are the only legal warrants upon which an arrest can be made according to the law of England, yet a practice had obtained of issuing warrants for all persons of a particular class, authorizing the officers to arrest all persons suspected, without naming or describing any particular person. In the year 1763 the legality of these general warrants came before the king's bench for solemn decision, and were held void for uncertainty.'

"If this amendment was indispensable to the full enjoyment of personal rights and security, the position of Judge Story, that it was an affirmance of the doctrines of the common law, needs no argument to support it, for it was the boast of the old lawyers and judges that the common law was the perfection of reason, and the bulwark of the rights of person and property of Englishmen. And if in England a legal warrant could not be issued, except

upon oath stating the crime and person to be apprehended by name, and if this was so by reason of the restriction of the common law, then the fourth amendment is nothing more than a constitutional declaration of the common-law rule, and it does not in any sense add anything to the essentials of a common-law information. If an oath was a necessary prerequisite, at common law, to the issuance of a warrant, and if the attorney general, by filing an information *ex officio*, could cause a warrant to be issued, then the only oath necessary was the oath of office of the attorney general; and if our district attorneys occupy the same relative position to the courts of this country as did the attorney general of England to the courts of that country, then an information filed by the district attorney *ex officio* will authorize the issuance of a warrant, both at common law and under the constitution; and the oath of office of the district attorney, as in this case, is a sufficient compliance with the fourth amendment to the constitution of the United States; and if he files the information as district attorney, it is not necessary for him to state in the body of the information that he files it on his oath of office. *State v. Sickie*, Brayt. 132.

"It follows that it is not necessary to support an information filed, *ex officio*, by the district attorney, with an affidavit, and the motion is overruled."

Finding no error in the record, the judgment of the court below is affirmed.

LONG, C. J., and HENDERSON, J., concur. REEVES, J., did not sit in this case.

STATE *ex rel.* REED *v.* SMITH and others. (Two Cases.)

(*Supreme Court of Oregon. April, 1887.*)

1. CORPORATION—PLEGDED STOCK—ELECTION.

Where shares of stock are pledged as collateral, the pledgee reserving the right to sell in case of default, and the pledgee causes a transfer to himself to be recorded on the books of the corporation, until the pledgeor's rights shall have been foreclosed by a sale, etc., he, and not the pledgee, is entitled to vote on the stock, in the absence of a statute providing otherwise.

2. SAME—MEETING—ELECTION—PRESIDING OFFICER.

Where, at a stockholders' meeting for the election of directors of the corporation, certain persons receive the requisite number of votes, the fact that the presiding officer insists on counting certain votes cast otherwise than as they should be counted, announces the result of the election to be otherwise than as it really is, issues certificates of election to those not entitled to them, and declares the meeting adjourned, although a majority vote against adjournment, in no way affects the rights as directors of those in fact elected.

3. SAME.

Nor are their rights as directors affected by an irregular and unofficial meeting reorganized by those remaining after the adjournment, at which meeting they are declared elected, their rights being derived from the election alone.

4. SAME—DIRECTORS—ORGANIZATION OF BOARD.

But where, immediately afterwards, on the same day, the directors thus elected proceed, at a special meeting, without notice to the former president, who also has been elected a member of the new board, to organize a board, choosing one of their number president, his title to the office will not be recognized by the courts, the proceeding exhibiting undue haste and irregularity.

5. SAME—NON-RESIDENCE.

The Oregon statute permitting a minority of the directors of corporations constructing railroads or canals to reside out of the state, applies to a corporation whose railroad, running from its furnace to its mine, is only three miles long, and whose short canal is not navigable.

6. SAME—ELIGIBILITY.

Where the statute declares that no person shall be eligible to the office of director of a corporation, unless he is a stockholder therein, and where the by-laws of a corporation provide that transfers of stock shall be made only on the corporate books, and that the transfer-book shall be closed for 10 days previous to the day of the annual meeting of the stockholders, although the purchaser of stock, who has not

caused his transfer to be recorded, might be refused permission to vote, or to receive dividends, yet he may be elected a director by the vote of a majority of the stockholders.

Dolph, Bellinger, Mallory & Simon, and R. & E. B. Williams, for appellant. Williams, Ach & Wood, for respondent.

THAYER, J. These two cases come here upon appeal from judgments of the circuit court for the county of Multnomah, rendered in them severally. Each of them was an action at law brought in said circuit court in the name of the state upon the relation of S. G. Reed. The first one, against Elijah Smith, C. J. Smith, and L. B. Seeley, is for usurping, intruding into, and unlawfully holding, the office of director in the Oregon Iron & Steel Company, and also upon the right of George B. Williams, Martin Winch, and William M. Ladd to the position. The second one, against said Elijah Smith, is for a like usurpation, intrusion into, and unlawfully holding the office of president of said company, and also upon the right of the said Reed to the same. The two cases arise out of the same transaction, and the circumstances involved in them are so blended that they were heard together, and may conveniently be considered together. The circuit court's findings of facts cover both cases and include all the general matters relating to them. The following are said findings:

"(1) That the Oregon Iron & Steel Company was organized under the general laws of Oregon on the twenty-second day of April, 1882, and among other specified objects and business for which it was organized it undertook 'to purchase, acquire, hold open, etc., blast-furnaces, rolling-mills, nail-mills, saw-mills, machine-shops, warehouses, ship-yards, and to engage in the manufacture of iron and steel, etc.; also—*Fourth.* To construct, purchase, acquire, hold, own, improve, and operate canals, and to transport freight and passengers by steam or otherwise thereon. *Fifth.* To build, equip, and operate a railroad from Portland to Oswego, Oregon, and to extend the same from Oswego to form a connection with any railroad in the Willamette valley, and to transport freight and passengers thereon; also to purchase, build, and operate railroads to connect its mines and other property with its furnace, rolling-mills, etc. *Seventh.* To promote or facilitate and assist the construction, building, extension, equipment, and operation of any railroad line, steam-ship line, or steam-boat line, and the formation of any companies for such purposes."

"(3) That the fifteenth day of June, 1886, was the date for the annual meeting of said corporation, and on that day the subscribed stock of the corporation was 7,501 shares, and a majority thereof was 3,751 shares, and there was represented at said meeting by the owners, in person or by proxy, (as appeared by the stock transfer-books of the corporation,) 5,701 shares, and according to said transfer and stock books S. G. Reed held in his own name 3,422½ shares, and represented the same in person, and held as proxy for George B. Clapp 500 shares, for H. N. Arnold, 100 shares, and for A. S. Reed, 400 shares,—making in all which said Reed apparently represented, in person and by proxy, 4,422½ shares of stock. That said S. G. Reed was president of said corporation, and presided at said meeting; Wm. M. Ladd, vice-president; Martin Winch was secretary of said corporation, and they were both present at said meeting, and said Winch acted as secretary. Upon representations there made, in effect, that Elijah Smith was on his way to Portland and would probably, if the meeting were adjourned to suit his convenience, make some proposition to resuscitate and benefit the company, Geo. H. Williams, being a stockholder present in person, moved and it was voted to adjourn till July 1, 1886.

"(4) That on the first day of July, 1886, according to adjournment, the stockholders met at the place appointed, S. G. Reed, president, presiding, Mar-

tin Winch, secretary, and acting as such, and Wm. M. Ladd, vice-president, present and participating in the proceeding, and on call of stock there were 7,501 shares represented by the owners, in person or by proxy, of which S. G. Reed appeared to represent in person 3,422 $\frac{1}{2}$ shares, and George B. Clapp, by L. B. Seeley, proxy, represented 500 shares. That at said meeting, and before a vote was taken for directors, L. B. Seeley claimed to own 361 shares of stock, that stood on the books of the company in the name of S. G. Reed, and demanded from said Reed a proxy to vote the same, which demand was answered by said Reed that said 361 shares would be voted in the usual way, and in accordance with the by-laws of the corporation; and thereupon, immediately, the sheriff of this county entered the room and served on said Reed an injunction issued out of this court from Department No. 2, commanding said Reed not to vote said 361 shares of said stock at said meeting, or at any adjourned meeting of said stockholders. That Geo. H. Williams then moved an adjournment of the meeting to July 9, 1886, in order that Reed might have opportunity to apply for a discharge of the injunction which had been issued *ex parte*, and the motion was seconded and put and lost. That as to the said 361 shares of stock, the same did, prior to November 6, 1885, stand upon the stock-book and transfer journal of said company in the name of L. B. Seeley; that on the twenty-seventh day of March, 1884, said Seeley assigned and delivered to said S. G. Reed said 361 shares of stock as collateral security for the payment to said Reed of \$50,000, in two years after date, with semi-annual interest at 7 per cent. per annum, for which sum Seeley on that day gave to Reed his promissory note. The assignment and transfer of said stock was absolute in form, and embodied an absolute and irrevocable power of attorney, directing and authorizing the transferee to transfer the same from Seeley's name to that of the transferee on the books of the company; said assignment was also accompanied by a written agreement of the same date, made by said Reed and Seeley, providing, among other things, that upon default in the payment of said \$50,000 note, and interest, at maturity thereof, said Reed might sell or dispose of said stock at public or private sale, and in such manner and on such terms as to said Reed should seem best; said stock remained in Seeley's name on the books of the company, and were voted by Seeley till the sixth of November, 1885, when said 361 shares, on request of said Reed, were transferred on the books of said corporation to said S. G. Reed, and the certificate thereof to Seeley was canceled, and said shares have ever since stood, and do now stand, on the books of said company in the name of said S. G. Reed. The \$50,000 promissory note of said Seeley, for the security of which said 361 shares were assigned to said Reed, was due on the thirtieth of March, 1886, and the same was not paid, nor had the same been paid on the said first day of July, 1886.

"That on the refusal of the meeting to adjourn, the usual business of an annual meeting was proceeded with, and, among other things, it was voted to proceed to the election of directors for the ensuing year. There was then laid before the meeting by Joseph Simon, proxy for E. W. Creighton, a certificate of stock in the name of E. W. Creighton, and he stated that one share thereof had been assigned to Elijah Smith, and one share to C. J. Smith, and the fact in regard to said two shares, was that on or about the fifth day of June, 1886, said E. W. Creighton, for the consideration of one hundred dollars cash to him paid, had assigned one share of said stock to Elijah Smith, and one share to C. J. Smith, and that within a week thereafter said Creighton sent to Martin Winch, secretary of said corporation, an informal notice of said assignment, but no transfer of said two shares, or either of them, had been made on the books of the company on the fifteenth day of June, 1886, the date of the annual meeting, nor on the first day of July, 1886, the date of said adjourned meeting, but said two shares were in fact transferred on the books of said corporation from E. W. Creighton to Elijah Smith and C. J. Smith, respect-

ively, on the second day of July, 1886. At said adjourned meeting C. R. Donohue was present and voted 87½ shares of stock in person, and also voted one share by Thos. N. Strong, proxy. E. W. Creighton was present in person, but his stock, 290½ shares, was controlled and voted by Jos. Simon, proxy. The 290½ shares so voted for E. W. Creighton included the two shares sold to Elijah and C. J. Smith aforesaid. At said meeting Elijah Smith held a written proxy from Wm. Alvord, authorizing him as proxy to vote Alvord's 100 shares of stock at the annual meeting, and a telegram, of date July 1st, confirming and extending the written proxy to all meetings during the year 1886, and the same were laid before the meeting. Geo. H. Williams objected to the stock of Wm. Alvord being voted by Elijah Smith, proxy, and also objected to L. B. Seeley's voting the 361 shares of stock standing in the name of S. G. Reed, and which said Reed had been enjoined from voting, and claimed that Seeley had no right to vote the said 361 shares.

"A vote for directors was then taken, and said 361 shares were voted by said Seeley for Elijah Smith, C. J. Smith, and L. B. Seeley, and the ballots laid before the president, said S. G. Reed, to be canvassed, and thereupon said Geo. H. Williams objected to the votes cast for Elijah Smith and L. B. Seeley being counted, because they were non-residents of this state, and also objected to the votes cast for Elijah Smith and C. J. Smith, because they were not stockholders within the meaning and intent of the by-laws, and objected to the said 361 shares voted by Seeley being counted. Said Reed, president, sustained the objection to the vote of said 361 shares, by L. B. Seeley, and the vote of said 100 shares owned by Wm. Alvord and voted by Elijah Smith, proxy, and excluded the same from the count of votes. Mr. Jos. Simon, as proxy for said E. W. Creighton, appealed from the decision of the president, and the appeal was seconded, but the president refused to entertain the appeal, and proceeded to declare the result of the voting, and then and there excluded from the count of votes the said 361 shares of stock voted by L. B. Seeley, and the 100 shares voted by Elijah Smith, proxy for Wm. Alvord, and declared the result of the voting as follows, to-wit: That S. G. Reed had received 7,040 votes; that W. S. Ladd had received 7,040 votes; that W. M. Ladd had received 3,563½ votes; that Geo. H. Williams had received 3,563½ votes; that Martin Winch had received 3,563½ votes; that Elijah Smith had received 3,476½ votes; that C. J. Smith had received 3,476½ votes; that L. B. Seeley had received 3,476½ votes. And then he declared that S. G. Reed, W. S. Ladd, Geo. H. Williams, Wm. M. Ladd, and Martin Winch, having received a majority of all the legal votes cast, were duly elected directors of the Oregon Iron & Steel Company for the year ensuing, and a certificate of their election was in due form issued to said persons by said Reed, president. Geo. H. Williams, after the declaration of the vote, moved an adjournment, and Martin Winch seconded it, and the president put the question to vote *viva voce*, and there was a sound of ayes and a sound of noes, but no call was made for a recorded vote by ayes and noes, nor for a division and special count of votes. Whereupon the president declared the meeting adjourned.

"The fact was, however, there were seven persons, representing a majority of the stock voting, who voted against adjournment, and four persons, representing a minority of the stock voting, who voted for the adjournment. On announcing the vote and declaring the meeting adjourned, the president, with Geo. H. Williams, and the secretary, Martin Winch, withdrew from the meeting, but before said Winch, secretary, had passed out of the room, the record book of the corporation, in which were recorded the minutes of stockholders' meetings, along with a part of the ballots for directors, and several other papers and documents belonging to the secretary's office, were taken from him by force by L. B. Seeley. After the president, secretary, and said Geo. H. Williams had so retired from the room, the persons remaining, among whom was Wm. M. Ladd, vice-president of the corporation, proceeded to choose W.

S. Ladd chairman and Wm. M. Ladd secretary, and proceeded to declare what they claimed to be the true result of the above-described vote cast for directors, and as *data* for the same referred to tally lists kept by some of the stockholders when Reed was canvassing the vote, and to *memoranda* left by Winch, as well as the recollection of the stockholders present, and said persons then, by vote, ordered that the 361 shares voted by L. B. Seeley, and the 100 shares voted by Elijah Smith, proxy for Alvord, should be counted. Said 361 shares and said 100 shares had been voted for Elijah Smith, C. J. Smith, and L. B. Seeley, for directors, and the same were now counted for said parties, and said W. S. Ladd, chairman, proceeded to declare the vote as follows, to-wit: That S. G. Reed had received 7,501 votes; that W. S. Ladd had received 7,501 votes; that Elijah Smith had received 3,937½ votes; that C. J. Smith had received 3,937½ votes; that L. B. Seeley had received 3,937½ votes; that Geo. H. Williams had received 3,563½ votes; that Martin Winch had received 3,563½ votes; that Wm. M. Ladd had received 3,563½ votes. And said W. S. Ladd, chairman, then declared that S. G. Reed, W. S. Ladd, Elijah Smith, C. J. Smith, and L. B. Seeley were elected directors for the ensuing year, and said chairman thereupon executed and issued to said persons a certificate of their election.

"(5) That Elijah Smith, C. J. Smith, L. B. Seeley, and W. S. Ladd, claiming to be directors of the Oregon Iron & Steel Company, by virtue of election as aforesaid, July 1, 1886, took the oath required by law to qualify directors of such corporations to act in such capacity, and on the same day, without notice to S. G. Reed, proceeded at a special meeting to organize said board of directors by choosing Elijah Smith for president, Wm. S. Ladd, vice-president, and Wm. M. Ladd, secretary, and at a regular meeting of said board, held on Tuesday, August 17, 1886, the proceedings of the said meeting of directors, held on July 1, 1886, was by vote and in form ratified, confirmed, and approved.

"(6) That on the sixth day of July, 1886, S. G. Reed, George H. Williams, and Martin Winch, claiming to have been elected directors of the Oregon Iron & Steel Company, at the meeting of stockholders held July 1, 1886, as above described, in due form took the oath required to qualify directors of such corporations to act as such, and on the same day, due notice thereof having been given to W. S. Ladd and Wm. M. Ladd, held a special meeting of said board of directors, and elected S. G. Reed president, George H. Williams vice-president, and Martin Winch secretary, for the ensuing year.

"(7) That Elijah Smith and L. B. Seeley were, on July 1, 1886, and still are, non-residents of this state, and they and C. J. Smith are claiming and assuming to act as directors of said corporation, and said Elijah Smith is claiming and assuming to act as president of said corporation.

"(8) That, if the 361 shares of stock standing on the books of the company in the name of S. G. Reed, and claimed by L. B. Seeley, and voted by him, be excluded from the count of votes, the number of votes cast at said meeting for Elijah Smith, C. J. Smith, and L. B. Seeley, respectively, would be 3,576½ for each, which is 174½ votes less than a majority of all the stock of the company.

"(9) That said Oregon Iron & Steel Company holds by purchase, and operates, a short narrow-gauge railroad, from its furnace to its mine, about three miles in length. That it owns a short canal, projected from Tualatin river to Sucker lake, and has spent in and about the improvement of the Tualatin river, so as to make said canal useful, and in getting right of way and of flowage, and the like, about \$10,000, but said canal is not now navigable for boats, and the said company has run a preliminary survey to extend said road to their timber lands in Washington county, a few miles distant, and proposed, in case of the extension and construction of said railroad, and the improvement of said canal and river, to do a general transportation business on said lines.

That Elijah Smith and C. J. Smith submitted to the stockholders' meeting, held July 1, 1886, a certificate of stock in the Oregon Iron & Steel Company, issued to E. W. Creighton for 290½ shares of the capital stock of said company, upon which certificate was indorsed an assignment and transfer of one share of said stock to Elijah Smith, and one share to C. J. Smith, each under date of June 5, 1886, and said Elijah Smith and C. J. Smith, at stockholders' meeting, upon exhibiting said certificate and assignment, claimed, by virtue thereof, that they were stockholders of said Oregon Iron & Steel Company."

From these findings of fact the said court found the following conclusions of law:

"(1) That L. B. Seeley was not a stockholder in the Oregon Iron & Steel Company, as to the 361 shares of stock claimed by him, and standing in the name of S. G. Reed, and was not entitled to vote said shares on the fifteenth day of June, 1886, nor on the first day of July, 1886, and said 361 shares were not entitled to be counted, when offered and cast by said L. B. Seeley.

"(2) That said Elijah Smith, C. J. Smith, and L. B. Seeley, not having either of them received a majority of the legal vote of the shares of the stock of said corporation, after rejecting from the count said 361 shares, cast by L. B. Seeley, and standing on the books of the company in the name of S. G. Reed, were not elected directors of said Oregon Iron & Steel Company, and are unlawfully assuming to act as such.

"(3) That the proceedings of the assembly of persons on the first day of July, 1886, described in the pleadings and findings of fact herein, whereof W. S. Ladd was chosen chairman, and at which a count of the votes of the stockholders of said corporation was claimed to have been made, and Elijah Smith, C. J. Smith, and L. B. Seeley were declared and elected directors of said corporation, were irregular, contrary to law, and are without force or validity.

"(4) That the canvass of votes by said W. S. Ladd, chairman, and the certificates of election of directors of said corporation, issued by said W. S. Ladd, chairman, were and are void and of no force or effect in law.

"(5) That Elijah Smith and C. J. Smith were not, nor was either of them, on said first day of July, 1886, a stockholder in the Oregon Iron & Steel Company, and neither of them was eligible to the office of director.

"(6) That the vote of 100 shares of stock owned by Wm. Alvord, and represented by Elijah Smith, proxy, at said meeting on July 1, 1886, was entitled to be counted, and was by said Reed unlawfully rejected.

"(7) That the alleged meeting of July 1, 1886, at which it is claimed Elijah Smith was chosen president of the Oregon Iron & Steel Company, was irregular and without authority of law.

"(8) That defendants, Elijah Smith, C. J. Smith, and L. B. Seeley, have each of them usurped, intruded into, and are unlawfully holding and exercising, the office of directors in the Oregon Iron & Steel Company, and the plaintiff is entitled to judgment that they and each of them be excluded from said office.

"(9) That Elijah Smith, defendant, has usurped, intruded into, and unlawfully holds and exercises, the office of president of the Oregon Iron & Steel Company, and the plaintiff is entitled to judgment that he be excluded from said office."

The general question to be determined here is whether the conclusions of law are warranted by the facts, and, if they are not, then, what deductions should be drawn from the facts and the effect thereof upon the final result reached by the circuit court. There seems to have been an active rivalry between two sets of the parties interested in the enterprise which the corporation was organized to promote, and a considerable effort made to employ sharp practice by the respective opponents. It has resulted in a complication of the affairs of the corporation which the courts must undertake to untangle, and which presents several important and difficult questions to solve. The conclusions of law, as found by the circuit court as a whole, cannot, in my opin-

ion, be sustained. I think Seeley was a stockholder as to the 361 shares of stock referred to in said first finding, and had a right to vote them on the dates therein mentioned. His assignment to Reed of said shares of stock, under the circumstances and for the purposes shown by the evidence, amounted only to a pledge. The agreement executed by Reed back to Seeley, at the time the assignment was made, clearly shows it. The transaction took place on the twenty-seventh day of March, 1884. The agreement recites that Reed was about to loan or advance to the Oregon Iron & Steel Company a certain amount of money, so that the total amount of his loan or advances to said company, including the amount theretofore loaned or advanced by him, should aggregate the sum of \$150,000, and that Seeley was willing to obtain a third interest in the said total, and had given his note of that date to Reed for the sum of \$50,000, payable two years from date, with 7 per cent. interest, and had delivered as collateral security for said note and interest the 361 shares of stock. Therefore, Reed undertook and agreed, upon the full payment of the note and interest, to redeliver to Seeley said shares of stock, etc., in consideration of which Seeley authorized and empowered Reed, upon default of the payment of the said note, at the maturity thereof, with the interest thereon, to sell or dispose of at public or private sale, and in such manner and upon such terms as to the said Reed should seem best, the said stock, etc. The terms of the assignment were absolute, and empowered Reed to transfer upon the books of the company the shares of stock; but did not change the character of the transaction. In *Edw. Bailm.* § 219, the author says: "Shares of stock in a corporation are now, and have been for many years, habitually pledged as collateral security for money loaned. The pledge is made by a direct transfer of the scrip, in writing, with an authority to effect a transfer in due form on the books of the corporation; and in his note for the sum loaned, the borrower further authorizes the pledgee to sell the stock. The effect of the transaction is not a mortgage, but a pledge of the stock to secure the prompt payment of the money borrowed. On account of its incorporeal nature, property in stock cannot be otherwise delivered. The delivery of the scrip alone is not considered sufficient, because it does not of itself enable the pledgee to sell the stock and apply the proceeds to pay the debt. * * * The contract of pledge is entirely consistent with the owner's right as a stockholder; until the pledge is rendered available by a foreclosure, he remains a member of the corporate body, interested in its management." It cannot be maintained, I am satisfied, that the transaction amounted to anything more than a pledge, or authorized Reed to use, employ, or dispose of the shares of stock, except in default of the payment of the note at its maturity, and then only by a public or private sale and transfer of them upon the books of the company.

The discussion at the hearing was quite earnest as to the necessity and effect of a transfer of shares of stock upon the company's books; the one side claiming that an assignment alone could only operate to transfer an equitable title, the other, that it transferred, in the language of section 14 of chapter 7, *Misc. Laws*, "all rights of the original holder, or person from whom the same is purchased." This point has been a source of a great deal of controversy in the courts, and attempts in many of the states have been made to settle it by legislative enactment. The state of New York, by an act passed more than 60 years ago, provided that in all cases where the right of voting upon any share or shares of stock of any incorporated company of that state should be questioned, it should be the duty of the inspectors of the elections to require the transfer books of said company as evidence of stock held; and all such shares as might appear standing thereon, in the name of any person or persons, should be voted on by such person or persons, directly by themselves, or by proxy, subject to the provisions of the act of incorporation. Another provision was also made at about the same time of the former, providing that

it should be the duty of the supreme court, upon the application of any person aggrieved by, or complaining of, any election, or any proceeding, act, or matter in or touching the same, to proceed forthwith, and in a summary way, to hear the affidavits, proofs, and allegations of the parties, or otherwise inquire into the matter or cause of complaint, and thereupon to establish the election so complained of, or to order a new election, or make such order, or give such relief in the premises, as right and justice might appear to the court to require. Under these two statutes it has been held by the courts of that state that the inspectors of such elections should be bound by the transfer-book; but that, as errors might creep into the transfer-books, it was deemed expedient to provide a mode of correcting the result of such errors. To that end the court was vested with ample power to inquire into the cause of complaint, on motion, and to give relief, by ordering a new election or otherwise, as right and justice should require. *Strong v. Smith*, 15 Hun, 224. How said courts would have held as to such inspectors being bound by the transfer-book upon a question of qualification as a voter, in the absence of the statute, can only be a matter of conjecture. In California there is a statute which provides that no transfer of stock shall be valid, except between the parties thereto, until the same shall have been so entered upon the books of the company as to show the name of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer. Under that statute it is held by the courts of that state that a transfer of stock, until entered upon the books of the company, confers on the transferee, as between himself and the company, no right beyond that of having such transfer properly entered. *People v. Robinson*, 64 Cal. 375, 1 Pac. Rep. 156. It was, however, held, in a former case, that a surviving partner had a right to vote shares of stock belonging to the partnership, although standing upon the books of the corporation in the name of the deceased partner. COPE, J., in delivering the opinion of the court, said: "We think that no consequence is to be attached to the circumstance that a portion of the stock represented by Hill stood upon the books of the corporation in the name of Devane alone. This was *prima facie* evidence that it belonged to the separate estate of Devane, but it was competent for the defendant to show that it was in fact the property of the partnership. The cases cited from New York proceed entirely upon a statute of that state, and the reasoning in some of the cases indicates very clearly that in the absence of the statute the conclusions would have been different. We are unable to perceive that the other authorities referred to have any bearing upon the case. It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meeting of the corporation, and the mere fact that he does not appear as owner upon the books of the company, should not exclude him from the privilege of doing so." *Allen v. Hill*, 16 Cal. 119. The authority of this case does not seem to be questioned in the later one; and from the two we may, I think, conclude that the real owner of the stock is entitled to represent it, in the absence of express law interfering with the right. In view of the New York statute referred to, "that shares of stock standing upon the books of the corporation in the name of a person or persons, shall be voted on by such person or persons, directly by themselves, or by proxy, subject to the provisions of the act of incorporation," we cannot expect much aid from the decisions of the courts of that state in construing the laws of this state upon the subject. And we are equally unfortunate in regard to the decisions of the California courts, respecting the rights of transferees of stock before any transfer is entered upon the books of the corporation, as the statute of that state, which has been referred to, declares in express terms the effect of such transfer. We are also in the same situation, so far as I have been able to observe, with reference to most of the decisions that have been cited by counsel herein. They have generally been made under some statute that controlled them. The decision of a court

of another state, when made under a statute similar in its provisions to our own, is entitled to consideration, but when it merely undertakes to construe a different one, it does not aid us in interpreting ours.

We have a statute which requires private corporations to keep a stock-book in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof, which stock-book, etc., shall be subject to the inspection, at all reasonable hours, of any person interested therein and applying therefor. Section 12, c. 7, Misc. Laws. But it wholly fails to declare the effect of a neglect to enter such transfer upon such stock-book, or of the extent of the right of a purchaser from a holder, except as provided in said section 14 of said chapter, as before mentioned: "The rights of the original holder, or person for whom the same is purchased." It seems to me that under the statutes of this state no such consequences attach on account of a neglect to have a transfer of stock entered upon the books of the corporation, as has been held by the courts of many of the other states, and that such holding has resulted from the peculiar provisions of the statutes of those states, or of the articles of incorporation of the companies, or by-laws authorized by statute. I believe that it was the intention of the legislative assembly of this state to permit a stockholder to sell his stock to whoever he might see fit, and that the purchaser should succeed to all his rights, both equitable and legal. Certain relations exist, it is true, between corporations and their stockholders, which are the subject of regulation. There are mutual obligations upon the part of the respective parties, and in order to maintain them, and promote the interest of all, the corporations are empowered to make reasonable by-laws for the conduct of their affairs. This power under the statute extends to the making of by-laws, not inconsistent with existing law, for the transfer of the stock of the corporation. Sub. 6, § 5, c. 7, Misc. Laws. The by-laws so made have no force, however, except to regulate the relations referred to. They merely prescribe rules to be observed in the performance of acts which the members are, by tacit obligation to the body politic, required to perform. Any exaction beyond this is an absolute nullity.

In the case under consideration, Mr. Seeley had a right to pledge to Mr. Reed the 361 shares of stock, and retain the general ownership of it, and it was not in the power of the latter, or of the corporation, to deprive the former of any right arising out of such ownership, without his consent. Mr. Reed's authority over the shares of stock was specified in the written document before referred to, and any attempt upon his part to exercise authority not therein conferred, was a usurpation. It appears that Mr. Reed, without selling the stock under the power given him, and without waiting for the event to transpire which authorized him to sell it, had it transferred on the books of the company to himself. He had no more right to do that than he would have had to forcibly take the stock from Seeley's possession, and have it transferred to him upon the books; and any countenance given to the transaction by the company made it a joint wrong-doer with him. The company had no power to sanction the act, or view it in any other light than a wrong. The fact that the stock was transferred upon the books to Reed, and stood in his name, unless done by consent of parties, or in pursuance of law authority, clothed him with no rights in reference to it, nor deprived Seeley of any. Nor did Reed's ruling, as president of the stockholders' meeting, that Seeley was not entitled to vote on said shares of stock, affect the question. The latter's right to so vote was derived from the law, and not from Mr. Reed. He did vote, and his vote should be deemed counted. Elijah Smith, C. J. Smith, and L. B. Seeley, received at that meeting a majority of the legal votes of the shares of stock of the corporation. The findings that the proceedings had on the first day of July, 1886, by the assembly of persons whereof W. S. Ladd was chosen chairman, were irregular, contrary to law, and without force or

validity; that the canvass of votes by W. S. Ladd, chairman, and the certificates of election issued by him as chairman, were void and of no force or effect in law, may in one sense be correct. The proceedings were certainly irregular, and there was a reason for it. Mr. Reed attempted to adjourn the meeting, evidently against the consent of a majority of the holders of stock represented in person and by proxy, and he and others left before the business was done. He had, before leaving, attempted to exclude the vote on the said 361 shares of stock; had declared himself and friends elected directors, when they had not received a majority vote of the stock, and declared the meeting adjourned. Such conduct was not calculated to incite order and regularity. It was a sort of *coup d' état* movement, which he probably felt justified in resorting to in order to counteract a similar one on the part of his opponents. This left the meeting, no doubt, in a confused condition. It, however, reorganized by choosing Mr. W. S. Ladd chairman, and the proceedings referred to were had, and whether the emergency authorized it or not did not affect the legality of the election that had taken place before it occurred. The vote had then been taken and the question decided. As was said by one of the counsel for the respondent, in an election contest case, while occupying a seat upon this bench, "whoever has received a majority of the legal votes cast is as much elected at the closing of the polls as he possibly can be by means of that election. The choice of the voters has become a perfect fixed fact. To make proof of that fact is all that remains to be done." *Day v. Kent*, 1 Or. 129. In the condition in which the meeting was left, after the president withdrew, it was doubtless embarrassing to know how to proceed or what to do. The members had a right to ascertain for their own benefit whether the result of the vote as declared by the president was correct or not, and if the action in the premises was entirely unofficial, I cannot see how it affects the case. Mr. Reed could not by any erroneous ruling as canvasser of the votes defeat any of the candidates. The will of the voters could not be thwarted in that way. The court would not, certainly, oust a person from the possession of an office who had received a majority of the legal votes cast for the office, because the canvasser had erroneously decided that certain of the votes cast for the officer were illegal, and had wrongfully excluded them; nor would it attempt to do it because parties interested in the election had undertaken to act as canvasser, and issue certificates of election, where they had no authority to do so. The only question the court would attempt to determine would be who received the requisite number of votes entitling him to the office. Under the view taken, as to the right of Seeley to vote on the 361 shares of stock pledged to Mr. Reed, Messrs. W. S. Ladd, Elijah Smith, C. J. Smith, and L. B. Seeley, severally received a majority of the votes on all the shares of stock of the corporation for the office of director; but whether they were all entitled to such office or not depends upon other questions that have been presented for our consideration.

One of the questions is that the corporation does not come within that class of corporations that can permit a minority of the board of directors to reside out of the state, and that, as Elijah Smith and L. B. Seeley were non-residents of the state at the time of the election, they were ineligible. From an inspection of the articles of incorporation it will be seen that they include objects the corporation was authorized to carry out, which came within the provisions of the statute allowing a minority of non-resident directors; and we think the evidence tends to show that the corporation may be included in the class referred to. The reasons for adopting the said proviso do not appear from anything contained in the statute, and I doubt whether the extent of business the corporation was engaged in, or expected to engage in, was the ground for adopting it. It applies to corporations "constructing railroads or military wagon roads, canals or flumes, or publishing newspapers, or conducting institutions of learning." They may be enterprises of great extent

or very limited. I do not see that the legislature had in view organizations engaged in general business any more than those engaged in local matters. If it did, it should have so indicated. The court could hardly be expected to determine the lengths the roads should be, or size of the canal or flume, in order to decide whether the corporation constructing it had the right to permit the minority of the board of directors to reside out of the state. I do not see that the court can do more than decide whether the corporation comes within the character of organizations allowed the privilege referred to, and it seems to me that this one does.

Another of the questions raised by the respondent's counsel is as to the qualification of Elijah Smith and C. J. Smith to be directors. They contend that the Smiths were not stockholders of the said corporation at the time of the election mentioned; there having been no transfer of stock held by them made upon the company's books. Section 4, article 6 of the by-laws of the corporation provides that "transfer of stock shall be made only upon the books of the company by the holders in person, or by power of attorney, duly executed and filed with the secretary of the company, and on the surrender of the certificate or certificates of such shares." Section 7, same article, provides that the secretary shall keep a transfer-book in which he shall register all transfers of stock, etc., and that such transfer book shall be closed for 10 days previous to and on the day of the annual meeting of the stockholders. These by-laws have no effect whatever upon the property rights of the stockholder; nor do they restrict his right to transfer his stock at pleasure, subject to the charter rights of the corporation. By-laws, as before suggested, have no force, except as a regulation of the intercourse between the stockholder and the company. They are restrictions, as said by BECK, J., in *Bank v. Wasson*, 48 Iowa, 339, "intended for the benefit of the corporation, when its rights may be protected thereby." Such a restriction as that contained in section 4 "is necessary in order that the officers of the corporation may know who are stockholders; which is essential in conducting elections of officers, and for other matters. It can never defeat the rights of other parties, and, in all cases, must be regarded as a reasonable requirement. * * * If the corporation has no rights to be protected by its exercise, and other parties would be deprived of their property thereby, it cannot be enforced in such cases. Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit." The same view is expressed also in *Seeligson v. Brown*, 61 Tex. 114, and in *Ang. & A. Corp.* § 354. The respondent's counsel, according to my notion, fell into an error in regard to by-laws of a corporation affecting property rights in the stock thereof. They insisted that a party might be a "stock owner," and not be, technically, a "stockholder," and that a purchaser of shares of stock from the holder, when not transferred upon the books of the company, could not vote the stock at corporation elections, or claim dividends accrued thereon, because he was not strictly a stockholder. This, as I view it, is a mistake. Such purchaser is both owner and holder of the stock, and would be so recognized everywhere, except in conducting affairs with the company. The latter might very properly claim and establish that it would recognize no one as a stockholder until a transfer of the stock was made upon its books. In the case at bar the Smiths appeared at the stockholders' meeting with a regular assignment of a share of stock to each, from a former holder, but without having been transferred upon the books of the company. That would ordinarily have been sufficient proof that they were stockholders, but not so with their dealings with the company. Its by-laws provided that the "transfer should be made only upon the books of the company by the holder in person;" and it had the right to ignore their claims to vote on the stock, or to receive dividends that might be due thereon. The corporation, through its board of directors, made the rule for its own benefit. It inconvenienced its officers in enabling them to

know from an inspection of the company's books who were its stockholders and entitled to enjoy the privileges and franchises it conferred; and it tended to avoid disputes and controversies regarding a transfer of its stock. I have no doubt but that a stockholder's right to vote on stock claimed to have been purchased, but not so transferred upon the books, or to demand dividends thereon, could be successfully challenged upon that ground alone. This, however, is the only purpose it could serve. I consider the regulation a reasonable one, where the law upon the subject is reasonably construed. The Smiths stood very differently in relation to the two shares of stock from what Seeley did with reference to the 361 shares pledged to Reed. The latter was on the books in Seeley's name until the attempt was made to transfer it to Reed. The former was on the books in the name of another party, and no transfer made as provided by the by-law. Negligence might be imputed to the Smiths in not having had their shares of stock transferred to them upon the books; but it could not be charged against Seeley, he not having authorized it, nor being a party to it. I do not think the former would have had the right to vote upon their share of stock if they had desired to do so.

But did this render them ineligible to be elected directors of the corporation? This is the most difficult question to my mind in the whole case. They were not shown to be stockholders by the books of the company, though they were such in fact, and the representatives of a majority of the shares voted in favor of their election. The by-laws are silent in regard to the consequences of not having the transfer made upon the books, and the power to adopt them, in the absence of express statutory authority, cannot, in any case, be extended further than necessary to the protection of corporate rights. It cannot be maintained that section 4 of article 6 of the by-laws, referred to, has the force of a legislative enactment, or, in view of the statute upon the subject, that a transfer of stock can be made only upon the books of the company. The statute provides that "the stocks in all private corporations organized under chapter 7, Misc. Laws, are to be deemed personal property, and subject to attachment, execution, levy, and sale, as such; and the corporation, in case of such sale, is required to make the necessary transfer to the purchaser upon the stock-book." Section 13 of said chapter. If such stock is personal property, subject to attachment, execution, levy, and sale, as such, the holder certainly is entitled to make a voluntary sale of it without authority from the statute; but if such authority were required, section 14 of said chapter, impliedly at least, gives it; and it will hardly be contended that a sale does not generally operate to transfer property from the vendor to the purchaser, and the same rule applies, in my opinion, to the sale of stock, whether transferred upon the stock-book or not. I cannot see that the latter, as expressed in the statute, amounts to anything more than a registration of the transaction. The sale is made by the seller to the buyer. The corporation has nothing to do with it, except to make the necessary entry upon the stock-book, showing the fact, and, as before suggested, that is evidently required for the convenience of the officers of the company in the management of its affairs. If a purchaser of stock were to neglect to have the transfer made upon the stock-book, his dividends could be withheld, or paid to the former holder, perhaps, and should he offer to vote on the stock at a stockholders' meeting, his vote could be refused. Under the statutes of this state, I do not believe that the corporation in question had any authority to adopt a by-law limiting the right to transfer stock, as the one in question attempted to do, or that it can be construed to have any more force or effect than I have indicated. If the stockholders at the meeting referred to had refused to recognize the Smiths as stockholders, for the reason mentioned, the latter could not have justly complained, but a majority of the stockholders did not. On the contrary, they voted for their election as directors of the company. Must this court then say, as a matter of law, that they were ineligible, and that

they unlawfully intruded into the office of director? In a case in 44 N. J. Law, 529, entitled "*In re Election of Directors of the St. Lawrence Steam-Boat Co.*," DEPUE, J., in delivering the opinion of the court, said: "The general rule is that the books of a corporation are the evidence of the persons who are entitled to the rights and privileges of stockholders in the management of the affairs of the corporation. * * * The books of the corporation are the only evidence of who are the stockholders, and as such are entitled to vote at elections. Neither the inspector nor other stockholder can dispute the right to vote of one who appears by the company's books to be the holder of stock legally issued. * * * But, with respect to the qualifications of a director, the company's books are not conclusive. A person may be qualified to be a director whose vote cannot be received at the election. He may be a *bona fide* holder of stock at that time, and yet be disqualified from voting on it by reason of the transfer not being entered on the books. He may appear as a stockholder on the books and still, for reasons *aliunde*, be disqualified for the office of director. The question of the competency of a person for the directorship is one exclusively of judicial cognizance, over which the inspectors of the election have no jurisdiction. They have no means of making the necessary investigation on the subject, and no power to reject a competent vote because cast for a person who, in their judgment, is disqualified for the office. * * * The question of eligibility is one that can be raised only in the courts. Independently of the statute, a person might be a director of a corporation without being a stockholder. The statute is guardedly expressed. It prescribes as the qualification of a director, that he shall be a *bona fide* holder of stock. A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. If the stock was legally issued, and is not the property of the corporation, and the legal title is in him, he is *prima facie* capable of being a director, and his right to be a director, in virtue of his legal title to such stock, can be impeached only by showing that title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose," etc.

If the conclusions of the learned judge are correct they are decisive of the question under consideration, although the view expressed may not be in every respect in harmony with our own. But the main point in the question is whether the Smiths were stockholders within the meaning of the section of our statute which provides that "no person is eligible to the office of director unless he is a stockholder in the corporation." Section 8 of said chapter 7. I am inclined to the belief that, in view of the various provisions of the statute, and in the absence of any qualification of the right acquired by general purchase, they were. If the opposite view were to obtain, cases would be likely to arise that would present a strange anomaly. If a majority of all the stock of this corporation had, on the day of the election, stood in the name of Elijah Smith, and five or six days previous thereto it had been sold regularly upon execution, and Mr. Reed had purchased it, still Smith could have gone into the stockholders' meeting and elected himself and friends directors, although he did not legally own a cent's worth of stock at the time. It seems to me that the right to vote the shares of stock under such circumstances would be carrying the doctrine far enough, without extending it to the right to elect a party director whose only title to stock was the fact that the entry of the transfer on the stock-book had not been made. That would be carrying fiction, in my judgment, to an unreasonable extent. It would, indeed, be a sacrifice of substance to name. This disposes of the case as against the directors.

The judgment against Elijah Smith, for intruding into the office of president of the board of directors, I am inclined to think should not be interfered with. The attempt upon the part of the directors, chosen under the circum-

stances he and his friends were, to hold a special meeting at once, without any notice to Mr. Reed, and elect officers, exhibited an indecent haste, and was irregular; nor do I think the irregularity was cured by the attempt, at the subsequent meeting, to ratify and confirm the proceedings of the previous one. I do not think such proceedings would be any more regular when ratified and confirmed than they were originally. The best way to legalize them is to begin over again and transact them properly. The special meeting, so called, was unauthorized, and the proceedings had thereat were a nullity, and not capable of ratification or confirmation. The result is that Elijah Smith was not president *de jure* of the board of directors. The judgment in the action against Elijah Smith, C. J. Smith, and L. B. Seeley will be reversed and the complaint dismissed, and the judgment in the action against Elijah Smith will be affirmed; costs in each case to be taxed in favor of the prevailing party.

NOTE. A very full and exhaustive argument, by way of petition for a rehearing, was carefully examined by the court, and denied by a majority thereof, on the fourteenth day of June, 1887. LORD, C. J., dissenting from the final determination.

STATE *ex rel.* O'MEARA v. ROSS. (No. 1,264.)

(Supreme Court of Nevada. September 10, 1887.)

1. MILITIA—ALLOWANCE FOR ARMORY RENT—OATH OF ALLEGIANCE—MANDAMUS.

An application was made for a writ of *mandamus* to compel a county auditor to issue to the county treasurer his certificate of the allowance, by the board of county commissioners, of an expense bill against a militia company, as provided by Gen. St. Nev. § 646. The refusal of the auditor to issue the certificate was based on the ground that the officers and members of the militia company had failed to take the oath of allegiance prescribed by St. Nev. 1887, p. 102, § 2, and hence were not entitled to the benefits of section 22 of the military law, providing that the county commissioners shall provide armories for volunteer organized military companies. *Held* that, as the company had not taken the required oath, it was not entitled to armory rent, and the writ was properly denied.

2. SAME—STATUTE PRESCRIBING OATH—RETROACTIVE.

St. Nev. 1887, p. 102, § 2, providing that "all officers and members of the volunteer militia of this state, on becoming members and performing duty, must take and subscribe the following oath, etc.," is retroactive, and binding upon all officers and members of companies organized prior to the passage of the act.

3. SAME—AMENDMENT OF STATUTE.

St. Nev. 1887, p. 102, is amendatory of, and supplementary to, the general military law of 1865, and the two must be taken together as one statute.

Application for *mandamus*.

W. E. F. Deal, for relator. The Attorney General, for respondent.

BELKNAP, J. The board of county commissioners of Storey county allowed a bill of the Emmett guard for rent of an armory for the month of March, 1887, under section 22 of the military law, which makes it the duty of the board of county commissioners of any county in which public arms, accoutrements, or military stores are received for the use of any volunteer organized military company, to provide an armory for such company. Gen. St. § 646. Bills of this nature are paid out of the general fund of the county, upon the presentation of the county auditor's certificate to the treasurer that the allowance has been made by the board of county commissioners. The auditor refuses to issue his certificate to this effect, and this proceeding in *mandamus* is brought to compel its issuance.

The Emmett guard is a volunteer military company of Storey county, and was organized prior to the year 1865. It has complied with the various provisions imposed by the laws of the state, except this: its officers and members have failed to take the oath of allegiance prescribed by the act of the legis-

lature supplementary to the military law, and approved March 3, 1887. The section containing the oath is as follows: "Sec. 2. All officers and members of the volunteer militia of this state, on becoming members and performing duty, must take and subscribe the following oath, which all commissioned officers thereof are authorized to administer: 'I do solemnly swear that I will support the constitution of the United States and the constitution of the state of Nevada, and will maintain and defend the laws and officers employed in administering the same. * * *'" St. 1887, p. 102. The refusal of the auditor is based upon the failure of the officers and members of the company to take this oath. The question for determination, therefore, is whether a military company, whose officers and members have not taken the oath, is entitled to armory rent payable out of the public funds.

In behalf of the relator it is said that the requirement to take the oath applies to those only who have become members since the passage of the law, and not to those who were members of the organization prior to March 3, 1887,—the date of the enactment. The contention is based upon the following language of the statute: "All officers and members * * * on becoming members and performing duty, * * * must take and subscribe the following oath. * * *"

The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute, and the intent, when ascertained, will prevail over the literal sense. Bac. Abr. "Statutes," I, §§ 5-10. The intent may be ascertained from a consideration of the condition of the law before the enactment and the cause for the change. Down to the time of the adoption of the supplementary military law no oath of allegiance had been required of the members of military companies. The purpose of the statute was to prescribe such oath. It is not to be presumed that this pledge of allegiance was to be exacted only from the new members of the militia, because no reason exists for a distinction in this regard between those who were members before the passage of the act, and those who have since, or may hereafter, become members. The company in whose interest this proceeding is brought has had accessions to its membership since the passage of the law. If the view contended for were adopted, the anomalous result would be produced of requiring a pledge of allegiance from some and not from other members of the same company. Probably other companies would be affected similarly. In the enactment of the provision the legislature naturally intended to require a uniform pledge of allegiance from all of the members of the militia. Again: The law of March 3, 1887, is amendatory of, and supplementary to, the general military law of 1865. This law, at section 55. (Gen. St. § 679,) provides that "all volunteer companies * * * organized prior to the passage of this act shall be deemed to have been organized in compliance with its provisions and entitled to its benefits; but such companies * * * shall be required to comply with all of the remaining provisions of this act. * * *" The original statute of 1865 and the amendatory law of 1887 must be taken together as one statute, and the requirement relating to the oath in the amendatory law becomes in effect one of the provisions anticipated by the section above quoted. The requirement is, therefore, expressly obligatory upon military companies organized prior to the passage of the law of 1865. If the legislature had intended to exclude companies then existing from the operation of the law requiring the oath, such intention, in view of the provisions of section 55, would doubtless have been expressed.

The main question—whether armory rent shall be allowed—is also affected by the provisions of section 55. Referring again to this section, it will be seen that companies organized in compliance with the various provisions of the act are entitled to its benefits. It is fairly inferable from this provision that companies failing to comply with the law are not entitled to its benefits. Another view may be taken leading to the same result. The legislature has

required from the officers and members of all militia companies an oath of allegiance. This requirement was intended as a qualification. Those lacking the qualification are not legally-appointed members of the militia. The rule of law is plain that the writ of *mandamus* will issue only to enforce a clear legal right. The members of the company have not the legal qualification, and are not, therefore, entitled to the writ. In determining that the company is not a legally-constituted military organization, it must not be understood that the provisions of the military law are not obligatory upon its members. The imposition of an oath was intended for the benefit of the state, and a failure to take it will not relieve the members of the company from their duty under the law.

It was urged that the statute prescribes no penalty for failure to take the oath. No penalty is prescribed which the civil courts can enforce. The military law commits to the governor of the state as commander in chief of the military forces the ultimate control of matters pertaining to the organization and discipline of the militia, to which this matter relates. He is authorized at any time "to disband any portion of the organized volunteer forces * * * which may evince a mutinous, disorderly, or disobedient spirit. * * *" Gen. St. § 691.

If it be claimed that refusing to allow armory rent is, in effect, imposing a penalty, the answer is, the members of the company have not obeyed the law, and, for this reason, cannot have the assistance of this court in obtaining the relief which they seek. *Mandamus* denied.

FRAZER v. OAKDALE LUMBER & WATER CO. (No. 11,799.)

(*Supreme Court of California.* August 15, 1887.)

1. PLEADING—MISTAKE IN COPY SERVED—HARMLESS ERROR.

After setting out several causes of action and their assignment to the plaintiff, the complaint proceeded: "* * * That said defendant is now indebted to the plaintiff thereon in the sums *hereinbefore* set forth." The copy of the complaint as served, with a copy of the summons, contained the word "hereinafter" where the word "hereinbefore" occurred in the original. *Held*, that the mistake was harmless and immaterial, and did not "mislead" the defendant, or "affect his substantial rights," within the meaning of Code Civil Proc. Cal. § 475.

2. SAME—JOINDER OF CAUSES OF ACTION—CONTRACT.

Code Civil Proc. Cal. § 427, provides that a plaintiff may unite several causes of action in the same complaint, where they all arise out of contracts, express or implied. *Held*, that a claim for work done by the plaintiff for the defendant might be united with a claim of third persons for work done by them for the defendant, and by them assigned to the plaintiff.

3. SAME—MISJOINDER—DEMURRER.

Under the California practice, it is not a ground of demurrer that two or more causes of action are improperly united in one count.

4. ASSIGNMENT OF CLAIMS—ACTION BY ASSIGNEE—WHEN MAINTAINABLE.

An assignee of claims for labor performed by the assignors "within two years last past" may maintain his action thereon against the debtor on the very day of the assignment.

Commissioners' decision. Department 2.

Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

On demurrer to complaint.

W. E. Turner, for the company, appellant. *F. D. & G. W. Nicol*, for Frazer, respondent.

BELCHER, C. C. In the complaint filed in this case there are set forth several distinct causes of action. The first is an account for work and labor alleged to have been performed by plaintiff for defendant at its special instance and request. The others are on account for work and labor alleged to have

been performed by other parties for the defendant at its special instance and request, and by such parties sold and transferred to the plaintiff. After setting out these several causes of action and their assignment to the plaintiff, the complaint then proceeds: "Plaintiff, further complaining, alleges that he is now the owner and holder of all said accounts; that said defendant is now indebted to him thereon in the sums *hereinbefore* set forth; that defendant has refused and neglected, and still does refuse and neglect, to pay said amounts, or any part or portion thereof, although the same is due, and payment thereof has been frequently demanded." Then follows the prayer that plaintiff have judgment against the defendant "in the sum of \$912.67 upon his account for work and labor; in the sum of \$165.84 upon the said assigned claim of John Borteilho; in the sum of \$315.40 upon the assigned claim of John Conlin," etc.,—"said sums aggregating the sum of \$3,758.93, together with costs of suit."

Service of the summons was made upon the president of the defendant corporation. In making the service the sheriff handed to the president a copy of the summons, with a copy of the complaint, in which the word "*hereinbefore*," as it appears in the clause before quoted, was written "*hereinafter*." The defendant appeared specially, and moved the court to set aside the service of summons, on the ground that no copy of the complaint, as required by law, had ever been served upon the defendant; "that the paper purporting to be a copy of the complaint, and which was handed to defendant, was not and is not a copy of the complaint as filed in said cause." The court denied the motion, and the defendant reserved an exception. Thereupon the defendant demurred to the complaint upon the grounds—*First*, that it did not state facts sufficient to constitute a cause of action; *second*, that several causes of action were improperly united.

When the demurrer came on to be heard, counsel for defendant asked that it be considered only with reference to the copy of the complaint as served. This request was refused, and an exception reserved. The demurrer was then argued, submitted, and overruled. The defendant was given time to answer, but neglected to do so, and thereupon, on motion, judgment was entered in favor of plaintiff.

1. We see nothing in the point that the court erred in not setting aside the service of summons. The mistake in writing the word "*hereinafter*" for "*hereinbefore*" in the copy of the complaint was harmless and immaterial. It could in no way have misled the defendant, or have affected its substantial rights. Section 475, Code Civil Proc. If in the complaint filed the word had been entirely omitted, or had been written as in the copy, the sufficiency of the complaint could not for that reason have been questioned. We agree, therefore, with the court below, that the copy was in all material respects a true and correct copy.

2. Nor do we see any error in the order overruling the demurrer. The complaint stated several causes of action, but they were such causes of action as may properly be united. Section 427, Code Civil Proc. They were separately stated, too, and not, as claimed, "all jumbled together" in one count. Besides, it is not made a ground of demurrer that two or more causes of action are improperly united in one count. *Bernero v. Insurance Co.*, 65 Cal. 386, 4 Pac. Rep. 382.

3. Some of the claims were assigned to the plaintiff on the day the complaint was filed, and the point is made that the defendant had all that day to pay them, and the action was therefore prematurely commenced. There is nothing in this point. The claims were for labor performed for the defendant by the assignors "within two years last past." The claims appeared to be due, and each claimant had a present right to commence an action. By the assignments the plaintiff acquired all the rights of his assignors.

The judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 193

BALL and others v. NICHOLS. (No. 11,934.)

(Supreme Court of California. August 16, 1887.)

1. APPEAL—By DEFENDANT—ERRORS AFFECTING CO-DEFENDANT.

On an appeal by one of several defendants, the appellant will not be heard to urge error either in the pleadings or the decree which affect his co-defendants only.

2. ADVERSE POSSESSION—PLEADING—PAYMENT OF TAXES.

Title by adverse possession may be pleaded without alleging that the taxes have been paid, as required by Code Civil Proc. Cal. § 325, as amended in 1878; the payment of such taxes is a matter of proof, and not of pleading.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Suit to reform a deed and quiet title, by C. R. Ball, respondent, against John H. Nichols, appellant, William George, and Charles Genasci, guardian. A. Burrows, for appellant. Chas. W. Kitts, for respondent.

FOOTE, C. This is an action to reform a deed for misdescription of land conveyed by it, and to quiet title. It was tried upon the issues raised by an amended complaint of the plaintiff, the answer of the defendants, and a cross-complaint by one J. H. Nichols, and the answer of the plaintiff thereto; the amendments to which latter pleading having been omitted from the transcript, but supplied upon suggestion of a diminution of the record. Judgment was rendered for the plaintiff, and from it Nichols alone of the defendants appeals. A point made by his counsel is that the complaint is insufficient, and shows no cause of action, and for such alleged defect that the judgment should be reversed. The appellant cannot be heard to complain as to any defect in the complaint so far as affects his co-defendants, as they do not appeal. The title to the land in question and the right to have the deed reformed were properly brought in issue by the complaint of plaintiff, the cross-complaint of Nichols, the answer of the plaintiff, and the amendments thereto, and there are findings on all the issues raised by those pleadings. The wards of Genasci are not bound by the decree in the case, as they are not mentioned in it, yet that omission affects them only, and the appellant cannot be heard in their behalf. He and the plaintiff obtained their title from a common source, and if, at the time when he obtained his subsequent deed to the land, he had full notice of its prior sale to the plaintiff, and of the fact that the latter's deed was intended to have the land in dispute included in it, but that it was omitted by a mistake of the parties as to its proper description, then he has nothing to do with the question as to whether the Genasci mortgage covered the plaintiff's land. All the concern he can have in the matter is that it affects that land which he has an interest in; and, even if there was no finding upon the allegation of the existence of the mortgage, it was immaterial so far as Nichols was concerned, but there is a finding which shows that the mortgage was invalid as to the plaintiff's land, as the mortgagee was charged with notice of the plaintiff's claim to the premises in dispute, and therefore when he took it knew that his mortgage could not legally give him any claim thereon.

It is urged that the statement in the complaint of the plaintiff's claim of title by adverse possession is not sufficient, because it is not alleged that the taxes have been paid, as required by section 325, Code Civil Proc., as amended in 1878. But the fact that such taxes had been paid, if essential to the plaintiff's claim through adverse possession, was only a matter of evidence, and

was not a necessary thing to have been pleaded. The language used in the case of *Webb v. Clark*, 65 Cal. 56, 2 Pac. Rep. 747, cited to us by the appellant's counsel in support of his view of this matter, does not conflict with what we have just said. Neither do we think that any of the findings are outside of the issues raised by the pleadings.

Upon the whole record we perceive no prejudicial error, and the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 228

BOSTWICK v. MAHONEY. (No. 11,969.)

(*Supreme Court of California.* August 27, 1887.)

1. APPEAL—WHAT REVIEWABLE—OBJECTION TO JURY—RECORD.

An objection to the jury that tried the case, upon the ground that the superior court of the county and the board of supervisors had not ordered and drawn jurors for the year, as provided by Code Civil Proc. Cal. § 204 *et seq.*, and that the jury was not part of the regular jurors, under section 210 of said Code, will not be considered on appeal, where there is nothing in the record to show that the jury was not what the appellant claims it ought to have been.

2. UNLAWFUL DETAINER—TITLE OF TENANT—PAROL EVIDENCE.

In an action of unlawful detainer, for holding over, the defendant, when a witness for himself, was asked if he "*held the legal title*" to the premises in question on a certain day. *Held*, that an objection to the question, on the ground that the tenant could not prove title in himself by parol, was properly sustained.

3. EVIDENCE—OFFER TO PROVE—INCOMPETENCY.

Where an "offer to prove," by a certain witness, contains testimony which is clearly incompetent, it is not error to reject it, although part of the evidence embraced in the offer is competent.

Department 2. Appeal from superior court, Stanislaus county; Wm. O. MINOR, Judge.

Stonesifer & Minor, for Mahoney, appellant. *Carter, Smith & Keniston and W. L. Dudley*, for Bostwick, respondent.

MCFARLAND, J. This is an action of unlawful detainer. Verdict and judgment were for plaintiff, and defendant appeals from an order denying a motion for a new trial, an appeal from the judgment having been dismissed. Plaintiff proved a written lease of the premises; the expiration of the term; due notice and demand; and all other facts necessary to a recovery. Defendant's defense seemed to rest upon the theory that he could defeat the action by showing that the lease was intended to be a mortgage; but the only exceptions which appear in the very meager record go to certain specific rulings made by the court during the progress of the trial.

Appellant objected to the jury upon the ground that the superior court of the county and the board of supervisors had not ordered and drawn jurors for the year as provided in section 204 *et seq.* of the Code of Civil Procedure, and that the jury in attendance was not part of the regular jurors under section 210 of said Code. But as there is nothing whatever in the record to show that the jury was *not* what appellant claims it ought to have been, we are relieved from any further consideration of that point.

The second exception is to the ruling of the court in sustaining an objection to the following question asked of defendant when a witness for himself: "Will you state whether on the ninth day of August, last year, you *held the legal title* to that property?" This would be a convenient, and exceedingly expeditious way to prove legal title; but the methods by which courts arrive at such proof, though slower, are more satisfactory.

The third exception is to a ruling sustaining an objection to a long question to the same witness, or rather to an "offer to prove by this witness," which covers about two pages of the transcript, and commences in this way: "Then, to get ourselves on the record, we will offer to prove, *by this witness*, that he (defendant) was seized in fee, possessed of and entitled to the possession of the land in dispute here," etc. Many other things are offered to be proved "by this witness" which rest on record or documentary evidence; and the ruling of the court was obviously correct, although the offer may have contained some other things not objectionable. And it may be remarked that "an offer to prove" is a very loose and unsatisfactory method of proposing evidence. Unless the parties agree about it, it is much the better way to ask the proposed question of the witness, or to offer the document sought to be introduced.

There is a general exception to the charge of the court; but no error is pointed out, and the charge, which is short, seems to be entirely correct. Order affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

73 Cal. 265

HEPPE v. JOHNSON and another. (No. 11,785.)

(*Supreme Court of California*. August 30, 1887.)

1. COUNTY TREASURER—EMBEZZLEMENT—SURPLUS AFTER MORTGAGE FORECLOSURE—LIABILITY OF SURETIES.

The surplus remaining after a mortgage foreclosure proceeding, was paid into court, and, by the clerk of the court, turned over to the county treasurer, as required by St. Cal. 1863-64, p. 468. The county treasurer turned the money over to his successor in office, by whom it was embezzled. In an action by the party entitled to the surplus, against the sureties upon the official bond of the embezzling treasurer, *held*, that no advantage could be taken by the sureties, of any irregularities there may have been in making the deposit by the clerk with the county treasurer.

2. SAME—BOND—ACTION AGAINST SURETIES—PARTIES.

In an action against the sureties upon the official bonds of a county treasurer, each bond being, in form, joint and several, the plaintiff can join as defendants one or more or all the persons severally liable upon the bonds, under Code Civil Proc. Cal. § 383, which provides that "persons severally liable upon the same obligation or instrument may all or any of them be included in the same action, at the option of the plaintiff."

3. SAME—EMBEZZLEMENT—WHEN MADE—LAST TERM.

Where money is embezzled by a county treasurer, in the absence of proof as to when it was misappropriated, the presumption is that the misappropriation took place at the end of his last term, and that the liability of sureties arises under the last bond.

4. SAME—JUDGMENT AGAINST SURETIES—FORM.

In an action against the sureties upon the official bond of a county treasurer, for money embezzled by him, the judgment rendered should not be in the ordinary form for the recovery of money, but should be a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond, and costs, with a proviso that each judgment should be satisfied by the collection or payment of the amount of the defalcation and costs; following *People v. Rooneu*, 29 Cal. 643, and *People v. Love*, 25 Cal. 520.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge. *Freeman, Johnson & Bates*, for appellant. *Taylor & Holl*, for respondents.

BELCHER, C. C. On the twenty-first day of February, 1873, a decree of foreclosure was entered in the district court in and for Sacramento county, in favor of Nicholas Schadt against William Nicholas Heppe, administrator of the estate of Jacob Heppe, deceased, and others. This decree, among other things, provided: "That if there be any surplus after the payment of the moneys due plaintiff, with interest, attorney's fees, costs, and accruing costs, v.14p.no.15—53

that such surplus be paid into court, to be disposed of under the order of the court to the persons entitled thereto." In pursuance of the decree the sheriff sold the mortgaged property, and, after paying the plaintiff, and all costs, as required, had left in his hands a surplus of \$1,178.85, which he paid to Lauren Upson, clerk of the court, on the twenty-first day of March, 1878. Immediately on receiving the money, Upson deposited the same with John Bellmer, then the county treasurer, and took from him a receipt which, after reciting the title of the court and cause, reads as follows: "Received, Sacramento, March 21, A. D. 1878, of Lauren Upson, clerk of the court aforesaid, the sum of \$1,178.85 in gold coin, paid into court in the above-entitled action, to be kept by me as a special deposit, subject to the order of court. JOHN BELLMER, County Treasurer."

On the eighteenth of June of the same year an order of court was made which, among other things, declared the plaintiff here entitled to \$589.42. one-half of the money paid into court by the sheriff, and directed that such sum be paid by the clerk of the court to the lawful guardian of plaintiff. The other half of the money was paid out, on the order of the court, to the parties entitled thereto, but the plaintiff's share was kept by Bellmer in a sack, with a tag on it, on which was written the amount of money, and the name of the case to which it belonged, until March 6, 1876, when his term of office expired. On that day he turned it over to D. E. Callahan, his successor in office, and took his receipt therefor. The money was deposited with Bellmer, and by him turned over to Callahan, without any order of court or of the county auditor, and no entry of it was ever made in any of the county books. Callahan held the office of county treasurer during three successive terms, the last term ending on the first Monday of January, 1883. It does not appear what became of the money after it was given to Callahan. It was never demanded of him by plaintiff, or by any person in her behalf, nor paid to her, or any one for her, nor was it turned over by him to his successor in office. Callahan died, and this action was afterwards brought to recover the money, with interest and costs, from the defendants, who were sureties on each of his official bonds.

The defendants answered to the complaint, and, among other defenses, pleaded that neither treasurer was authorized to receive the money sued for in his official capacity, and also that there was a defect of parties, because on each of the bonds there was a large number of sureties who were not made parties defendant in the action. At the trial defendants objected to all evidence showing the receipt of the money by the treasurer, and their objections were overruled. They also moved for a nonsuit, upon the ground that there was a failure to prove any of the material allegations of the complaint, and this motion was denied. At the conclusion of the trial, judgment was entered in favor of the plaintiff, and from that judgment, and an order denying a new trial, this appeal is prosecuted.

When the mortgage referred to was foreclosed the Code provided that, if there be surplus money remaining in a foreclosure proceeding, after payment of the amount due on the mortgage, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in the court. Section 727, Code Civil Proc.

In April, 1864, an act was passed by the legislature entitled "An act concerning moneys deposited in courts of record of this state." St. 1863-64, p. 468. The first section of the act provides that "in all cases in which the statutes of this state authorize the deposit of moneys in the courts of record of this state, the moneys so deposited shall be paid to the clerk of the court, who shall deposit them, in his name of office, with the treasurer of the county." The second section makes it the duty of the treasurer "to receive such deposits of moneys from the clerk of the court as special deposits, and to keep each deposit entirely separate from all other moneys under his control,

and to give to the clerk making such deposits receipts for the same, which receipts shall state the court in which action is pending, and also the title of the action in which such deposit is made, and the amount so deposited." The third section provides that for the safe-keeping of all moneys so deposited the treasurer shall be responsible upon his official bond.

It is claimed for the appellants that this act was repealed when the Codes took effect on the first day of January, 1873. Section 18 of the Code of Civil Procedure declares that "in all cases provided for by this Code, all statutes, laws, and rules, heretofore in force in this state, whether consistent or not with the provisions of this Code, unless expressly continued in force by it, are repealed and abrogated." If the act was repealed by this provision it was because the subject of the act was one of the "cases provided for" by the Code. We have not been cited to any sections of the Code in force in 1873, which cover the ground occupied by the statute, nor do we know of any. Sections 572 and 573, Code Civil Proc., provide for a different case. In 1874 a new section was added, numbered 2104, which seems to take the place of the statute. In our opinion the act was in force in 1873, and it controlled and justified the action of the clerk.

It is further contended that the treasurer was not authorized to receive the money from the clerk, because it was not accompanied by the certificate of the auditor, as provided in sections 4145 and 4217 of the Political Code. On the other hand, it is claimed for the respondent that these sections have no application to special deposits made by the clerk of a court of record. However this may be, it is clear that the money was deposited and receipted for as required by the act of 1864. Bellmer received it without question, and held it during his term of office, and then turned it over to his successor. It was evidently his duty to so turn it over, and we can perceive no irregularity in the manner of his doing it. Now, if it be conceded that Bellmer received the money irregularly, does it follow that Callahan, after he received it, could embezzle it without any official responsibility? Suppose Bellmer had received from the tax collector public funds, without the certificate and discharge required by the Political Code, and had regularly turned the money over to Callahan, could Callahan have embezzled that money and not be responsible for it on his official bond? We think not. It seems to us that when Callahan received the money in question, whatever irregularities there may have been in making the deposit with Bellmer, he received it in his official capacity, and was bound to pay it out, on the order of the court, or turn it over to his successor in office.

The point that there was a defect of parties is not maintainable. Each of the bonds on which the defendants were sureties was in form joint and several. Section 958, Pol. Code. Section 383 of the Code of Civil Procedure provides that "persons severally liable upon the same obligation or instrument, * * * may all or any of them be included in the same action at the option of the plaintiff." Under this section, the plaintiff had the right, at her election, to join as defendants one or more or all the persons severally liable upon the same obligation or instrument. *People v. Love*, 25 Cal. 526; *People v. Evans*, 29 Cal. 436.

If the defendants are liable at all, we are asked to determine under which of the three bonds their liability arises. It was the duty of Callahan to safely keep the money and turn it over to his successor. In the absence of proof as to when it was misappropriated, the presumption must be that the misappropriation took place at the end of his last term, and the liability would therefore be under the last bond.

The judgment rendered in the case was in the ordinary form of a judgment for the recovery of money. That is not the proper form in a case like this, as was held in *People v. Love*, 25 Cal. 520, and in *People v. Rooney*, 29 Cal. 643. The case should be remanded to the court below, with directions to mod-

ify the judgment in accordance with the cases cited, and as modified it should stand affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the cause is remanded to the court below, with instructions to modify the judgment in accordance with the views above expressed, and as so modified the judgment is affirmed.

73 Cal. 318

PEOPLE v. KUNZ. (No. 20,292.)

(Supreme Court of California. August 31, 1887.)

1. JURY—CHALLENGE FOR ACTUAL BIAS—EXAMINATION.

A proposed juror who had testified to holding an opinion as to the guilt or innocence of the defendant, but that he could give him a fair and impartial trial, was asked, in support of a challenge for actual bias, whether the opinion was adverse to defendant, and the question was excluded. *Held* error; following *People v. Brown*, 14 Pac. Rep. 90. McFARLAND, J., dissenting.

2. SAME—CHALLENGE SUSTAINED—REVIEW OF RULING.

The action of the court in sustaining a challenge to a juror, there being no exception to any ruling upon the admission or rejection of evidence, cannot be reviewed on appeal.

3. CRIMINAL PRACTICE—TESTIMONY OF ACCOMPLICE—CORROBORATION.

It is not necessary that every fact sworn to by an accomplice shall be specifically corroborated.

4. SAME—SUFFICIENCY OF CORROBORATING TESTIMONY—QUESTION FOR JURY.

Where, independent of the evidence of an accomplice, there is evidence tending to connect the defendant with the commission of the offense, the question of its sufficiency is for the jury.¹

Appeal from superior court, Trinity county; T. E. JONES, Judge.

D. G. Reid and *J. N. Gillett*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

TEMPLE, J. This case must be reversed on the authority of *People v. Brown*, 14 Pac. Rep. 90. On the preliminary examination of the jurors, three of them announced, in response to proper questions, that they each had decided opinions as to the guilt or innocence of the defendant, but thought they could give the defendant a fair and impartial trial. Each was challenged for actual bias by the defendant, who then, to further show the nature of the bias, asked whether the opinion was adverse to the defendant. This question was in each case objected to, the objection sustained, and an exception noted. The defendant challenged the jurors peremptorily, and before the panel was completed exhausted all his peremptory challenges. The question was so recently before us in the case above cited that further discussion of the point is unnecessary. Such evidence has always been held admissible in this state upon a challenge for actual bias, and there are no decisions in which a contrary opinion is intimated. One Kerlin was called and examined on *voir dire* as to his qualifications to serve as a juror. He was challenged by the district attorney for actual bias. There is no exception to any ruling of the court upon the admission or rejection of testimony, and this court cannot review the action of the court in sustaining the challenge. We understand that the corroborating evidence goes much beyond proof of mere threats on the part of the defendant. There was evidence outside of that of the accomplice of a conspiracy to procure the murder of deceased. We are not prepared to say that

¹ Respecting the sufficiency of accomplice testimony, see *People v. Elliott*, (N. Y.) 12 N. E. Rep. 602, and note. As to who is an accomplice within the rule, see *Smith v. State*, (Tex.) 5 S. W. Rep. 219, and note.

this does not constitute some evidence corroborating the testimony of the accomplice which of itself, and without the aid of the evidence of the accomplice, tended to connect the defendant with the commission of the offense. The sufficiency of that evidence was properly left to the jury. The rule does not require that every fact testified to by the accomplice shall be specifically corroborated.

The judgment is reversed, and cause remanded for a new trial.

We concur: SEARLS, C. J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

McFARLAND, J. I dissent. While the Penal Code does not allow an exception to a ruling of the court, denying a challenge to a juror for actual bias, it is true that it does allow an exception to a ruling upon the admissibility of evidence on the trial of such challenge; thus presenting a wonderful example of the incident being considered more important than the principle, and a part greater than the whole. But, notwithstanding this anomaly, it does not follow that a judgment of conviction must be reversed every time a court commits an error in ruling upon testimony on the trial of a challenge. The rule of section 1258 that this court must not regard "exceptions which do not affect the substantial rights of the parties" applies here, as well as to wiser provisions of the law. Now, in what way was any substantial right of appellant affected by the refusal of the court to allow the three jurors to be asked whether their opinions were adverse to defendant? When the question was asked in each instance the juror had been examined at great length as to the strength and fixedness of his opinion, and defendant had interposed his challenge for actual bias. It must be remembered that whether or not the court should have allowed the challenge is not before us; that was a ruling which we cannot review. The defendant was not injured, therefore, by the rejection of the proposed question, unless we can assume, upon any possible view, that the ruling of the court on the challenge would or might have been different if it had known that the opinion of the juror, such as it was, *was adverse to defendant*. But the court at that juncture had no business with the question, "to which side does the opinion of the juror incline?" If the opinion of the juror disqualified him, he should have been discharged, no matter from what side the challenge came. And, to assume that the judge of the court below would have changed his ruling, and allowed the challenge if he had known that such change of opinion would have favored one party as against the other, would be to assume that he was partial and unfair,—an assumption utterly intolerable. I cannot see, therefore, how the allowance of the proposed question could possibly have affected the final ruling of the court on the challenge,—a ruling which we cannot disturb. I think, therefore, that the judgment should be affirmed. I have assumed that the question was a proper one, because I suppose that point may be considered as settled by the judgment of this court in *People v. Brown*, a judgment in which I did not concur, and from which I had no opportunity to dissent. The facts of that case, however, differ from those of the case at bar. The practice lately grown up of asking all sorts of imaginable questions of jurors has come to be a grievous evil, and should be discouraged in every legitimate way.

79 Cal. 39

MENK v. HOME MUT. INS. CO. (No. 7,890.)

(Supreme Court of California. August 30, 1887.)

1. INSURANCE—MISSTATEMENTS IN APPLICATION—KNOWLEDGE OF INSURANCE AGENT.

In an action on a fire-insurance policy, evidence that the application was made out by an agent of the insurance company, with full knowledge as to the condition of the premises, and that plaintiff did not know what representations it contained,

held admissible, under an issue of misrepresentations. The defendants cannot take advantage of misstatements in the application made by their own agent, and known by him to be false.

2. SAME—LOSS—EVIDENCE OF LOSS OF PROPERTY NOT INSURED.

In an action upon a fire insurance policy, where the defendant alleges that plaintiff burned his own property, evidence on the part of plaintiff showing the loss of other property besides that which was insured is admissible.

3. SAME—PROOF OF LOSS—ADMISSIBILITY OF AFFIDAVIT.

In such a case, it is not prejudicial error to permit the plaintiff to read in evidence his affidavit, prepared soon after the fire, making proof of the loss, where he has testified fully as to the facts within his knowledge, and where the effect of such evidence is expressly limited by the court to showing that plaintiff had made the affidavit.

4. SAME—DESCRIPTION OF PROPERTY INSURED—REFERENCE TO APPLICATION.

Where the application for a policy of fire insurance, in describing the property, included the cellar under the building, but in the policy itself the cellar was omitted, and reference was made to the application for a more particular description, *held*, that the cellar was covered by the insurance.

5. NEW TRIAL—MOTION FOR—QUESTIONS PRESENTED BY.

A general statement in a motion for a new trial, in an action upon a fire insurance policy, that there was no evidence to prove that plaintiff performed all the required conditions of the contract of insurance, is insufficient to allow defendant to make the point that by the terms of the contract, if the parties could not agree upon the amount of loss, it should be referred to arbitration.

Department 1. Appeal from superior court, San Francisco; JOHN CALDWELL, Judge.

Byrne & Cross, for appellant. *Gaylord & Searls*, (*A. B. Dibble*, of counsel,) for respondent.

TEMPLE, J. Suit was brought upon a policy of insurance issued by the defendant, and from the judgment rendered in the action against the defendant, and from an order denying defendant's motion for a new trial this appeal is taken. The application and survey were expressly referred to and made part of the policy, and it was further stipulated that such application and survey should be considered a part of the contract and a warranty by the assured, and that any false representation, by the assured, of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or any overvaluation, should render the policy void.

Among other defenses, it was claimed that there was an overvaluation of the property and a misrepresentation as to its value; that a portion of the premises was occupied by a tenant as a saloon for the sale of liquors, which fact was not mentioned in the application, which stated, as to the occupancy of the premises: "First story by the applicant as a brewery; the second story as a lodging-house, and family residence in the rear." It was also claimed on the trial, although there was no special plea of such defense, that the application contained a warranty in the above-quoted language that the applicant resided with his family on the premises, whereas, in fact, he did not reside there, but the premises were occupied by a tenant. In addition to the above language bearing upon this last point, the application, in reply to the question, "Each story, how occupied?" has this: "Second story by tenant as a lodging-house." It is plain that there is no representation that the applicant personally resided there. The rear was occupied as a residence by the tenant who had the lodging-house.

On the trial the plaintiff was permitted to testify, against the objection and exception of the defendant, that the application was in fact made out by an agent of defendant by the name of Burekhalter, and that the plaintiff did not know what representations it contained; and, further, that the agent knew all about the premises, and the manner in which they were occupied, and their value. There was other testimony to the same effect. It is claimed that this was error, and the case of *Menk v. Insurance Co.*, 11 Pac. Rep. 654, is relied

upon as authority. That was a case by the same plaintiff to recover for the same loss, the property being insured in the two companies at the same time, Burckhalter being the agent for both companies. Counsel assert that the language of the two complaints is practically identical. In that case this court said, in effect, that the complaint alleged that the policy was issued upon an application made and signed by the plaintiff, and that such testimony was in contradiction of the complaint and should have been ruled out. The language of that complaint is not before us, except in the statements quoted from the opinion. In this case the allegation is simply, "a copy of the application of plaintiff for said insurance, referred to in said policy, is also hereto annexed." Obviously this is not an allegation that the application was made out by the plaintiff. Of course, whoever made it out, it was the application of the plaintiff, and was signed by him or his agent. The only point in the offered testimony was that if the agent, knowing all the essential facts, made out the application for plaintiff, the company cannot take advantage of defective statements contained in it as not complying with the requirements of the company; nor would misstatements be fatal to the claim of plaintiff, which the agent well knew to be false, when he made out the application, received the money of the applicant, and issued the policy.

The tendency of the decisions is plainly to hold all those conditions waived which, to the knowledge of the agent, would make the policy void as soon as delivered. Otherwise the company would knowingly receive the money of the applicant without value returned, and the whole transaction would be a palpable fraud. *Kruger v. Insurance Co.*, 13 Pac. Rep. 156. This consideration answers several points made by the defendant, which need not be further referred to.

It is claimed that the plaintiff was allowed, against the objection of defendant, to prove, in making out his loss, the value of property not insured. The application describes the property as follows: "Viz.: \$2,000 on his 2-story frame building and cellar, value \$6,700,—the first story occupied as a brewery, the second story as a lodging-house, and family residence in rear; \$400 on his brewery apparatus, such as kettle, beer kegs, tubs, faucets, cooler, and tools, value \$1,400; \$100 on his household furniture contained therein, value \$300; situate north side Front street, Truckee, Nevada county, Cal." In the policy the property is described thus: "Viz.: \$2,000 on his 2-story frame building occupied as a brewery, lodging-house, and family residence in rear, situate north side Front street, Truckee, Nevada county, California; \$400 on his brewery apparatus; and \$100 on his household furniture contained therein; \$2,500 other concurrent insurance permitted, reference being had to application and survey No. 88,038, on file in this office, which is made a part hereof."

The words "and cellar" are omitted in the policy. The amount of insurance, \$2,000, was asked upon the frame building and cellar, which were together valued at \$6,700. No separate valuation was placed upon the frame building, nor was any insurance asked upon it as a separate property. The cellar was inclosed by the frame building, and probably, when he came to write the policy, the agent concluded that the two constituted one building. The cellar was in the rear portion of the frame building, and "was a stone building, having its floor somewhat lower than that of the frame building, and rising 13 or 14 feet above the level at that floor, but not as high as the ceiling by about 5 feet. 'It was made of rocks; walls two feet thick. Had iron doors. Covered on top with bricks and fourteen inches of dirt.'" The application was expressly referred to in aid of the description. There can be no doubt that the cellar was included in the policy.

We are unable to discover any error in the admission of evidence in regard to the personal property. Read in connection with the application it seems plain that the articles for which the recovery was had were included in the policy. We see no injury to the defendant in the fact that the plaintiff was

allowed to testify as to the loss of other property beside that which was insured. It was a part of the statement as to what was burned, and then it had a bearing upon the issue tendered by the defense, that plaintiff had burned his own property.

The plaintiff was allowed to read in evidence his affidavit, which was prepared soon after the fire, to make proof of loss. The effect of the paper as evidence was expressly limited by the court to showing that he had made the affidavit. The most that can be said about it is that the evidence was immaterial. In the face of the fact that the plaintiff had been on the stand, and had testified fully as to the facts within his knowledge, we will not presume that the jury could have disregarded the positive injunctions of the court. We do not think that the error, if it were error, could have prejudiced the rights of the defendant. It does not appear that the affidavit was ever sent to the defendant, and if it had been, and the defendant set up as a defense the alleged breach of the contract in making the statement charged to be false, we see no materiality in it.

The evidence offered to show that liquor had been sold to Indians, admitting its materiality, was clearly incompetent.

The defendant is not in a position to make the point that, by the terms of the contract, if the parties could not agree upon the amount of loss, it should be referred to arbitration. Waiving the question as to whether it should have been pleaded, there is no specification in the statement on motion for a new trial of insufficiency of the evidence, under which it could be raised. A general statement that there was no evidence which proved, or tended to prove, that the plaintiff at any time complied with or performed all the conditions or any of the conditions of the contract of insurance by him to be performed, would not be sufficient.

Judgment and order affirmed.

We concur. **McKINSTRY, J.; PATERSON, J.**

73 Cal. 281

ROACH, Adm'r, v. COFFEY, Judge, etc. (No. 12,143.)

(*Supreme Court of California. August 30, 1887.*)

ADMINISTRATOR—CONTEST BETWEEN HEIRS—RIGHTS OF ADMINISTRATOR—MANDAMUS.

In California an administrator, having been made a formal party defendant in a contest between heirs, to settle the rights of all persons in the estate, filed cross-interrogatories, and applied to have them annexed to a commission to take depositions which had been issued. His application was refused, and he filed a petition for *mandamus* to compel the probate judge to grant it. *Held*, that the administrator was not entitled to contest the claim of the parties to heirship in the estate or to distribution, and that *mandamus* would not lie.

Department 2.

Petition for mandate. Superior court, San Francisco; **COFFEY, Judge.**

John A. Wright, for petitioner. **Edward R. Taylor** and **E. D. Sawyer**, for respondent.

McFARLAND, J. This is a petition to compel the respondent by a writ of *mandamus* to settle certain proposed cross-interrogatories. During the pendency of the administration of the estate of Thomas H. Blythe, deceased, in the court of respondent, one Florence Blythe, in pursuance of section 1664 of the Code of Civil Procedure, filed her petition in said court for the purpose of ascertaining and declaring the rights of all persons to said estate, and to whom distribution thereof should be made. Notice was issued on said petition, and after the return-day thereof the said Florence filed her complaint as provided in said section. In her complaint she made a great many persons parties defendant, and, among others, William Savage and David Savage, and

also the petitioner herein, who was and is public administrator and administrator of said estate. William and David Savage filed an answer to the complaint of said Florence, denying her heirship, and averring that they and certain other persons were the true heirs; and afterwards procured a commission to issue out of the court of respondent to take the depositions of certain witnesses in England. A day was fixed for the settlement of direct and cross-interrogatories before the respondent. The petitioner herein served and filed certain cross-interrogatories, and asked to have them settled and annexed to the commission; but, upon motion of said William and David Savage, the respondent omitted to annex said interrogatories to said commission, upon the ground that petitioner, as administrator, was not entitled to contest the claim of the parties in said action to heirship, or distribution of said estate, and this proceeding is brought to compel respondent by *mandamus* to settle the said interrogatories of petitioner, and annex them to said commission.

We think that it is the settled law of this state that an administrator cannot represent either side of a contest between heirs, devisees, or legatees, contesting for the distribution of an estate. He cannot litigate the claims of one set against the other. His duty is to preserve the estate, and distribute it as the court shall direct. It is true that petitioner was named as a formal party in the complaint filed by Florence Blythe; but the only averment in relation to him is that he was administrator. He is not alleged to be a claimant to the estate; and there are no issues to which his interrogatories could be addressed. *Estate of Wright*, 49 Cal. 550; *Bates v. Ryberg*, 40 Cal. 465; *Estate of Marrey*, 3 Pac. Rep. 896.

Prayer of petitioner denied, and writ dismissed.

We concur: SHARPSTEIN, J. · THORNTON, J.

73 Cal. 260

SHUMWAY v. LEAKEY. (No. 11,700.)

(Supreme Court of California. August 30, 1887.)

1. SHERIFF—PROPERTY HELD UNDER ATTACHMENT—KEEPER'S FEES—ORDER OF COURT.

Under the statute of California, relating to the fees of the sheriff of Lassen county, which provides that he shall be allowed for his trouble and expense in keeping property under attachment such sum as the court shall order, not exceeding three dollars *per diem*, for keeper's fees, the sheriff has no right to the fees unless the court makes such order.

2. SAME—WHAT AMOUNTS TO ORDER—REMARK OF JUDGE.

In such a case, when the judge of the court in which the attachment suit was pending, in a conversation with the sheriff on the street, told him to pay the fees, this does not amount to an order.

3. SAME—ACTION AGAINST—ALLOWANCE OF FEES—ORDER OF COURT.

In an action against a sheriff to recover money retained by him as fees for keeping and preserving property under attachment, without first obtaining the order of the court allowing said fees, as required by the statute of California, a motion made by defendant, after plaintiff has rested his case, to have the court then make an order allowing the fees, is properly denied, as such order was to be made, if at all, in the attachment suit.

4. SAME—RETAINING MONEY—PENALTIES—DEMAND.

Under Pol. Code Cal. § 4181, which provides that if a sheriff neglects * * * to pay over, on demand, money which may come into his hands by virtue of his office, the amount thereof, with 25 per cent. damages, and interest at the rate of 10 per cent. per month from the time of demand, may be recovered by the person entitled thereto, the party seeking to avail himself of such severe penalty must be exact in his proceedings; and a demand for an amount greater than that claimed in a suit therefor, and much greater than that found due by the court, is not sufficient to justify the court in allowing the penalty and interest.

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county; PRESSLEY, Judge.

E. V. Spencer, for appellant. *A. D. Goodwin* and *A. L. Shinn*, for respondent.

HAYNE, C. This is an action under section 4181 of the Political Code, which provides in relation to a sheriff that, "if he neglects or refuses to pay over on demand to the person entitled thereto any money which may come into his hands by virtue of his office, (after deducting his legal fees,) the amount thereof, with 25 per cent. damages and interest at the rate of 10 per cent. per month from the time of demand, may be recovered by such person." The defense of the sheriff was that, after deducting his legal fees, there remained only \$76.66, which he duly tendered to the plaintiff, but which plaintiff refuses to receive. The fees which he claimed the right to deduct were keeper's fees, etc., upon an attachment in the cause. The controversy turns upon the right to deduct these fees.

The provision of the statute in relation to the fees of the sheriff of Lassen county is as follows: "For his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, such sum as the court shall order: provided, that no more than \$3 *per diem* shall be allowed to a keeper." Laws 1869-70, p. 158. With reference to similar provisions, it is the settled rule that unless the court makes such order the sheriff has no right to the fees. *Bower v. Rankin*, 61 Cal. 108; *Lane v. McElhany*, 49 Cal. 424; *Geil v. Stevens*, 48 Cal. 590. Now, in this case, there was no such order. The findings state that the sums claimed as fees were paid by the sheriff "without at any time obtaining an order of said court allowing, fixing, or authorizing such payment, or any portion thereof." And this finding is sustained by the evidence.

The objection to the offer of defendant to prove that before paying out the fees "he had asked the Hon. J. W. HENDRICK, superior judge, about paying the bills, upon meeting said judge upon the street, and that said judge told him to pay them," was properly sustained. What the judge told the defendant on the street is not an order. Even if the judge had promised out of court to have the order entered, it would not have amounted to an order. *Campbell v. Jones*, 41 Cal. 518. Nor was there error in the denial of the defendant's motion, made after the plaintiff had rested his case, to have the court then make an order allowing the fees. Such order was to be made, if at all, in the attachment suit. The motion was not a part of the case before the court, and hence cannot be considered on this appeal. The court, therefore, properly rendered judgment against the defendant.

But we think the court erred in allowing the penalty of 25 per cent., and interest at 10 per cent. per month. The statute provides that the penalty is to be imposed for non-payment "on demand." In seeking to avail himself of such a severe penalty, the party must be exact in his proceedings. And without expressing any opinion as to whether a demand in general terms, without naming any sum, would have been sufficient, we think that a demand for \$921.47, when the amount claimed in the complaint was only \$848.73, and the amount found to be due only \$366.73, was not sufficient. This point does not appear to have been taken before the learned judge of the court below, nor is it made on appeal. But we think that justice requires this disposition of the case. In this view it is not necessary to determine whether the penalty can only be recovered in an action for a false return.

We therefore advise that the judgment be reversed, and the cause remanded, with directions to enter judgment for \$366.73, with interest from February 25, 1885, at legal rates, and for costs of suit.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to enter judgment for \$966.75, with interest from February 25, 1885, at legal rates, and for costs of suit.

2 Cal. Unrep. 794

SWAMP-LAND RECLAMATION DIST. NO. 407 v. WILCOX. (No. 11,782.)

(Supreme Court of California. August 31, 1887.)

1. SWAMP-LANDS—ASSESSMENTS—ORDER OF BOARD OF SUPERVISORS—ALTERATION—EVIDENCE.

In an action by a swamp-land reclamation district to enforce the payment of a swamp-land assessment, plaintiff offered in evidence an order appearing in the "minute-book" of the board of supervisors, in which, by Pol. Code Cal. §§ 4029-4031, all orders of the board are required to be recorded; and it was conceded that, without the direction of the board, the order had been altered by B., who at the time of the entry, but not at the time of the alteration, was *ex officio* clerk of the board. B. testified, against objection, that he made the alteration to correct what appeared to him, on examination, to be a clerical error of his deputy, now deceased, the then acting clerk of the board. The "rough minute-book," containing the original entry from which the record was made, and to which the altered record conformed, was also admitted against objection. *Held*, that it was error for the court to admit the order in evidence.

2. SAME—RECORD—ALTERATION—PAROL EVIDENCE.

Held, further, that the order was a record which B. had no right to alter or amend, and that parol proof was inadmissible to correct or change the record.

3. SAME—ASSESSMENT LISTS—DESCRIPTION.

Under Pol. Code Cal. § 3461, requiring certain assessment lists to contain "a description, by legal subdivisions, swamp-land surveys, or natural boundaries," a description, naming the adjoining proprietors on the respective boundaries, is sufficient.

4. SAME—ASSESSMENTS AND BENEFITS—DUTY OF COMMISSIONERS.

Pol. Code Cal. § 3456, provides that assessments for swamp-land improvements shall be proportionate to the resulting benefit, and section 3461 provides, among other requisites, that the list must contain "the amount of the charge assessed against each tract." The list in question conformed to the requirements of section 3461. *Held*, that the commissioners were not required to report that, in making the assessment, they had complied with section 3456, and that in the absence of evidence to the contrary, they must be presumed to have regularly performed their official duty.

5. SAME—ASSESSMENT LIST.

In an action to enforce the payment of a swamp-land assessment, it appeared that, in the assessment list, there was no dollar-mark before the figures opposite defendant's name, under the heading "Amount of charges assessed." In a number of assessments the dollar-mark preceded the figures under that heading, and in others the mark did not appear. *Held*, that the figures must be construed to represent dollars.

6. SAME—OATH OF COMMISSIONERS.

The commissioners of swamp-land assessments were verbally sworn before viewing the land, but it did not appear that they subscribed their oath, and filed it in the county clerk's office, as required of all "officers" by Pol. Code Cal. §§ 904, 909. *Held*, that whether the commissioners were or were not "officers," within the meaning of those sections, a failure of strict compliance with their requirements would not avoid official acts fully performed.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

W. H. Beatty, Add C. Hinkson, and Freeman, Johnson & Bates, for appellant. A. P. Catlin, for respondent.

BELCHER, C. C. This is an action to enforce payment of a swamp-land assessment. The plaintiff was organized as a swamp-land district in January, 1882, to reclaim certain swamp lands situate on Andrus island, in Sacramento county; and, as alleged in the complaint, the assessment sought to be recovered was thereafter regularly levied on land owned by the defendant within the district. In the court below judgment was entered in favor of the plaintiff, from which, and from an order denying a new trial, the defendant has appealed.

The validity of the assessment is assailed by the appellant upon several grounds, but they need not all be noticed.

*Reversed in banc. See 17 Pac. 241, 75 Cal. 443.
Cal. Rep. 12-15 P.—52

In support of the averment that commissioners were appointed to view the lands of the district, and to assess upon them the proper charge for their reclamation, the plaintiff offered in evidence at the trial an order appearing in minute-book "K" of the records of the board of supervisors, which read as follows:

"OFFICE OF THE BOARD OF SUPERVISORS,

"FRIDAY, August 25, 1882.

"Swamp-land district No. 407. The report of the trustees of swamp-land district No. 407, was received and the following report adopted: 'Ordered that J. M. Upham, J. M. Stephenson, and John Miller, three competent and disinterested persons and residents of Sacramento county, be, and are hereby, appointed commissioners, who must, in the manner provided by law, view the land of said district and assess thereupon the proper assessment and charge for the reclamation of said land, to-wit: The sum of \$78,000, in the manner and at the cost surveyed, planned, and estimated by J. C. Pierson, engineer of said district, and by the board of trustees filed this day with the clerk of this board.'"

The defendant objected to the entry being received in evidence upon the ground that when made it was an order appointing commissioners to view and assess a charge on lands in swamp-land district No. 341, and that it had since been altered and changed, and was therefore irrelevant and immaterial. And in this connection counsel offered to show that from August 25, 1882, until 1885, the record read as follows: "Swamp-land district No. 341. The report of the trustees of swamp-land district No. 341, was received and the following report adopted: 'Ordered that J. M. Upham, J. M. Stephenson and John Miller,' etc. Then followed the balance of the order as above set out.

Thereupon the attorney for the plaintiff admitted in open court that on the seventeenth day of July, 1885, the day before the trial, Thomas H. Berkey, in his presence, changed the figures designating the number of the district from "341" to "407." It was then shown that Thomas H. Berkey was the county clerk of Sacramento county on the twenty-fifth day of August, 1882, but that his term of office had expired before he changed the record as above stated, and that he was then acting as a deputy county clerk; that the record of the proceedings of the board of supervisors, of which the entry in question was a part, was signed by the president of the board, but was not signed by Berkey, or any of his deputies, and that the alteration was made by Berkey when the board of supervisors was not in session and without its direction or permission. Berkey was called as a witness and testified, against the objection of defendant, that he made the alteration as soon as his attention was called to what appeared to him, by a comparison of the records and examination of different pages of the record-book, to be a clerical error made by one Parnell, now deceased, who, in August, 1882, was his deputy, and as such was the acting clerk of the board of supervisors. A book was also introduced in evidence, against the objections of defendant, described by the witness, Berkey, as the book of original entry, and what he termed the "rough minutes"—a book in which the clerk first entered the minutes of the proceedings of the board, and from which the record of its proceedings was made up. In that rough minute-book appeared the following entry under date of August 25, 1882: "The board of swamp-land com., No. 407; report of trustees filed and ordered adopted; see order." Upon this showing the court overruled the objections of defendant, and admitted the order in evidence.

In so doing we think the court erred. The county clerk is *ex officio* clerk of the board of supervisors, and as such must record all the proceedings of the board. And the board must cause to be kept a "minute-book," in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special meetings. Sections 4029-4031, Pol. Code. The order in question was, therefore, a record which, it is evident, Berkey had no right to alter or amend, even though he had personal knowledge—

as he did not have in this case—that it was erroneously entered. *Dyer v. Brogan*, 11 Pac. Rep. 589; *Pacheco v. Beck*, 52 Cal. 3; *Wigginton v. Markley*, Id. 411. Nor was parol proof admissible, in a collateral proceeding like this, to correct or change the record. This must be so on principle, and has been held in many similar cases. Thus, in *Jordan v. School-District*, 38 Me. 170, it is said: "School-districts are required by law to keep a record of their proceedings by a sworn clerk. Such proceedings can therefore be proved only by the record, or a copy thereof, properly authenticated. The parol proof offered was consequently properly rejected." So, in *Morrison v. City of Lawrence*, 98 Mass. 221, it is said: "Parol evidence was inadmissible to prove any acts or proceedings of the city council, or that the record of such proceedings as kept by the clerk was erroneous or defective." See, also, *Mayhew v. District of Gay Head*, 13 Allen, 134, and *City of Logansport v. Crockett*, 64 Ind. 819.

If the record was, in fact, erroneous in the particulars named, the plaintiff's remedy was an application to the board of supervisors, or some other direct proceedings, to have it corrected.

The defendant also objected to the assessment list, offered in evidence by the plaintiff, upon several grounds, and his objections were overruled. One ground of objection was that the land was not properly described. The Code required the list to contain "a description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed," and "the number of acres in each tract." The land assessed to the defendant was described as a portion of two swamp-land surveys, "bounded on the north by the lands of Mrs. R. F. Davis, on the east by the lands of L. C. Ruble, on the south by the lands of the Pacific Mutual Life Insurance Company, and on the west by Old river,—number of acres, 100." This should be held, we think, to be a sufficient description, as otherwise it would seem impossible to describe the land so as to comply with the statute. Evidently, it could not have been described by legal subdivisions, nor, being a portion of two surveys, by swamp-land surveys. If, then, the words "natural boundaries" are to be construed as excluding all artificial boundaries, or boundaries made by man, it must follow that no sufficient description of the land could be made. We do not think such a result was intended or should be declared. In our opinion any description which clearly identifies and marks out the land is sufficient.

Another ground of objection was that it did not appear from the face of the assessment list, or from any other evidence, that the assessment or charge was made in proportion to the whole expense, and to the benefits which would result from the works of reclamation, nor that the charge was estimated in gold and silver coin of the United States, nor in any kind of money. Section 3456 of the Political Code requires the commissioners to "view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works, and estimate it in gold and silver coin of the United States." And section 3461 provides what the list must contain, as follows: "The list must contain: (1) A description by legal subdivisions, swamp-land surveys, or natural boundaries of each tract assessed. (2) The number of acres in each tract. (3) The names of the owners of each tract, if known; and if unknown, that fact. (4) The amount of the charge assessed against each tract."

The list returned was signed by the supposed commissioners, and complied with the requirements of section 3461, and there is nothing to show that the assessment was not made in full compliance with section 3456. The commissioners were not required to report that in making the assessment they had complied with the requirements of section 3456, and, if they had done so, their certificate to that effect would not have been even *prima facie* evidence of the fact. *People v. Hagar*, 49 Cal. 232. They were, however, charged with an official duty, and, in the absence of all evidence to the contrary, must be presumed to have regularly performed that duty. Section

1963, subd. 15, Code Civil Proc. It is true that there was no dollar-mark before the figures, "4,746.45," placed opposite the name of defendant, under the heading, "Amount of charges assessed;" but the record shows that this was only one of a number of assessments contained in the list, and that "in a number of cases there was a dollar-mark (\$) preceding the figures in columns headed with the words 'Amount of charges assessed,' and in a number of other instances, as in this, the dollar-mark did not appear." It is not shown when or in how many places the dollar-mark did appear, but if it was prefixed to some of the items in the column, then all the figures standing in the same column, and in the same relation to other similar items, must be construed to be dollars, without a repetition of the mark before each item. *People v. Emptre G. & S. M. Co.*, 33 Cal. 171.

Still another ground of objection was that it did not appear that Upham, Stephenson, and Miller took, subscribed, and filed their oath of office in the office of the county clerk, before they assessed the land and made the assessment list. It did appear that they were sworn verbally by a justice of the peace, before they went out to view the land. It is not necessary to decide whether or not they were such officers as sections 904 and 909 of the Political Code refer to; for, if they were, their official acts, after being fully performed, were not rendered void by the fact that they had failed to comply strictly with the requirements of those sections.

After carefully examining the whole record, we find no error of which the defendant can complain, save the one first above noted; but for that error the judgment and order should be reversed and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

SWAMP-LAND RECLAMATION DIST. NO. 407 v. RUBLE. (No. 11,732.)

(Supreme Court of California. August 31, 1887.)

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge.

W. H. Beatty, Add C. Hinkson, and Freeman, Johnson & Bates, for appellant. A. P. Cullin, for respondent.

BELCHER, C. C. This case does not differ in any material respect from that of *Swamp-Land Reclamation Dist. No. 407 v. Wilcox*, ante, 843, (just decided.) Upon the authority of that case the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

2 Cal. Unrep. 800

WHYLER and another v. VAN TIGER. (No. 11,931.)

(Supreme Court of California. August 31, 1887.)

I. GUARDIAN AND WARD—APPOINTMENT—ISSUE OF LETTERS.

Where a mother was appointed guardian of the person and estate of her minor son, and on the same day presented her bond, which was approved, a lease made

by her of the ward's property on the following day was held valid, though no letters of guardianship had been issued to her, and she had not taken the oath of office.

2. SAME—LEASE IN INDIVIDUAL NAME.

A lease purporting to be made by one tenant in common in her own right, and as the guardian of the estate of her co-tenant and ward, is valid, although signed and delivered as her individual deed.

Department 2. Appeal from superior court, Sutter county; PHIL. W. KEYSER, Judge.

This action was brought by Joseph Martin Whyler to recover the possession of the undivided one-half of 300 acres of land situated in Sutter county, California, for an accounting of the rents and profits, and for \$150 damages for withholding possession. The land in controversy was leased to Henry Van Tiger by Mary E. Whyler, as guardian of the estate of Joseph Martin Whyler, but the lease was signed and delivered as her individual deed.

The cause was tried by the court, a jury being waived, and the court found from the evidence and admissions of counsel the following facts:

"(1) That the plaintiff is a minor, under the age of 14 years, and now is, and more than two years last past has been, a resident of Sutter county, California, and has estate therein. (2) That on the twenty-eighth day of September, 1885, Mary E. Whyler, who was the mother of said minor, filed her petition with the clerk of this court, asking to be appointed the guardian of the person and estate of said minor, Jos. M. Whyler; and thereupon, by an order entered on its minutes and without notice, this court appointed her such guardian, and fixed her bond at \$1,000; and thereafter, to-wit, on the twenty-ninth day of September, 1885, she presented her bond conditioned according to law, and the order of said court, which, on the same day, was duly approved by the judge thereof, and she immediately entered upon the discharge of her duties as such guardian. No letters of guardianship were issued to said Mary E. Whyler, nor did she take the oath of office. (3) That on the third day of May, 1886, John T. Allment and Mary E. Whyler filed their petition with the clerk of this court, asking that said John T. Allment be appointed guardian of the estate of the said minor, Joseph M. Whyler; and thereupon, by an order entered in its minutes, and without notice, this court appointed John T. Allment guardian of the estate of said minor, and fixed his bond at \$500; and thereafter, to-wit, on the fourth day of May, 1886, the said John T. Allment presented his bond, conditioned according to law, and the order of said court, which on the same day was duly approved by the judge thereof; that letters of guardianship were issued to said John T. Allment, and thereafter, to-wit, on said last-mentioned day, the said John T. Allment took and subscribed the oath of office. (4) That said plaintiff and Mary E. Whyler were, on the twenty-eighth day of September, 1885, ever since have been, and now are, the owners in fee as tenants in common, in equal shares, of the land and premises described in plaintiff's complaint. (5) That on the thirtieth day of September, 1885, the said Mary E. Whyler, acting for herself, and also as guardian of the estate of said minor, Jos. M. Whyler, duly made, executed, and delivered to defendant a written lease of said premises, for the period of four years from the date thereof; that on said last-mentioned day said defendant entered into the possession of said premises, and ever since has held, and now holds, the possession thereof, as the lessee thereof.

"(1) As conclusions of law, I find that Mary E. Whyler was the legal guardian of the person and estate of said minor, Jos. Martin Whyler, at the time she executed the lease to the defendant of the premises in controversy. (2) That she executed and was authorized to execute said lease, at the time it bears date, for herself and as such guardian, to said defendant, and that said lease conveyed to said defendant the right of possession of said premises.

(3) That said defendant entered into possession of said premises under and by virtue of said lease, and is now and was on the fifteenth day of May, 1886, entitled to and is and was lawfully in the possession thereof. (4) That the defendant is entitled to judgment against the plaintiff for costs.

J. H. Craddock, for appellant. *Stabler & Bayne* and *Sanborn & Phipps*, for respondent.

BY THE COURT. There is no error in the record. We think that *Mrs. Whyler* was a guardian when she executed the lease to defendant, and that the lease was properly executed.

The judgment must be affirmed. So ordered.

73 Cal. 345

PEOPLE v. WEST. (No. 20,317.)

(*Supreme Court of California*. September 5, 1887.)

1. CRIMINAL PRACTICE—ASSAULT WITH INTENT TO COMMIT MURDER—VERDICT—SUBSTANCE AND FORM.

Under Pen. Code Cal. § 1151, a verdict of the jury, on the trial of a defendant charged with an assault with an intent to commit murder, "We, the jury in the above-entitled case, find the defendant guilty," is sufficient in form and substance.

2. SAME—INSTRUCTIONS—FORM OF VERDICT.

On the trial of a defendant charged with an assault with intent to commit murder, it is not misleading to instruct the jury that, if they find the defendant guilty of the offense charged in the indictment, their verdict shall be, "We, the jury, find the defendant guilty," but if they find him guilty of the lower crime of assault their verdict shall designate the crime, "We, the jury, find the defendant guilty of assault."

3. SAME—TRIAL—MISCONDUCT OF JURY—DISCUSSING MERITS OF CASE.

It is not a prejudicial disobedience of the admonition of the court not to talk about the merits of the case, for a juror to state, at the conclusion of the charge of the court, that there is a misunderstanding among the jury as to the testimony of a witness, and ask to have stated what the testimony was.

4. SAME—EVIDENCE—ASSAULT—DECLARATIONS OF PROSECUTING WITNESS.

When a witness is called by the defense for the purpose of showing that the prosecuting witness did not know who assaulted him, and testifies to a conversation had with the prosecuting witness the morning after the commission of the offense, in which he told him he did not know whether it was the defendant or not, it is competent to ask him, upon cross-examination, if the prosecuting witness did not tell him the evening before that it was the defendant who assaulted him.

In bank. Appeal from superior court, Butte county. *W. O. VAN FLEET*, Judge.

Reardan & Freer, for appellant. *John C. Gray* and *Geo. A. Johnson*, Atty. Gen., for respondent.

PATERSON, J. The defendant was charged with the crime of assault with intent to commit murder. The jury found the defendant guilty in the following language: "We, the jury in the above-entitled case, find the defendant guilty." It is claimed that this verdict is contrary to law; does not find the defendant guilty of any offense; and that, because the lesser crime of simple assault is included within the crime charged in the information, the verdict is ambiguous and uncertain. The jury were given four forms of verdict, the court saying: "I have prepared forms of verdict for you. You will find that they conform to the definition of the crime and the different offenses which I have defined to you. If your verdict be that the defendant is guilty of the offense charged in this information, then it is simply essential for you to find a verdict like the following: 'We, the jury in the above-entitled case, find the defendant guilty,' and that imports the conviction of the offense with which the defendant is charged in the information. If, however, you should in your wisdom arrive at the conclusion that the defendant is guilty of the lower crime of assault, which I have defined to you, then, in that event, it

will be essential that you designate the character of the offense, and your verdict in that case would be: 'We, the jury, find the defendant guilty of assault.' " In the case upon which appellant relies, (*People v. Ah Gow*, 58 Cal. 628,) the form of the verdict was: "Guilty of the indictment as charged to him." It was there held that the jury had failed to find the defendant guilty of anything. An assault with intent to commit murder is not divided into degrees, and the general rule is that a verdict of guilty is a conviction upon every material allegation in the information. *People v. March*, 6 Cal. 543. Section 1151 of the Penal Code provides that a verdict of guilty upon the general issue imports a conviction of the crime charged in the information. Under the instructions given in the court, the jury could not have been misled, and the verdict is sufficient in form and substance.

Immediately upon the conclusion of the charge of the court to the jury one of the jurors said: "I would like to ask one question, if the court please, about which there is a conflict among the jury. The evidence of the two men who swore that they saw this man West, at 6 o'clock or a little after that, going through that lane, and that of the defendant with regard to it, is not clearly understood. The question is whether he swore that he was there at all, and the two men swore that they saw him in there at that time?" It is not pretended that the jurors in any material respect disobeyed the admonition of the court not to talk about the merits of the case, and this question itself indicates nothing prejudicial to the rights of the defendant. It is simply an inquiry on the part of one of the jurors, and indicates only that there was a misunderstanding as to the testimony of one or more of the witnesses. The inquiry of the juror was answered by stating the testimony to him, to which there was no objection. During the progress of a trial a juror may not hear clearly what has been said, and without impropriety may ask a fellow-juryman whether the testimony is as he understands it. In the absence of something more than the showing that is made here, we must hold that the defendant was not injured. *People v. McCurdy*, 68 Cal. 576, 10 Pac. Rep. 207.

There was no error in permitting the witness Ward to answer the question, "How did it come up?" The defense had attempted to show by him that the prosecuting witness did not know whether it was West or another person who had committed the assault; and, for that purpose, had been permitted to show that Weyman had said to him on the morning after the commission of the offense that he (Weyman) did not know whether it was West or a white man. We think it was legitimate cross-examination of the witness to inquire whether, in the conversation had with the same party the evening before, he had not said that it was West who assaulted him.

Judgment and order affirmed.

We concur: SEARLS, C. J.; TEMPLE, J.; MCFARLAND, J.; MCKINSTRY, J.; THORNTON, J.; SHARPSTEIN, J.

73 Cal. 223

PEOPLE v. KERRIGAN. (No. 20,297.)

(Supreme Court of California. August 25, 1887.)

1. CRIMINAL PRACTICE—CONDUCT OF TRIAL—EXCLUSION OF SPECTATORS—PUBLIC TRIAL.

During the progress of a trial for an assault with intent to commit murder, the court made an order directing that the lobby outside of the court-room should be cleared of spectators, and that no person except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial, should be allowed to remain; but no order was made requiring the doors to be closed, and the friends of defendant and reporters were permitted to come and go at will. The order of the court was made on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd in the court-room tended to excite the defendant. *Held*, that defendant's right to a public trial was not violated.

7.14P.no.15—54

2. INSANITY AS DEFENSE—MORAL INSANITY.

Under the decisions of California, moral insanity, as distinguished from mental derangement, is no excuse for crime, nor an exemption from punishment therefor.

In bank. Appeal from superior court, San Francisco; **D. J. MURPHY**, Judge.

J. A. Hosmer and D. T. Sullivan, for appellant. *Geo. A. Johnson*, for the People.

PATERSON, J. The defendant was convicted of an assault with intent to commit murder. The defenses interposed at the trial were, not guilty, and insanity. During the progress of the trial in the court below the defendant became greatly excited and indulged in profane and abusive language, addressed to the judge and other officers of the court. Her conduct created so much commotion among the spectators that the trial was seriously interrupted, and the court found it necessary to make an order excluding spectators from the court-room. Appellant claims that she was deprived of the constitutional right of a public trial by the making and enforcement of this order.

There is some controversy as to the scope of the order,—which was not entered in the minutes at the time,—but the judge certifies that the order was “that the lobby outside of the court-room should be cleared of spectators, as their presence tended to irritate and excite the defendant, and that no persons except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial, should be allowed to remain.” It appears further, from the statement of the judge, that no order was made requiring the doors to be closed, and that, in fact, the friends of defendant and reporters were permitted to come and go at will; that the order was made by the court on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd of spectators in the court-room evidently tended to excite the defendant; and it is apparent from the affidavits, showing the conduct of the defendant and many of the spectators, that such was the fact.

In our opinion, the order and action of the court, as shown by the bill of exceptions, were not in violation of the defendant's right to a public trial. It was proper, we think, under the circumstances, to exclude from the court-room those who were excluded, not only because of the vulgar and profane language of the defendant herself, but because such action was evidently necessary to protect the court from indignity and indecorum. No actual injury to the defendant is shown. It is not shown that any person who could have been of any service to the defendant on her trial was excluded. While it is very important that all the rights guaranteed by the constitution to a person charged with crime should be fully and fairly awarded to him, it is also important that courts of justice should be upheld in the enforcement of all necessary and reasonable rules for the orderly, speedy, and effective conduct of their duties. *People v. Swafford*, 65 Cal. 224, 3 Pac. Rep. 809; *Grimmett v. State*, 2 S. W. Rep. 631; section 128, Code Civil Proc.

It is claimed that the court erred in its charge to the jury upon the subject of moral insanity; that the court, in effect, took the evidence upon this question from the jury's consideration by instructing them, in substance, that there is no such thing as moral insanity. Counsel for appellant has not pointed out the particular instruction to which his objection is directed; but the following, from those given by the court of its own motion, evidently shows the views of the court as expressed to the jury: “In our courts of law there is no such doctrine established or recognized as moral insanity, distinguished from mental derangement, as an excuse for crime, and as an exemption from punishment therefor. There is no such type of insanity recognized in our courts, as, for instance, that a person may steal your property, burn your dwelling, murder or attempt to murder you, and know at the time that the deed is a

criminal act, and wrong in itself, and deserves punishment; having the ability to correctly reason on the subject, and yet be held guiltless and not punishable on the ground solely of a perversion of the moral senses."

It may be true, as claimed by appellant's counsel, that the weight of authority in this country is against the doctrine here enunciated. The authorities cited by him support his contention that "moral insanity is now as well understood by medico-jurists, and almost as well established by judicial recognition, as the intellectual form." But it is not an open question in this state. The instruction quoted is within the test of insanity as given by this court in former decisions, and we adhere to the rule of decision with confidence in the correctness of the principle established. If the defendant had sufficient mental capacity to appreciate the nature of her act; if she knew and understood that she was violating the rights of another by an act which was in itself wrong, and which was prohibited by the law, and the commission of which would entail punishment upon herself; if she had the capacity thus to appreciate the character and comprehend the consequences of her act,—she is responsible to the law for the act thus committed, and must be judged accordingly, regardless of any perversion of the moral senses, however great; for, if great moral depravity should be taken as a test of insanity, then the highest degree or enormity of crime would, by virtue of its own atrocity, furnish the best evidence of insanity on behalf of the one who committed the act.

The third point relied upon by the appellant is that the verdict of the jury is contrary to the evidence. It is claimed that the defense of insanity was established by a preponderance of evidence, and that there is no testimony, in fact, sufficient to cause a substantial conflict. To support this contention, we should have to hold that the testimony of Dr. Dozier, a physician of 20 years' practice, 11 of which were devoted exclusively to the patients of the Napa Insane Asylum, is unworthy of consideration or belief. This we cannot do. The witness, as first assistant physician of the asylum, had defendant under his personal observation for a period of about six weeks, and testified that he never saw her, and never spoke to her at any time while she was under his charge, when she impressed him as being an insane person. There was other evidence in the case which tended to corroborate Dr. Dozier in his theory that her malady was that of extreme moral depravity, or moral insanity only, and that she was capable of distinguishing right from wrong.

We see no errors, and the judgment and order are affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; TEMPLE, J.; McFARLAND, J.; THORNTON, J.

73 Cal. 230

PEOPLE v. RICE. (No. 20,234.)

(*Supreme Court of California.* August 25, 1887.)

1. RECEIVING STOLEN GOODS—INFORMATION—ALLEGATION OF VALUE.

Under Pen. Code Cal., defining the crime of receiving stolen goods, it is not necessary, in the information charging a person with that crime, to allege that the property was of any value.

2. SAME—TIME OF OFFENSE—VARIANCE.

On the trial of a person for receiving stolen goods, it is not a material variance, within Pen. Code Cal. § 955, prescribing when time is material, that the evidence shows the crime to have been committed three months before the time stated in the information.

3. CRIMINAL PRACTICE—ABSENCE OF COUNSEL OF ACCUSED.

It is not a cause for reversal that, on the trial of a person charged with receiving stolen goods, his counsel was absent when the court overruled the demurrer to the information; no reason being assigned for his absence, and it not being shown that defendant was injured thereby.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

W. D. Grady and *R. H. Ward*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. Appellant was accused by information, and convicted of the crime of receiving stolen property. There is no allegation that the property was of any value, and the information was demurred to on that ground. The demurrer was overruled, and that ruling is assigned as error. There is nothing in the Code defining the crime which, by necessary implication, requires that the value of the property should be alleged, and it is sufficient to charge the offense as defined by the Code. *People v. Avila*, 43 Cal. 196; *People v. Shuler*, 28 Cal. 490. The punishment for receiving stolen goods does not in any degree depend upon the value of them. Therefore, value need not be stated. 2 Bish. Crim. Proc. 930.

Independently of any admission by defendant's counsel at the trial that the property alleged to have been stolen was stolen, we think the evidence sufficient to justify a finding that it was stolen. No one testified to having seen it stolen, but the circumstances proven, in our opinion, established the fact beyond a reasonable doubt. The evidence shows that the offense was committed three months before the time stated in the information. We think the variance immaterial. Pen. Code, 955.

It appears that defendant's counsel was not present when the court announced the overruling of his demurrer to the information. No reason is assigned for his absence, nor is it shown, or attempted to be shown, that the defendant was in any way prejudiced thereby. The rule which requires that a defendant on trial for a felony must be present during the entire trial, does not apply to a point like this, and there is no reason why it should.

Judgment and order affirmed.

We concur: *SEARLS, C. J.*; *THORNTON, J.*; *McFARLAND, J.*; *TEMPLE, J.*; *PATERSON, J.*

73 Cal. 219

WOLFF v. PROSSER. (No. 11,898.)

(Supreme Court of California. August 25, 1887.)

PARTITION—DECREE—BENEFICIARY NOT A PARTY—HARMLESS INJURY.

In an action for partition of certain mining claims, a grantee of the plaintiff was made a beneficiary under the decree, though not a party to the suit. It appeared, however, that the sum to be distributed to him amounted to only \$10. *Held*, that although such grantee's right should not have been determined, it was a proper case for the application of the maxim, "*de minimis non curat lex*," and the error was without substantial injury.

Commissioners' decision. Department 2.

Appeal from superior court, Sierra county; *F. D. LOWARD*, Judge.
Taylor & Holl, for appellant. *Van Clief & Weihe*, for respondent.

HAYNE, C. Action for the partition of certain mining claims. The court ordered the property to be sold and the proceeds divided in a specified way. Part of the division consisted in the payment to "John Gale, the grantee of said Wolff," of one-sixth of what should remain after applying the proceeds as directed. The only point made is that, since Gale was not a party to the action, his right to any part of the proceeds should not have been determined. Conceding this to be so, it appears from the record that after applying the proceeds in the manner first directed by the decree, the sum to be distributed to Gale amounted to only \$10. We think this is a proper case for the application of the maxim, *de minimis*, etc., and that the error was without substantial injury. We therefore advise that the judgments be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgments are affirmed.

73 Cal. 230

PEOPLE *ex rel.* ATTORNEY GENERAL v. LEONARD. (No. 11,983.)

(*Supreme Court of California.* August 26, 1887.)

1. OFFICE AND OFFICER—ELIGIBILITY—LUCRATIVE OFFICE UNDER UNITED STATES.

Section 20, art. 4, Const. Cal., providing that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state," etc., should be construed to mean eligible to hold office as well as to be elected to office, and hence disqualifying a state supervisor from holding this office after he had received and entered upon the duties under a lucrative federal appointment.

2. SAME.

Section 20, art. 4, Const. Cal., provides that "no person holding any lucrative office under the United States * * * shall be eligible to any civil office of profit under this state," etc. *Held*, that the words "lucrative office" refer solely to the office "under the United States," and one holding such lucrative office is disqualified to hold any state office, no matter how small the emolument of the latter may be.

Commissioners' decision. Department 2.

Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. D. Nicol, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. This action was instituted for the purpose of having the office of supervisor of the First district of Tuolumne county declared vacant. The court below gave judgment in accordance with the prayer of the complaint, and from that the defendant has appealed. It appears that he had been duly elected by the people of his district to the office of supervisor thereof, and had held it for some months, receiving for his services less than \$500 a year as salary, and that then he was appointed to the office of postmaster of the city of Sonora, which is a lucrative office under the United States. It is contended by the relator, in support of the judgment, (although the defendant was eligible to the office of supervisor at the time he was elected to fill it, and he held it legally and properly up to the time when he was appointed to and held the office of postmaster,) that the moment he thus accepted the latter office he became an unconstitutional holder of the office of supervisor, and that the same at once became vacant and subject to be so declared by the proper court, under section 20, art. 4, of our state constitution. That section reads as follows: "No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that officers in the militia, who receive no annual salary, local officers, or postmasters whose compensation does not exceed \$500 per annum, shall not be deemed to hold lucrative offices."

In seeking to interpret the meaning of a constitutional provision, it is proper always that the intent of the framers of such an instrument should, if possible, be ascertained and carried out. Upon looking at the section under discussion, we find it the same as originally passed by the convention of 1849. The primary matter, as shown in the first clause of the section, to which the minds of the members of that and succeeding constitutional conventions seem to have been addressed, was to make ineligible to any state civil office of profit, any person who held a lucrative office under the United States, or any other power. The main object, then, must have been to prevent a conjunction of a federal and state office of profit in the same person, without any condition whatever; then the inconvenience of so arbitrary a rule was thought of, and thence came the determination to exempt from the terms "civil office of profit," or "lucrative office," officers in the militia to whose positions no sal-

ary is attached, and local officers and postmasters who did not receive by way of compensation more than \$500 per annum. If the section in controversy can be so construed as to permit the holder of a civil office of profit under the state to be appointed to and hold, at the same time, a lucrative office under the United States, then the prime object of the members of the constitutional convention, which made such section a part of the law of the land, viz.: The prevention of dual office-holding by one person under two separate and distinct governments, and the separation of the allegiance justly due one by its officers from that due to another power,—would be defeated, and the earnest intentions of that body rendered utterly abortive.

In addressing himself to the discussion of such a matter as the one now in hand, the distinguished Chief Justice RYAN, in *State v. Trumpf*, 50 Wis. 112, 5 N. W. Rep. 876, and 6 N. W. Rep. 512, after deploring the fact that it had become the law of that state, through successive decisions of its court of last resort, that "eligibility" in the constitution of that commonwealth meant eligibility to hold office, and not eligibility to be elected thereto, was constrained to say this: that "the distinction between eligibility to election to office and eligibility to hold office is too nice to enter into a rule of judicial decision." So it appears to us, when we come to consider the motive which must of necessity have actuated the constitutional assembly that enacted the provision which we are considering, and the cogent and powerful reasons which would occur to the mind of any earnest thinker, why such a restriction should be placed on the holding of office by one man, at the same time, under more than one government, (such as that it would tend, if the duties of both offices were onerous, to the neglect of one or both, or to the undue influence of the office-holder as a powerful agent of some ambitious president, or head of a department, if the federal office was a lucrative one, and the like,) that it was clearly intended that one holding "a lucrative office" under the United States should not hold a "civil office of profit" under the state.

The case of *Searcy v. Grow*, 15 Cal. 121, which is cited to us as declarative of the proposition that "eligibility," as used in our constitution, does not mean incapacity to hold, but incapacity to be elected to a civil office of profit under the state, while holding a lucrative federal office, does not, as we understand it, go to the extent claimed, for there the question involved was, whether or not the holder of a lucrative federal office was eligible for election to a state office, and therefore the language used in that case, in so far as it does not directly apply to the point actually submitted for decision, is but *obiter dictum*. And we are not without authority as to the correctness of the view which we take of the meaning of the word "eligibility" as used in the text of the state constitution, although there is no case to which we have been enabled to have access, which involves the precise question in issue here; that is, whether one duly eligible and elected to a civil office of profit under the state can be permitted to hold that office after he has accepted and is in the incumbency of a lucrative federal office. The nearest approach to it is that of *State v. Clarke*, 8 Nev. 566. There it appeared that Clarke was United States district attorney for the state of Nevada when he was elected to the office of attorney general of the state. The constitution of that state is similar in its language to ours upon the point under review, being as follows: "No person holding any lucrative office under the government of the United States, or any other power, shall be eligible to any civil office of profit under this state: provided, that postmasters, whose compensation does not exceed \$500 per annum, or commissioners of deeds, shall not be deemed as holding a lucrative office." That court used this language in determining the meaning to be attached to the word "eligible," as used in the Nevada constitution: "We agree with the defendant that the framers of the constitution intended to prohibit one who was holding a lucrative federal office from holding a state office at the same time. But instead of restricting the meaning of the word 'eligi-

ble,' as defendant contends, we think, to carry out the intention of the constitutional convention, we ought to give it a more extended signification than is generally given, and hold that it means both 'incapable of being legally chosen' and 'incapable of legally holding.'"

And we have found upon investigation that in very many, if not all, of the various state constitutions, the principle seems to have been incorporated and adopted of prohibiting the holding by one person, at the same time, of a lucrative federal office and any one of the more important state offices. And in most of such constitutions the word "eligible" has (as it appears to us) been made use of, as it is in our constitution, in a broad and far-reaching sense. In the case of *Carson v. McPhetridge*, 15 Ind. 327, this is said: "The term 'eligible,' as used in our constitution, relates to capacity of holding, as well as capacity of being elected to, an office." In *Brady v. Howe*, 50 Miss. 626, "eligibility" is defined to mean capacity to take and hold an office; one not eligible to mean one disqualified from taking and holding. And in *State v. Murray*, 28 Wis. 99, "the term 'ineligible' means as well disqualification to hold an office, as disqualification to be elected to an office." And so it will be found upon examination that in nearly all, if not all, of the cases where "eligible" was said to mean capacity to be elected to an office, and not capacity to hold it, the party seeking to hold the office was declared not to be eligible, because of the want of capacity to be elected; and there is nothing said in any of them which, by fair construction and interpretation, in the light of the facts of the case, shows that the mind of the court was directed to, and intended to decide, where unlimited and unexplained by other language, that eligibility to office did not mean the qualification to hold as well as to be elected to an office. So that, upon the first ground contended for by the appellant for the reversal of the judgment, it is apparent he is without legal support.

Neither can we concur with appellant's second proposition, which is that, because the annual salary of his office of supervisor was less than \$500, therefore section 20, art. 4, of the constitution does not apply. The words "lucrative office," as used in that section, refer solely to the office "under the United States,"—the federal office. If the salary of the office "under the United States" exceeds \$500,—which is admitted to be the case here,—then its incumbent cannot hold "any civil office of profit under this state," whether the profit of the latter exceeds \$500 per annum or not. The words "local officers," immediately preceding "postmasters," refer evidently to local federal officers. The words "officers of the militia" probably mean such officers when called into the federal service. At all events, it is clear that "lucrative office" applies only to offices under the United States, and "civil office of profit" only to offices under the state.

Therefore the judgment should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

78 Cal. 340

HEINLEN v. BEANS and another. (No. 11,999.)

(Supreme Court of California. August 29, 1887.)

APPEAL—FROM JUDGMENT ENTERED BY ORDER OF SUPREME COURT.

When the supreme court, upon appeal, affirm the judgment of the court below, or directs the entry of a specific judgment, and such judgment is entered by the lower court, it cannot be appealed from.

Department 2. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

G. A. Heinlen, for appellant. *John Reynolds*, for respondents.

McFARLAND, J. When this case was here upon a legitimate appeal, this court reversed the judgment and directed the court below to enter judgment for defendants. 12 Pac. Rep. 169. The court below entered judgment as directed, which fact is not disputed. From that judgment, which this court directed to be entered, plaintiff now appeals; and respondent moves to dismiss the appeal for the obvious reason that no appeal lies from such a judgment.

When this court, upon appeal, affirms the judgment of the court below, or directs the entry of a specific judgment, and such judgment is entered by the lower court as directed, the litigation is over, and the case ended.

Query: Whether the attempt to appeal in this instance is not a contempt under subdivision 4 of section 1209 of the Code of Civil Procedure?

The appeal from the judgment is dismissed. The appeal of appellant from an order of the court below refusing to allow him to amend his complaint after the *remittitur* had reached that court, is also dismissed. *Kirby v. Superior Court*, 68 Cal. 604, 10 Pac. Rep. 119.

We concur: THORNTON, J.; SHARPSTEIN, J.

73 Cal. 341

PEOPLE v. HOTZ. (No. 20,304.)

(*Supreme Court of California.* August 29, 1887.)

CRIMINAL PRACTICE—NEW TRIAL—WEIGHT OF EVIDENCE—DISCRETION OF COURT.

A motion for a new trial, on the ground that the verdict is contrary to the evidence, is addressed to the sound discretion of the trial court, the exercise of which, in the absence of manifest abuse, will not be disturbed on appeal.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Indictment for an assault with a deadly weapon.

John J. West, for respondent. *Geo. A. Johnson*, Atty. Gen., for the People, appellants.

THORNTON, J. This is an appeal from an order granting the defendant a new trial. One of the grounds on which the motion for a new trial was made is that the verdict is contrary to the evidence. An order granting a new trial on such ground is addressed to the sound discretion of the court, and is never disturbed by this court unless there is a manifest abuse of discretion by the trial court. We find no such abuse here.

We find no error in the refusal of the instruction to which our attention is called.

The order is affirmed.

We concur: SEARLS, C. J.; McFARLAND, J.; SHARPSTEIN, J.; TEMPLE, J.; MCKINSTRY, J.; PATERSON, J.

73 Cal. 276

HAUSLING v. HAUSMAN and another. (No. 12,001.)

(*Supreme Court of California.* August 30, 1887.)

JUDICIAL SALES—MOTION TO SET ASIDE SALE UNDER FORECLOSURE OF LIEN.

Sale of a mining claim was made under a decree of foreclosure of a laborer's lien taken *pro confesso*. The defendant moved to set aside the sale on the ground that the confession was induced by promises that the judgment should not be enforced without consent; that plaintiff would liquidate certain liens against the claim, take a conveyance thereof, dismiss his action, and reconvey an interest in the claim to defendant; that in accordance with such agreement defendant had conveyed the claim to plaintiff, but that thereupon plaintiff repudiated and refused to carry out

the agreement to reconvey. *Held*, that the court properly refused to set aside the sale, as the rights of the parties under the alleged agreement could be properly adjudicated only by an action brought in a court of equity.

Commissioners' decision. Department 2.

Appeal from superior court, Placer county; B. F. MYERS, Judge.

Otto Tum Suden and W. B. Lardner, for appellant. *C. A. & F. P. Tuttle and J. M. Fulweiler*, for respondent.

BELCHER, C. C. This is an appeal from an order made by the superior court of Placer county, refusing to vacate and set aside the sale of a certain mining claim under a decree of foreclosure of a laborer's lien, to restrain the sheriff from executing a deed of the property, and to enter satisfaction of the judgment and decree under which the sale was had. The decree was made and entered on the twenty-first of May, 1886, upon the complaint of plaintiff and the answer of the defendant Hausman, in which answer all the facts alleged in the complaint were admitted, and judgment and decree confessed and prayed for in accordance with the allegations and prayer of the complaint. The sale under the decree was made on the twelfth of July, 1886, the respondent being the purchaser, and the motion leading to the order appealed from was heard and denied on the twenty-third of November, 1886.

In support of his motion, defendant, appellant here, presented and filed his affidavit, from which it appeared that he was the owner of the mining claim, and that, on or about the first of August, 1885, he and respondent entered into a verbal agreement, by which the respondent was to superintend the working of the mine at a fixed salary per month, and was to purchase a one-tenth interest therein at a fixed sum, to be paid for by his labor; that, after August 1st, the mine was to be worked jointly by the parties, and the profits and losses were to be divided between them in proportion to their respective interests; that the appellant was to furnish all the money required to put the mine upon a paying basis, and the respondent was to be debited with the one-tenth part thereof; that both parties performed the conditions of the contract until about the first day of February, 1886; that between the first of August and the first of February the mine was worked at a great pecuniary loss, and the respondent's share of the loss was more than sufficient to balance the amount due him for labor; that on the first day of February the respondent filed a claim of lien upon the mining claim for the labor performed thereon by him, and thereafter in due time commenced the action to foreclose his lien, in which the decree in question was rendered; that various other parties filed liens upon the claim for labor performed by them, and in due time commenced a joint action to foreclose their liens; that the parties then made a new verbal agreement, under which the appellant was to confess judgment in favor of respondent as prayed for in his complaint, the judgment, however, not to be carried into execution without appellant's consent, and respondent was to buy in the claims of the other lienholders, the appellant furnishing the money therefor; and, on this being accomplished, the appellant was to convey to respondent the mining claim by a good and sufficient deed, and the respondent was then to dismiss his action, and reconvey to appellant the undivided nine-tenths part of the claim; that in accordance with this agreement the claims of the other lienholders were purchased, and the appellant then, on or about the twentieth of April, 1886, conveyed the mining claim to respondent, without any consideration other than that here set forth, and the respondent accepted the deed and caused it to be placed on record. The affidavit then further states that, having received and recorded the deed, respondent repudiated his agreement, set up a claim to the entire mine adverse to appellant, under the latter's deed, and that he now holds the mine adversely to appellant and claims to be the sole and only owner thereof.

In answer to the appellant's affidavit the respondent read two affidavits, one made by his attorney, John M. Fulweiler, and the other by himself. In his affidavit Fulweiler denies the statements of appellant about dismissing the action and not enforcing the judgment, and says that it was distinctly understood and agreed between the parties that the action was not to be dismissed, but that judgment might be entered and enforced. The respondent also denies that the action was to be dismissed, and says that the appellant voluntarily executed and delivered to him the confession of judgment, and that it was then and there mutually agreed by and between them that the judgment and decree of the court should be entered up in accordance with the confession, and within a reasonable time thereafter the amount of the judgment should be paid to respondent by appellant; that pending such payment the execution of the judgment was to be staid, and upon payment it was to be satisfied; that shortly thereafter appellant refused to pay as agreed, the amount due respondent, and that by reason of such failure and refusal respondent, on the twenty-first of May, 1886, procured the entry of judgment, upon appellant's confession, as he of right was entitled to do.

It further appears from the bill of exceptions that on the hearing of a similar motion made on the sixth of July, 1886, to set aside the same judgment, the attorneys for appellant admitted in open court that no part of the indebtedness claimed by respondent, and for which the judgment had been confessed and entered, had been paid, but the same was then due respondent from appellant.

Upon this showing we cannot say that the court erred in refusing to set aside the sale, and to order satisfaction of the judgment to be entered. There was a manifest conflict as to some of the material facts of the case; and, besides, the real contest seems to be in reference to the title to the mine. Counsel for appellant contend that when respondent accepted a deed of the property—and that it is an admitted fact that he did so—his debt was satisfied, his lien lost or merged, and he took, and thereafter held, nine-tenths of the title, in trust for appellant. It is further said that respondent has repudiated his trust, and set up an adverse claim to the whole property under his deed, and to permit him now to receive the sheriff's deed would tend to cloud appellant's title, and render it more difficult for him to establish his rights. Undoubtedly, if the facts be as claimed by appellant, the purchase of the property by respondent, under his decree, gave him no greater rights than he already had. The sheriff's deed would not confer any new rights, or extinguish or affect appellant's equities. But conceding this, what was appellant's remedy? He admits that the legal title is in respondent under the deed of April 20, 1886. Now, if the sale were set aside, and the judgment satisfied, the title would still be in respondent, and appellant would still be required to bring his action in equity to compel the conveyance to him of the nine-tenths interest which he claims. Courts do not ordinarily deal with questions by piece-meal, and, besides, the matter of preventing or removing clouds upon titles is one of purely equitable cognizance.

Upon the showing made, it seems to us, the appellant should have commenced an action in a court of equity, where all the questions involved could have been tried and the rights of both parties fully ascertained and determined.

We conclude therefore that the order appealed from should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the order is affirmed.

73 Cal. 249

BRYAN v. IDAHO QUARTZ MIN. CO. (No. 11,790.)

(Supreme Court of California. August 30, 1887.)

1. DEED—RIGHT OF WAY FOR FLUME—RESERVATION—WASTE WATER.

A deed granting to a mining company a right of way across grantor's land for a flume to its quartz mine, and for a reservoir and waste water ditch, reserving to the grantor the right to use so much of the waste water from the reservoir as he shall choose, does not imply a covenant that there shall be any waste water, nor, by its mention of the mine as the terminus of the flume, that all of the water conveyed thereby shall be used at such mine; and the grantee is not prevented from tapping its flume between the grantor's land and its mine, to supply water to another mine.

2. CONTRACT—CONSTRUCTION—PAROL EVIDENCE.

A contract being perfectly clear in its terms, parol evidence of prior conversations between the parties, and of what was understood respecting the consideration, is properly rejected.

3. APPEAL—REVIEW.

A finding of law cannot be reviewed on appeal, when it is, if anything, too favorable to appellant, and respondent has not appealed therefrom.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Frank Power and Farley & Little, for appellant. Cross & Simonds and C. W. Kitts, for respondent.

HAYNE, C. The plaintiff made a deed by which he granted, bargained, sold, and conveyed to the defendant the right to make and maintain a water ditch upon and across his land, along a line then surveyed, to a certain point upon the land, and the right to construct and maintain at such point a reservoir, not exceeding one and one-half acres, the exact site thereof to be thereafter determined, and the right to "lay down and maintain upon said premises an iron pipe, flume, ditch, or other conduit leading from said dam or reservoir to the Idaho quartz mine; also a strip of land, one rod in width, along the whole length of said pipe or ditch, said pipe and ditch to be the center of said strip; also the land upon which said reservoir shall be constructed, not exceeding one and one-half acres in extent; also the right of way, with sufficient land for a ditch to carry away the waste water from said dam or reservoir, said ditch to be constructed on such land as the grantee may hereafter determine; also the right of said grantee, or its successors, and its and their servants, officers, agents, and employees, to at all times enter upon and pass over and through said premises, for the purpose of repairing and maintaining said ditches, pipes, and reservoirs. * * * The land herein conveyed being simply for right of way for said ditch, reservoir, and pipe, and for no other purpose. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion, reversions, remainder, remainders, rents, issues, and profits thereof, to have and to hold all and singular of said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns forever." The deed contained also the following clause: "It being understood and a part of the consideration for this conveyance that the grantor shall have the right at all times to appropriate for his own use, and to conduct, wherever he shall desire, so much of the waste water flowing over said dam or reservoir as he shall choose."

The plaintiff's grievance is that the defendant allowed the Maryland Mining Company to tap its pipe "by a branch pipe or tap in said iron pipe leading to the said Idaho quartz mine at a long distance from said reservoir and said Idaho quartz mine, and intermediate the same;" and that by reason of such diversion there was not enough waste water for his purposes. But we do not think he has any legal ground of complaint. It does not appear that he was the owner of any of the water which was conducted across and collected upon

his land. All the water-right which he has comes from his contract with the defendant. And by this contract he is entitled only to the waste water. In order to say that the plaintiff is entitled to the water sold to the Maryland Company, we must affirm that such water is "waste water," which we are unable to do. It is perfectly true that the quantity of waste water is diminished by the use of the Maryland Company. But there is no covenant that there shall be any waste water. Nor is there anything in the contract imposing upon the defendant an obligation to use all the water at the Idaho mine. That mine is simply mentioned as the terminus of the flume leading from the reservoir. We see no restriction whatever upon the disposition which the defendant may make of the water. If the plaintiff desired any such restriction, he should have had it put in the contract.

The contract being perfectly clear, and the action being in affirmance of the contract, the court below was right in rejecting parol evidence of prior conversations, and as to what was understood, etc. If the branch pipe put in for the use of the Maryland Company were upon plaintiff's land, it might be objected by him that this additional burden was not authorized by his deed. But it appears from the findings that this branch pipe was put in "at a point between the land of plaintiff and the Idaho quartz mine." We think, therefore, that the judgment refusing any relief to the plaintiff was proper.

Upon the cross-complaint of the defendant the court decreed that the defendant "is the owner of the right of way forever over the lands hereinafter described, for a ditch, pipe, flume, conduit, and reservoir, to store and convey water, etc., * * * for any lawful purpose." The defendant argues that the decree ought to have adjudged that it is the owner in fee-simple of the land covered by the reservoir and the ditch, and not simply of a right of way. But not having appealed, it cannot be heard upon this question. So far as the plaintiff is concerned, the only doubt is whether this part of the judgment is not too favorable to him. The other matters argued do not require special mention.

We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

73 Cal. 257

PEOPLE v. DOBBINS. (No. 12,106.)

(Supreme Court of California. August 30, 1887.)

1. STATUTES—CONSTRUCTION—CONFLICTING SECTIONS.

Section 4484, Pol. Code Cal., providing that, if conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, has no application where the sections are passed at different times.

2. SAME—CONFLICTING PROVISIONS AS TO FINES—LATEST AMENDMENT.

The provisions of Pen. Code Cal. §§ 634, 636, as to the disposition of certain fines being in direct conflict, section 634, having been last amended when the fines in dispute were collected, is the latest expression of the legislative will, and controls in the matter of their disposition.

3. CONSTITUTIONAL LAW—SUBJECT OF STATUTE EXPRESSED IN TITLE.

The title of the act of March 12, 1885, "An act to amend an act entitled 'An act to establish a Penal Code,' approved February 14, 1872, by amending section 634, relating to fish and game," sufficiently expresses its subject, and the act is valid.

Commissioners' decision. Department 1.

Appeal from superior court, Sacramento county; T. B. McFARLAND, Judge. J. F. Wendell, for appellant. A. B. Dibble and A. D. Mason, for respondent.

BELCHER, C. C. This is an agreed case, and the only question involved is whether the provisions of sections 634 or 636 of the Penal Code govern as to the disposition of fines collected for violations of chapter 1, tit. 15, of that Code, the two sections being in direct conflict. It appears from the agreed statement that the district attorney of Solano county, the appellant here, had in his hands the sum of \$305, being the one-fourth of certain fines collected in cases prosecuted by him for violation of that chapter in the justices' courts of his county, during the year 1885, and subsequent to May 12th of that year; and the question is what is to be done with that money. Of the other three-fourths, the sum of \$610 was paid to the informers, and \$305 to the district attorney, and about this there is no controversy.

Section 636 was amended on March 30, 1878, and, until it was again amended on March 24, 1887, in so far as it related to the disposition of moneys collected for fines, reads as follows: "One-half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to informers, and one-half to the district attorney of the county in which the action is prosecuted."

Section 634 contained no provision relating to the moneys collected for fines until March 12, 1885, but it was then amended, the amendment taking effect May 12th, so as to contain the following provision: "One-half of all moneys collected for fines for violation of the provisions of this chapter shall be paid to the informer, one-quarter to the district attorney of the county in which the action is tried, and one-quarter shall be paid into the fish commission fund."

It is claimed for the appellant that section 636 must control as to the disposition of the money, because it is last in numerical order, and there is nothing in the chapter, apart from the conflicting provisions, to indicate an intention that the section first in numerical order should prevail; and section 4484 of the Political Code is cited as decisive of the question. That section provides as follows: "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article."

There can be no question that the four Codes constitute but one statute, (section 4480, Pol. Code; *People v. Applegarth*, 64 Cal. 229,) and that if the two conflicting sections had been passed at the same time, the rule invoked would apply. But the question here is, does that rule apply where the sections were passed at different times? We do not think it does. It is an old and well-settled rule that when two laws, upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail. So it has always been the rule that when different provisions of a statute, all passed at the same time, could not be reconciled, the one that came last in point of position must prevail. And this was upon the theory that effect should always be given to the latest, rather than to an earlier expression of the legislative will, presumption being that the latter part of the statute was last considered. Section 4484 ought not to be so construed as to change these old and well-established rules, unless it clearly appears that at the time of its passage such was the legislative intent. We are unable to see anything indicating such an intent; on the contrary, the section seems to be only the plain expression of what was already well-established law. In our opinion, therefore, section 634, being the latest expression of the legislative will, must be held to be the law, and must control as to the disposition of the moneys referred to therein.

The point is also made that the provision of section 634 for the disposition of the fines collected for violations of that chapter is unconstitutional, because that subject is not expressed in the title of the act. The act is entitled, "An act to amend an act entitled 'An act to establish a Penal Code,' approved February 14, 1872, by amending section 634, relating to fish and game." In

People v. Parvin, ante, 783, (decided August 23, 1887,) this court had under consideration an act passed by the legislature entitled, "An act to amend section 3481 of the Political Code." It was objected that that act was void because the subject of the act was not expressed in its title, but the court held the title sufficient and the act valid. Upon the point in hand that case is decisive of this.

In our opinion the judgment should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

73 Cal. 228

ELMER v. GRAY and another. (No. 12,063.)

(Supreme Court of California. August 30, 1887.)

GUARDIAN AND WARD—ALLOWANCE FOR SUPPORT OF WARD—POWER UNDER WILL.

Where the same persons were named in the will as executors and guardians of the residuary legatee, and the will, in a clause giving plaintiff a monthly allowance during her life, directed the "executors" to expend such further sums for her care and comfort as they should deem necessary, the guardians, after their discharge as executors, have power to increase the allowance.

Commissioners' decision. Department 2.

Appeal from superior court, Sutter county; PHIL. W. KEYSER, Judge.

R. D. Clement, for appellant. E. A. Davis and S. J. Stabler, for respondent.

FOOTE, C. This is an action to construe a will. The defendants Gray and Wilbur were nominated in the will the executors thereof, and the guardians of the estate of the testator's child, who was the residuary legatee. The plaintiff is the person named in the fifth clause, which is as follows: "*Fifth.* I give and devise to my sister, Mary Elmer, now of San Francisco, Cal., the sum of \$40 per month, from the date of my death during her natural life; and if it is necessary for her care and comfort, I will and direct that my executors pay to her, or expend for and on her behalf, such other and further sums as they in their best judgment may deem meet and proper; and in case of her death to give her a decent burial." The defendants paid this sum, together with an increase of \$10, until the distribution of the estate to the residuary legatee, of whose estate they are now guardians by the terms of the will. They now doubt whether they have power to increase the allowance, because the above clause of the will vests the discretion in them as "executors," and they are no longer executors but are guardians. We think they have the power. The leading intention of the testator in this regard was to make a suitable provision for his sister during the rest of her life. For this purpose he gave her an allowance of \$40 per month "during her natural life;" and because he could not foresee what her needs might be as increasing age crept upon her, he vested a discretion in certain persons to increase the allowance if they thought it was necessary. The word "executors" seems to us to have been used simply as a designation of the persons who were to exercise the discretion, and not as a limitation of the time in which it was to be exercised, and it is unimportant that the official name of these persons has been changed.

We therefore advise that the judgment be reversed, and the cause remanded for further proceedings.

We concur: BELCHER, C. C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for further proceedings.

73 Cal. 263

GREEHN v. SHUMWAY. (No. 11,642.)

(Supreme Court of California. August 30, 1887.)

APPEAL—APPEALABLE ORDER—REFUSAL TO ACT—REMEDY.

The denial by a trial court, after final judgment, of an order allowing the sheriff's bill of expenditures for an attachment and sale in the action, is simply a refusal to act, and therefore not appealable, the remedy, if any, being by *mandamus*.

Commissioners' decision. Department 1.

Appeal from superior court, Lassen county; JOHN G. PRESSLEY, Judge.
E. V. Spencer and *J. E. Raker*, for appellant. *Goodwin & Shinn*, for respondent.

HAYNE, C. The case of *Shumway v. Leahey*, ante, 841, (just decided,) was an action under section 4181 of the Political Code, to recover money in the sheriff's hands, which he had refused to pay over to the party entitled. No order had been made fixing the amount of the fees, and upon that ground it has just been decided that the sheriff was not entitled to retain what he claimed as his fees out of the money in his hands. Pending the trial of said case the sheriff made a motion for an order allowing his fees. Shumway (defendant in the attachment suit and plaintiff in the suit above-mentioned) objected, "on the ground that such proof was irrelevant, and that the court had no jurisdiction to hear, or settle, or allow the said bill of expenditures after the same had been paid. The said objection was sustained, and the motion denied by the court. To which ruling counsel for said sheriff duly excepted." The sheriff attempts to make this action of the court the subject of an appeal. If the court had acted upon the application, and made an order allowing or disallowing the fees, it would then be a question whether such order was appealable. It is apparent, however, that the court simply refused to take any action in the matter, one way or the other. And we think it clear that this "order" is not appealable. If the sheriff has any remedy, it is by *mandamus* to the proper court to take action in the matter. The "order" not being appealable, there is nothing before the court.

We concur. BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the proceedings upon attempted appeal are dismissed.

73 Cal. 271

GRUPE v. BYERS and another.

(Supreme Court of California. August 30, 1887.)

HOMESTEAD—DIVORCE—CONVEYANCE BY HUSBAND TO WIFE.

In a suit for the foreclosure of a mortgage, executed by a wife upon homestead property, held, that a deed, signed by the husband alone, conveying to his wife all his interest in the homestead, made subsequent to a decree of divorce, was valid, and divested the property of its homestead character.

Department 2. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

This suit is brought against the defendants, husband and wife, for the foreclosure of a mortgage, executed by the wife after their divorce. Some time previous to the divorce the wife had made a selection of the property covered by the mortgage, as a homestead, and executed a written declaration thereof for the joint benefit of herself and husband. The decree of divorce made no disposition of the homestead property; but, subsequently to the rendering of the decree, the husband made a deed of the same to his wife, which was signed by himself only, and thereafter the wife executed the mortgage in question,

which was not signed by the husband. The defendants claimed that the property still retained its homestead character.

Aug. Muentner and W. B. Nutter, for appellant. *J. C. Byers*, for respondent. *J. H. Budd*, for guardian *ad litem*. *Louittit, Woods & Levinsky, amici curiae*.

BY THE COURT. We are of opinion that the deed to the wife executed by the husband, after the decree of divorce in this case, was a valid one, and conveyed all the interest of the grantor. The mortgage of the wife was therefore valid, and the plaintiff (mortgagee) is entitled to a judgment of foreclosure. The portion of the judgment appealed from is reversed, and the cause remanded for a new trial, and on such new trial the views above expressed are to be followed. Ordered accordingly.

73 Cal. 297

OULLAHAN v. MORRISEY. (No. 11,893.)

(*Supreme Court of California. August 30, 1887.*)

1. APPEAL—JUDGMENT BY CONFESSION.

Where a party consents to the entry of judgment against himself he cannot appeal from it; or, if he can, can be heard only as to that portion to which he did not consent.

2. SAME—JURISDICTIONAL AMOUNT—COSTS.

The supreme court of California has no jurisdiction of an appeal involving only the question of costs which amount to less than \$300.

In bank. Appeal from superior court, San Joaquin county; *J. G. SWINERTON*, Judge.

D. S. Terry, F. T. Baldwin, and *J. C. Campbell*, for appellant. *Joseph H. Budd*, for respondent.

BY THE COURT. The plaintiff, having consented to the entry of the judgment against himself, cannot appeal from it; or, if he can, can be heard only as to that portion to which he did not consent. That in this case is at the most the demand for costs, which, being less than \$300, does not give this court jurisdiction. The appeal must be dismissed. So ordered.

McKINSTRY, J., expressing no opinion.

73 Cal. 317

CHANDLER v. PEOPLE'S BANK. (No. 11,524.)

(*Supreme Court of California. August 31, 1887.*)

NEW TRIAL—PROCEEDINGS BELOW—ISSUES TO BE TRIED.

Where a new trial is granted on the ground that plaintiff had not been allowed to show that certain balances were of an interest-bearing character, it is not the duty of the court below, on the new trial, to try all the issues anew, but it may confine the testimony to the issue improperly decided.

In bank. Appeal from superior court, Sacramento county; *T. B. McFARLAND*, Judge.

H. O. Beatty, Beatty & Denson, and *A. L. Hart*, for appellant. *Joseph McKenna* and *Freeman & Bates*, for respondent.

BY THE COURT. In the above-entitled cause the judgment and order appealed from are affirmed, for the reasons given by department 1. 11 Pac. Rep. 791.

TEMPLE, THORNTON, and *SHARPSTEIN, JJ.*, dissenting.

WEIBOLD v. DAVIS.

(Supreme Court of Montana. July 23, 1887.)

1. MINING CLAIM—BUTTE CITY TOWN-SITE PATENT.

The town-site patent of Butte City does not cover the mineral ground included within the limits of the patent in controversy. That ground is expressly reserved from the operations of the patent by the terms of the patent itself, and by the act of congress. The exceptions in the mineral patent are unauthorized by law, and void, and the mineral patent conveys a perfect title to the surface ground in controversy, to which defendants have no claim whatever. *King v. Thomas*, 12 Pac. Rep. 865, and *Butte City Smoke-House Lode Cases*, 12 Pac. Rep. 858, followed.

2. SAME—TOWN-SITE AND MINERAL PATENTS.

Where lands, included in a town-site patent, are covered by a mineral patent, it is not competent, in an action of ejectment, brought by the holder of the mineral patent against the claimants under the town-site patent, to show by extrinsic evidence that the lands are not mineral in their character.

3. SAME—RUNNING OF STATUTE OF LIMITATIONS—ISSUE OF PATENT.

The statute of limitations cannot run against a mining claim until the patent thereto has been issued, any state or territorial legislation to the contrary notwithstanding.

Appeal from Second district, Silver Bow county.

Knowles & Forbes, for appellant. *Thomas L. Napton*, for respondent.

BACH, J. It is conceded that the questions for review in this case are identical with those heretofore decided by this court in the case of *King v. Thomas*, 6 Mont. 409, 12 Pac. Rep. 865. Accordingly, and on the authority of that case, the judgment and order denying a motion for a new trial are affirmed, with costs.

SOWDERS and others v. STATE.

(Supreme Court of Kansas. September 9, 1887.)

BASTARDY—BOND FOR APPEARANCE—UNDERTAKING TO PERFORM JUDGMENT.

The bond prescribed by Comp. Laws Kan. 1885, c. 47, § 5, to be given before the justice in bastardy proceedings, conditioned that the defendant will appear at the next term of the district court to answer such complaint, and not depart without leave, and abide the judgment and orders of such court, is simply a recognizance, which is discharged by the appearance and surrender of the defendant, and not an undertaking to perform the judgment.

Error from superior court, Shawnee county; W. C. WEBB, Judge.

Action on bond. One George Sowders was arrested and brought before a magistrate on a charge of bastardy. On examination he was adjudged to be the father of a bastard child, and gave bond for his appearance at the district court; plaintiffs in error being sureties thereon. On trial Sowders was adjudged guilty and ordered to pay \$700, and in default of security was committed to jail. While said Sowders was in jail, this action was brought on the bond given before the justice.

Overmeyer & Safford, for plaintiffs in error. *Charles Curtis* and *Wm. R. Hazen*, for defendant in error.

PER CURIAM. The law of this case has been settled by the decision in *McGarry v. State*, ante, 491. The record before us sufficiently shows that the defendant below voluntarily appeared and surrendered himself into the custody of the court, as required by section 13 of the act relating to illegitimate children; and therefore it fully appears that no breach of the recognizance or bond has taken place. *McGarry v. State*, supra. The judgment of the district court must be reversed, and the case will be remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

v.14p.no.16—55

MCDONALD v. MACKENZIE and others.*(Supreme Court of Oregon. May 24, 1887.)***1. SET-OFF—INDIVIDUAL AND PARTNERSHIP DEBTS.**

Where plaintiff sold a quantity of wheat to C. and M., who were copartners, all three agreeing that a promissory note owing by plaintiff to C. should be applied as part payment, and subsequently C. assigned the note, after maturity, to a third party, the price of the wheat may be set off against the note in the hands of such third party.

2. SAME.

Where both members of a partnership agree that a debt owing to one of them may be applied in part payment of a demand existing against the partnership, the individual debt is subject to a set-off of the partnership debt.

3. EQUITY—DECREE UPON CLAIM SUBJECT TO SET-OFF—RESTRAINING EXECUTION.

Where a defendant has obtained a decree upon a note and mortgage, which note was subject in his hands to a counter-claim against his assignor, who is insolvent, the court in which the decree was rendered may entertain an original bill to restrain its enforcement.

Appeal from circuit court, Umatilla county; LUTHER B. ISON, Judge.
L. B. Cox, for appellant. *J. J. Ballery*, for respondent.

LORD, C. J. In substance, the facts are these: The defendants Mackenzie and Cavanaugh are copartners. On the twenty-first day of June, 1882, the plaintiff, McDonald, became indebted to the defendant Cavanaugh upon a certain promissory note, whereby he agreed to pay to the order of the said Cavanaugh a sum therein named, etc., and secured the same by a mortgage. On the — day of March, 1884, the defendants Mackenzie & Cavanaugh, as partners, were indebted to the plaintiff, McDonald, in a sum largely in excess of said note, and which arose out of a sale of wheat by plaintiff to them, whereby it was then agreed, as a part of that transaction, by the defendant Cavanaugh, as the payee of the note, and the firm of Mackenzie & Cavanaugh, as partners, with this plaintiff, that the said note should be taken, allowed, and satisfied, as part payment for said wheat, and the note delivered to the plaintiff; but the defendant Cavanaugh neglected so to do, but assigned said note to the defendant Smith, after its maturity; that the plaintiff has obtained a judgment against the defendants Mackenzie & Cavanaugh, who are now insolvent and out of the state, and that the defendant Smith has commenced suit, and since, it is alleged by way of supplemental complaint, obtained a decree upon said note and mortgage so assigned to him after its maturity, and had execution issued, and caused the sheriff to levy upon the property of the plaintiff, etc., and, unless restrained, will sell the same, to the irretrievable injury of the plaintiff, who therefore prays that the defendant Smith be perpetually enjoined from the enforcement of said decree, and that the same be set off against the amount of the judgment due the plaintiff from the defendants Mackenzie & Cavanaugh, and that the said Smith be required to surrender, or that said note be canceled, etc. The defendant Smith demurred to the complaint, which was sustained, and, the plaintiff declining to plead further, on motion the decree from which this appeal is taken was entered.

From this statement of the facts it is manifest that the main object of this suit is to secure set-off, or what is in the nature of a set-off, between the judgment rendered in the said action of law in favor of the plaintiff, and against the defendants Mackenzie & Cavanaugh, as copartners, and a judgment rendered upon a decree in equity in favor of the defendant Smith, and against the plaintiff, upon the note secured by mortgage, executed by the plaintiff to Cavanaugh, and by him assigned to the defendant Smith after maturity, in the manner and under the circumstances already referred to. It is insisted by counsel for the defendant Smith, in support of the demurrer, that the com-

plaint does not state facts sufficient to constitute a cause of suit, for the reason that the matter alleged would have been no defense to the original suit of *Smith v. McDonald*, as it does not constitute matter of counter-claim, set-off, or recoupment, or any equitable defense. The basis of his contention is that neither at law nor in equity can a debt due one member of a firm be offset against the joint debt of a partnership, nor can such joint indebtedness be offset against the assignee, for value of a debt due one of the partners. It is true that a separate debt cannot ordinarily be set off against a joint debt, nor a joint debt against a separate debt, but special circumstances may occur which in equity will justify such an interposition. "Where there is an agreement," said HEMPHILL, C. J., "that a separate may be discounted against a joint debt, or conversely, or where it appears that a joint credit was given on account of a separate debt, and also under other equitable circumstances not necessary to be enumerated, the debts, though not mutual or in the same right, will be allowed to be interposed against each other." *Henderson v. Gilliam*, 12 Tex. 74; Story, Eq. Jur. § 1437, and notes. While, therefore, a debt due from one partner cannot be set off against a debt due the firm, (*Williams v. Brimhall*, 13 Gray, 462,) even though so agreed with such partner, (*Evernglim v. Enswoth*, 7 Wend. 326; *Rogers v. Batchelor*, 12 Pet. 221,) yet it may be done if the other partners knowing of such agreement have assented thereto. *Eaves v. Henderson*, 17 Wend. 191; *Homer v. Wood*, 11 Cush. 62. But it is said that a party who takes a note for value after maturity, acquires it subject to such equities only as are connected with, or inhere in, the paper, but exempt from all equities arising out of independent and collateral transactions; that under the law-merchant the note in question passed to the defendant Smith exempt from all right of set-off on account of independent transactions between the original parties, which are not properly equities. This is undoubtedly the English rule upon the subject. *Burrough v. Moss*, 10 Barn. & C. 558; *Whitehead v. Walker*, 10 Mees. & W. 698. See, also, Story, Bills, 220; Daniel, Neg. Inst. §§ 1435-1437. It is thought, however, that the English rule does not prevail very generally in this country, although there is a conflict of decisions. Daniel, Neg. Inst., *supra*, and authorities cited in note; Wat. Set-Off, § 279, and notes. The decisions adverse to the English rule proceed on the ground that a bill or note indorsed after it becomes due is taken by an indorsee with notice on its face that it is discredited, and, therefore, subject to all payments and offsets in the nature of payments. Not, as CRESSWELL, J., said, "that he takes the bill subject to *all its equities*," (*Sturtevant v. Ford*, 4 Man. & G. 106,) but subject to all equities between the prior parties. But it is not perceived how under the facts the operation of the English rule can exclude such a defense or equity. In *Burrough v. Moss*, *supra*, PARKE, B., said: "If there is an agreement, either expressed or implied, affecting the note, that is an equity which attaches upon it, and is available against any person who takes it when overdue." And in *Oulds v. Harrison*, 28 Eng. Law & Eq. 524, the same distinguished jurist said: "It must be considered as entirely settled by the case of *Burrough v. Moss* that the indorsee of an overdue bill takes it subject to all the equities that attach to the bill itself in the hands of the holder when it was due; as, for instance, payment or satisfaction of the bill itself to such holder. But the indorsee does not take it subject to the claim arising out of collateral matters. There are cases where the bill has been paid, or where the lien has been created on the bill in the hands of the holder, at the time it is due. In that case, the subsequent taker of the bill must take it subject to repayment, or right of action, or that lien, whatever it may be, but the indorsee does not take it subject to the claim arising out of collateral matter. The notice of the existence of the set-off to the holder of the bill, at the time it was due, makes no difference, as was settled in the case of *Whiteham v. Walker*, 10 Mees. & W. 696, unless, indeed, express notice was given by the party liable, and evi-

dence of an acquiescence, such as would amount to proof of an agreement to let in the set-off, assented to by both parties; and then it would be in satisfaction of the bill, and depend entirely upon the statute itself." In *Robinson v. Lyman*, 10 Conn. 34, in which it is supposed the English rule was followed, the court, through CHURCH, J., said: "There was no infirmity, no illegality, nor legal nor equitable defense existing against the note in question, while it remained in the hands of Moore, the payee, growing out of the existence of the note due to Patten & Russell. There was no agreement between the original parties to the note before its transfer, that the defendants should pay to Patten & Russell their note, and have an application thereof upon the note in question. Indeed, there was no connection, either in fact or by agreement of parties, between the note in dispute and the debt due to Patten & Russell. If payment had been made, either partially or in full; if there had been a failure or fraud in the consideration of the note, or any illegality therein; or if there had been any agreement between the parties affecting the note, before it was transferred to the plaintiff,—these and other matters which might be suggested would have created such an infirmity, defense, or equity, as would have attached to the note in the hands of the plaintiff." See, also, *Britton v. Bishop*, 11 Vt. 70; *Armstrong v. Noble*, 55 Vt. 431; *Haley v. Congdor*, 56 Vt. 67; *Threlkeld v. Dobbin*, 45 Ga. 145; *Miller v. Florer*, 15 Ohio St. 149; *Farrington v. Bank*, 39 Barb. 646.

It must be clear, then, that a maker and a payee of a note may, by an agreement made before its transfer, provide in any legitimate way for its payment, which, if acted upon and performed before such transfer, will operate as a payment or satisfaction of such note. Such an agreement between the parties before its transfer, when carried out, affects directly the note, and whoever thereafter takes such overdue note, takes it subject to the highest equity,—the equity of payment. Now, the payee of the note in question promised and agreed with the maker, the firm of which the payee was a member consenting to the arrangement, at the time, and as a part of the transaction for the purchase and sale of a lot of wheat to the firm, that the said note should be allowed and taken as part payment for said wheat, and that in accordance with that agreement the wheat was delivered, and the firm became indebted to the plaintiff in an amount largely in excess of said note. The object of this agreement was plainly to liquidate the note, and operate, when executed, in the payment or extinguishment of the note. In *Eaves v. Henderson*, 17 Wend. 192, it was held that an agreement, made after the giving of a note, that a debt contemplated to be contracted by the payee with a third person should be allowed in payment of the note, is a valid agreement, and the debt, when contracted, may be shown in payment of the note under the general issue. COWEN, J., said: "An agreement to apply a subsequent account to be run up by the plaintiff with Nicholls, or with him and his partner, the account afterward being made, and that, too, as here, with the assent of the partner, would inure as payment, beyond all doubt, and come in as such under the general issue. *Kinnerley v. Hossack*, 2 Taunt. 170; *Roper v. Bumford*, 3 Taunt. 76. And an agreement to apply a distinct, independent, precedent debt, the agreement having been made after the note given, has recently been held also to operate as payment. *Gardiner v. Cullender*, 12 Pick. 374."

In the case in hand the note, however, instead of being delivered to the plaintiff, as was agreed, was transferred, under the circumstances of insolvency as alleged, after its maturity, to the defendant Smith, who is also insolvent. Now, if the note was paid, it being overdue when transferred, he took it subject to an infirmity or equity which attached to the note itself, as payment, in his hands. It being overdue, its face gave him notice of its dishonor when transferred, and he took it subject to the same defenses as if it had remained in the hands of the payee. Cavanaugh, certainly, could not

admit the facts of that agreement, and the payment effected under it, and maintain an action on the note; nor, certainly, can his assignee, who, as to such an equity or defense, stands in his shoes. He takes it with notice—for so the law intends—of such equity or defense, and is chargeable with that defense in his hands. Said TILGHMAN, C. J.: "The counsel for the plaintiff concede that if the holder receive the note, *knowing* that payments had been made, he shall allow these payments. And why? Because it would be fraudulent not to do so. But if *actual* notice will affect the holder, so also will *implied*; because the consequences of actual and implied notice are the same. Now, if a man receive a note under circumstances calculated to excite suspicion, he ought to make further inquiry, and, if he does not, he takes upon himself the knowledge of all the material facts. One of the circumstances which have been held sufficient to excite suspicion, is the note being overdue. Before the day of payment, it is to be presumed that payment will be punctually made. The note passes from hand to hand on that presumption and its credit is entire. But not being paid, it appears on the face of the note that faith hath been broken, or that, for some latent cause, it is questionable whether payment ought to be made." *Cromwell v. Arrott*, 1 Serg. & R. 182. The assignee can always go to the debtor or the maker of the note, which is then overdue, and ascertain whether it is paid, or what claims he may have against it, before purchasing it. If he neglect to take these precautions, or, perhaps, is not desirous of knowledge upon the subject, he need not complain of the consequences with which the law charges him.

It is next objected that the bill is an original one to enjoin a decree of the same court. There is no doubt but the authorities are somewhat conflicting and not wholly reconcilable on this subject. None of the authorities referred to by counsel for the defendant Smith, with the exception of *Dyckman v. Kernochan*, 2 Paige, 26, since expressly overruled by *Railroad Co. v. Ramsey*, 45 N. Y. 637, are in point as to this question. The case is quite different when a court undertakes by injunction to restrain or interfere with the proceedings of another court of like jurisdiction. In a proper case, we are inclined to think that a court of equity may entertain an original bill to enjoin the execution of its own decrees, (*Montgomery v. Whitworth*, 1 Tenn. Ch. 174; *Anderson v. Mullenix*, 5 Lea, 288; 1 High, Inj. § 270;) and as at present advised must reverse the decree and remand the cause.

PUGET SOUND IRON CO. v. LAWRENCE.

(*Supreme Court of Washington Territory. July 25, 1887.*)

MASTER AND SERVANT—NEGLIGENT USE OF DEFECTIVE APPLIANCES.

In an action by an employe for damages for personal injuries, caused by the negligence of his employer in using defective appliances, where there is *prima facie* proof of the negligence charged, an instruction "that to overcome such *prima facie* evidence of negligence the burden of proof is upon defendant, and unless the defendant establish, by a clear preponderance of evidence," the exercise of proper care, he is guilty of negligence, is erroneous.

Error to district court, Third judicial district, Port Townsend.

J. R. Lewis, Jacobs & Jenner, and *Bradshaw & Sachs*, for plaintiff in error. *Burke & Haller*, for defendant in error.

ALLYN, J. The plaintiff in court below was an employe of appellant, the Puget Sound Iron Company. In the course of his employment he was assisting in the removal of an engine bed-plate up an incline. For this purpose a 4½-inch manilla rope was used, with blocks, pulleys, etc. The rope broke, from some hidden defect, when the bed-plate was about two-thirds of the way up the incline, and the bed-plate thus relieved, descended, injuring one of plaintiff's arms. There was evidence tending to show this rope to have been

sufficiently and properly tested, and, on the other hand, evidence tending to show that this had not been thoroughly or sufficiently done, and that the defect should have been seen through discoloration, etc. The jury found for the plaintiff.

It is claimed that the court erred in several instructions, excepted to at the time; but we think it sufficient to consider only the sixth instruction, and, in fact, no considerable stress seems placed on the others. The sixth instruction, given at request of plaintiff's counsel, and excepted to by defendant, is as follows: "The fact that the rope was broken in the performance of the work in question is of itself *prima facie* evidence that the defendant did not use reasonable care or diligence in the selection and use of the rope, blocks, and apparatus in question, and, to overcome such *prima facie* evidence of negligence, the burden of proof is upon the defendant corporation; and unless the defendant establish, by a clear preponderance of the evidence, that before said rope, blocks, and apparatus were used for the work in question, the defendant, through its agents, used every available and ordinary means to ascertain any defects there might be in the rope, blocks, and apparatus, then you must find that the defendant was guilty of negligence; and if the plaintiff was injured by such negligence, and was not in fault, you must find a verdict for the plaintiff." The rule thus announced as to care and diligence, in such a case, we find no fault with; but to go further, as herein, and say, in effect, "the burden of proof is then upon the defendant to establish by a clear preponderance," is certainly not correct, and a very dangerous use of terms. The presumption first stated made it incumbent upon the defendant to satisfactorily explain, as the jury should have been told; but they might naturally infer, and doubtless did, that the "burden of proof" was shifted. More than this, the defendant, it is said, must do this by a clear preponderance, etc. It was held in a late case, an instruction, "unless the preponderance of evidence clearly shows," was erroneous, the word "clearly" being calculated to lead the jury to believe that something more than a mere preponderance was necessary. *Prather v. Wilkins*, 4 S. W. Rep. 252. The remaining portion of the instruction is, perhaps, equally objectionable, in requiring the defendant to use "every available means," etc., clearly implying an examination and test of much more than the "usual and ordinary" character.

For these reasons, we think the instruction would almost certainly mislead the jury, and the cause is therefore reversed, a new trial granted, and the cause remanded for further proceedings.

We concur: TURNER, J.; LANGFORD, J.

JONES, C. J. I concur in the conclusion to which my Brother ALLYN has arrived, upon the ground that the instruction quoted by him is erroneous in law. That instruction recognizes the rule that the burden of proof was upon the plaintiff below to establish the fact that the injury resulted from the negligence of the defendant. The error exists in the latter part of the instruction, where it is held that, plaintiff having made a *prima facie* case, it then devolves upon the defendant to overcome the cause so made, "by a clear preponderance of the evidence," whereas, if the evidence, when all received and considered, did not leave a preponderance in favor of the plaintiff, the defendant was entitled to a verdict. I concur in the criticism of Justice ALLYN, upon the language of the tenth instruction. The fourth instruction is, perhaps, erroneous, in this: "When an employe is suddenly ordered to do an unusually dangerous thing, he is not required or expected to deliberate upon the danger," etc. The intention was, doubtless, to instruct the jury that, in a case of sudden and unexpected danger, an order being given by the master, requiring instant execution by the servant, deliberation by him as to the danger would not be required or expected in order to free him from negligence. This would

have little to do with the suddenness of the order, but would arise from the fact that the danger was not such as might be reasonably anticipated, and was, in fact, unforeseen, and must be met by promptness in obeying the master's order. The evidence is not reported to us, and consequently we are unable to say that this instruction, as given, would actually mislead the jury. The tenth instruction may or may not be obnoxious to the criticism here urged against it. That depends upon the evidence and the remainder of the charge, and as that is not set forth in the brief, we are not able to say that this instruction is erroneous. There is no error upon its face, and none is shown.

REESE v. KINKHEAD and others. (No. 1,263.)

(*Supreme Court of Nevada.* September 10, 1887.)

1. PLEADING—DEFENSE OF FRAUD—SUFFICIENCY ON APPEAL.

In an action against the vendee to enforce a vendor's lien, defendant pleaded "that said conveyance was not made for any good or valuable consideration, but with intent and for the express purpose to hinder, delay, and defraud the creditors" of the vendor. The plaintiff failed to object to the sufficiency of the plea of fraud, and at the trial evidence was admitted to the effect that the plaintiff at the time of making the conveyance was largely indebted; also other and conflicting evidence upon the question of fraud between the parties. *Held*, that no objection having been made to the sufficiency of the plea of fraud, it was sufficient to sustain, under the evidence, the court's finding that the conveyance was fraudulent.

2. APPEAL—REVIEW—EXCEPTIONS MUST BE TAKEN BELOW.

Where no exceptions are taken to the rulings of the court below, the appellate court will not consider the error.

Appeal from district court, Washoe county; W. M. BOARDMAN, Judge.
Wm. Webster, for appellant. *Clarke & King*, for respondent.

LEONARD, C. J. This is an appeal from an order denying plaintiff's motion for a new trial in an action to enforce an alleged vendor's lien. Defendant Kinkhead is the executor of the last will and testament and estate of R. H. Crocker, deceased, the grantee mentioned in the deed of conveyance, and the other defendants are legatees and heirs at law of said Crocker, deceased, who claim an interest in the real estate upon which the lien is claimed. In the answer it is alleged that "said conveyance was not made for any good or valuable consideration, but with intent and for the express purpose to hinder, delay, and defraud the creditors of the said Philip Reese, of their lawful suits, debts, and demands, at the time due and owing by the said Reese. Defendant further avers that, at the time said conveyance was made, it was upon the express agreement that said R. H. Crocker should not pay any sum of money in consideration thereof."

1. The first assignment of error is that "the court erred in admitting the letter offered by the defendant, over the objection of the plaintiff." The letter was from R. H. Crocker to Phillip Reese, and it was offered in support of the assertion in the answer, and one of the defenses in the case, that the conveyance by Reese to Crocker was made for the purpose and with the intent to hinder, delay, and defraud the creditors of said Reese. Counsel for plaintiff objected to the introduction of the letter for the purpose of showing fraud between Crocker and Reese, on the ground that no issue had been made or tendered on that ground; that no allegation in the answer presented or tendered an issue upon any question involving fraud in the execution of the deed by Reese to Crocker; that the answer, in substance, recited the statute on the subject of fraud, without pleading any fact showing fraud between said Crocker and Reese. The court overruled plaintiff's objections, and the letter was admitted in evidence. No exception was taken to the court's ruling, and it follows, therefore, that we cannot consider the alleged error.

2. The finding of fraud, and the entry of judgment in favor of defendants

on the ground of fraud, are also assigned as errors, for the reasons stated above, against the admission of the letter in evidence, and the further reason that there was no evidence showing, or tending to show, that the plaintiff was in debt at the time of his conveyance to Crocker, with the exception of the demands upon which Crocker was liable as surety for Reese. It is undoubtedly the general rule that the findings and judgment of the court must be warranted by the pleadings; but it does not follow, necessarily, that the pleadings in this case do not justify the findings and judgment, even though a demurrer to the answer setting up fraud ought to have been sustained, if one had been interposed. After trial upon the merits, as though the issue of fraud had been properly made, there is a marked distinction between a general allegation of fraud, although defective, and an entire absence of an issue upon that question. In *King v. Davis*, 34 Cal. 106, the court say: "The point made by the appellants, that the answer does not make an issue of fraud, cannot be considered by us further than to say that it comes too late. The answer contains a general allegation of fraud, and the appellants went to trial upon the issue thus joined, without taking any exception to the answer on the score of sufficiency. Nor was any objection made by appellants to the testimony introduced by the respondent in support of the issue of fraud; On the contrary, that issue was assumed to have been properly made, and was tried upon its merits. Under these circumstances, an objection to the answer, upon the ground that it does not contain a statement of the particular facts and circumstances constituting the alleged fraud, cannot be entertained by us." See, also, *Crans v. Hunter*, 28 N. Y. 395.

It is true that plaintiff objected in this case to the admission of the letter in evidence, on the ground that the issue of fraud had not been made, for the reason that the facts showing fraud had not been set up in the answer; but failing to except to the court's ruling, the error, if any, was waived, the objection went for naught, and the result is the same as though no objection had been made. We express no opinion upon the sufficiency of the answer upon the question of fraud, except to say that, upon the facts shown by the record, it sustains the finding of fraud, and the judgment in favor of defendants on that ground.

Counsel for appellant is mistaken in saying there was no evidence showing or tending to show that plaintiff owed debts other than the demands upon which Crocker was liable as surety for him. The sister of Crocker testified as follows: "I don't think my brother was on the note from which Reese feared trouble; it was another note I had in mind. Mr. Crocker said that Mr. Reese was indebted to the parties in Virginia, who would, in all probability, proceed against him, and that the deed was made to prevent that, to protect my brother. * * *" In view of the letter and other evidence admitted in the case, we cannot say that the finding of fraud was error. The most favorable view that can be taken of the evidence is that there was a conflict. The order overruling motion for new trial is affirmed.

BEKNAP, J. I concur in the judgment.

13 Cal. 295

HITCHCOCK v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 12,071.)

(Supreme Court of California. August 30, 1887.)

JUDGMENT BY DEFAULT—APPLICATION TO OPEN—REVIEW BY CERTIORARI.

The notice in proceedings to determine title to decedent's estate, under Code Civil Proc. Cal. § 1664, prescribing the practice in such cases, was served by publication, and on February 5, 1886, an order was made declaring all persons, named or not named, who had not appeared, to be in default. Petitioner, a non-resident, had not heard of the proceedings prior to July 14, 1886, and was not named in any of

the proceedings prior to September 7, 1886, when she filed her motion to open the default, and for leave to appear and answer. *Held*, that the court had jurisdiction to make an order denying petitioner's motion, and that the order could not be disturbed on *certiorari*.

In bank. Application for writ of review, superior court, San Francisco; J. V. CORREY, Judge.

Section 1664, Code Civil Proc. Cal., prescribes that the notice referred to in the opinion shall be served in the same manner as a summons in a civil action, and that, upon proof of service, the court shall have jurisdiction to determine the interest of all persons in the property, and its determination shall be final and conclusive. By section 473 the court may allow a defendant upon whom the summons in an action was not personally served to answer within one year after rendering judgment. By section 1713 the provisions of part 2 of the Code, of which section 473 is a part, are made applicable to, and constitute the rules of practice in, the proceedings mentioned in the title embracing section 1664.

T. Z. Blakeman, (Edward J. Pringle and Broadhead & Haeussler, of counsel,) for petitioner.

Petitioner is entitled to one year in which to appear and move to set aside her default. Code Civil Proc. Cal. §§ 473, 1664, 1713; *Guy v. Ide*, 6 Cal. 99; *Francis v. Cox*, 33 Cal. 323; *Gracier v. Weir*, 45 Cal. 53. Unless the default is opened, and petitioner allowed to answer, she is deprived of her property without due process of law. *Davidson v. New Orleans*, 96 U. S. 97; *Murray's Lessee v. Hoboken Land Co.*, 18 How. 277; *Bank of Columbia v. Okely*, 4 Wheat. 235; *Cooley, Const. Lim.* 357; *Boorman v. Santa Barbara*, 65 Cal. 314, 4 Pac. Rep. 31; *Galpin v. Page*, 18 Wall. 368; *Wilkinson v. Leland*, 2 Pet. 659; *Hollingsworth v. Barbour*, 4 Pet. 471; *Cooley, Const. Lim.* § 107; *Pennoyer v. Neff*, 95 U. S. 714; *Belcher v. Chambers*, 53 Cal. 636; *Anderson v. Goff*, 13 Pac. Rep. 73; *Ware v. Robinson*, 9 Cal. 111.

The error complained of may be corrected on *certiorari*. *Field v. Turner*, 1 Cal. 156; *Fraser v. Freelon*, 53 Cal. 645; *Whitting v. Board of Delegates*, 14 Cal. 501; *Whitney v. Fire Dept.*, Id. 479; *Hall v. Superior Court*, 12 Pac. Rep. 672; *Baker v. Superior Court*, Id. 685; *Levy v. Superior Court*, 66 Cal. 292, 5 Pac. Rep. 353; *Boorman v. Santa Barbara*, 65 Cal. 314, 4 Pac. Rep. 31.

McAllister & Bergin, for respondent.

McFARLAND, J. This is a proceeding in *certiorari* to review an order of the respondent denying a motion of petitioner to open a default, and for leave to appear and answer, in certain proceedings pending in respondent's court in the matter of the estate of Thomas H. Blythe, deceased. After the expiration of one year from the issuing of letters of administration in said estate of Blythe, deceased, one Florence Blythe, proceeding under section 1664, Code Civil Proc., filed a petition for the purpose of ascertaining and declaring the rights of all persons to said estate. A notice was issued upon said petition in pursuance of said section, in which a large number of persons were named, but in which petitioner herein was not named. The notice was published in manner as required for the service of summons by publication, and on February 5, 1886, which was five days after the return-day of the notice, the court made an order adjudging all persons (named or not named) who had not appeared, to be in default. Thereafter, on February 25, 1886, said Florence Blythe filed her complaint as provided by said section 1664, alleging her sole heirship, but did not name petitioner herein in said complaint or in any subsequent proceedings prior to the seventh day of September, 1886. Petitioner is not a resident of, and has never been in, the state of California, and did not know and had not heard of said proceedings prior to July 14, 1886. On September 7, 1886, she filed her motion, in due form, to open the

default, and for leave to appear as an heir of said Blythe, deceased, and to answer the said complaint of said Florence Blythe, presenting at the same time her proposed answer, duly verified with affidavit of merits, etc. Her motion was denied February 15, 1887, and we are asked to annul, upon *certiorari*, the order denying this motion.

We are of opinion that the respondent had jurisdiction to make the order complained of, and that it cannot be disturbed on this proceeding. But whether the proceeding in which the ruling complained of occurred will be conclusive against petitioner at the final distribution of the estate, or whether, having had no notice and not having been made a party, she does not come within the express exception of the final clause of said section 1664, which provides that "nothing contained in this section shall be construed to exclude the right, upon final distribution of any estate, to contest the question of heirship, title, or interest in the estate so distributed, when the same *shall not have been determined* under the provisions of this section,"—these are questions which do not arise here. The prayer of the petitioner is denied, and the writ dismissed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; TEMPLE, J.; PATERSON, J.

73 Cal. 291

WARDER v. ENSLEN. (No. 11,843.)

(Supreme Court of California. August 30, 1887.)

1. MORTGAGE—ABSOLUTE DEED—REDEMPTION—ADVERSE POSSESSION.

An absolute deed was given as security for the payment of a debt, under an agreement that, whenever the grantor could sell the premises for an amount sufficient to pay the debt, the defendant would reconvey the premises, on payment of said debt. Possession was given to the grantee, who was to have the rents and profits, etc., as interest upon the debt. The premises could have been sold for enough to pay the indebtedness any time after January, 1879, but plaintiff made no attempt to do so, and made no attempt to redeem until January 22, 1885, and defendant never denied plaintiff's right to redeem prior to that date. *Held*, that defendant's possession did not become adverse until January 22, 1885.¹

2. SAME—ADVERSE POSSESSION BY MORTGAGE—REDEMPTION, WHEN BARRED.

Under Code Civil Proc. Cal. § 346, the mortgagee must have held adverse possession for five years after the breach of some condition of the mortgage, before the mortgagor's right to redeem is barred.

3. TRIAL—FINDINGS—DISCREPANCY.

If a discrepancy exists in findings of fact by the trial court, the more specific findings of particular facts must control.

Department 2. Appeal from superior court, Stanislaus county; WM. O. MINOR, Judge.

B. McKinne, Kittrell & Maddux and *Ben T. Rawlins*, for appellant. *W. L. Dudley* and *Wright & Hazen*, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment, and the contention of appellant is that the facts found by the court below are insufficient to support the judgment. It is an action to redeem a mortgage. Substantially, the court found that the plaintiff, being indebted to the defendant in the sum of \$12,440.38, for the sole purpose of securing the payment of said indebtedness, executed and delivered to defendant, August 29, 1877, an instrument in form of a deed absolute, purporting to convey the premises described in the com-

¹A deed, though absolute in form, if intended merely as security for an indebtedness, will be treated as a mortgage, *Knapp v. Bailey*, (Me.) 9 Atl. Rep. 122; *Nesbitt v. Cavender*, (S. C.) 2 S. E. Rep. 702, and note; *First Bank v. Ashmead*, (Fla.) 2 South. Rep. 657, and note; *Frey v. Campbell*, (Ky.) 3 S. W. Rep. 368, and note.

Respecting adverse possession, as between mortgagor and mortgagee, see *Bank v. Thomas*, (Ky.) 3 S. W. Rep. 12, and note.

plaint, which was made by the plaintiff, and accepted by the defendant, as security for the payment of said sum of money, and for no other purpose whatsoever. "Simultaneously with the execution and delivery of said instrument, and on the same day, to-wit, the twenty-ninth day of August, 1874, the plaintiff and the defendant made and entered into an agreement by the terms of which the defendant agreed to and with the plaintiff, that, whenever the plaintiff could sell the above-described land and premises for a sufficient sum of money, to pay the defendant the amount of the aforesaid indebtedness, to-wit, the sum of \$12,440.38, that then the defendant would, on demand, reconvey to this plaintiff the whole of said land and premises on payment to the defendant of said sum of \$12,440.38. And the plaintiff at the same time promised and agreed upon his part that, whenever he could sell said land for a sufficient sum to pay said indebtedness to the defendant, he would, on demand of said defendant, sell said land and pay said indebtedness and redeem said land. And it was then and there further mutually agreed by and between the plaintiff and the defendant, that, until the sale or redemption of the said land, the defendant should have and receive the rents and profits, use and occupation of the said land and premises, and that the same were and should be deemed equal and equivalent to any and all interest that might or could accrue upon said sum of \$12,440.38, and the defendant further agreed to pay all taxes upon, and the cost of all necessary repairs, and the insurance of the improvements on, the said premises; and the defendant, in consideration of having and receiving the use and occupation, rents and profits, of said premises, agreed that the same should be in full payment of said interest, and defendant further agreed, for a valuable consideration on the part of plaintiff, that he would pay and discharge said taxes, make said repairs, and would at all times keep said improvements fully insured. Thereupon, and in pursuance of said deed and agreement, the defendant entered upon and has since possessed the premises."

The plaintiff never afterwards made any effort to sell the land, although it would have sold for enough to pay the debt at any time after January, 1879, and the land has not been sold, and no part of the indebtedness has been paid. The defendant has never at any time demanded of plaintiff that he should sell or redeem said land. On the twenty-second day of January, 1885, the plaintiff offered to pay said sum of \$12,440.38 to defendant, on condition that he would convey said land to plaintiff, plaintiff then having said money in a bank subject to his order. Defendant waived the actual production of said money, and demanded that plaintiff exhibit evidence of the alleged indebtedness, which plaintiff refused to do, or to state whether any existed. The defendant did not enter into the possession of said premises under claim of title exclusive of other right, founding such claim upon said deed from plaintiff, but he entered into the possession under and in pursuance of said agreement, to hold the same as security for said debt, and he never, at any time prior to January 22, 1885, gave the plaintiff notice that he, defendant, claimed the land as his own, or denied the right of plaintiff to redeem the same, except so far as his (defendant's) possession under said agreement, after the said land had become salable for enough to pay said indebtedness, was notice of an adverse holding.

The court further finds the defendant has, ever since the twenty-ninth day of August, 1874, been in the exclusive possession of said land, and ever since January 1, 1879, holding the same adversely to the plaintiff under claim of title under said deed, and at all times asserted said right when called upon to disclose his claim respecting said land. And also finds plaintiff's cause of action is barred by the provisions of section 346 and of sections 319, 322, and 343, Code Civil Proc.

The findings of an adverse holding and of the bar of the statute of limitations are attacked by appellant, on the ground that the court does not find that the action is barred by the provisions of section 346, Code Civil Proc.,

which alone applies to this case. That section reads as follows: "An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after the breach of some condition of the mortgage." The contention of the appellant is that the findings show that the possession of defendant was not adverse before the twenty-second of January, 1885, and this action was commenced within a few days thereafter. The specific findings of fact certainly sustain that contention, and "if a discrepancy exist, the more specific findings of particular facts must control." *Hidden v. Jordan*, 28 Cal. 301. The specific findings show that the entry and possession of the defendant was not adverse to the plaintiff up to January 22, 1885. In *Frink v. Le Roy*, 49 Cal. 314, the defendant had entered into and held possession of the mortgaged premises under a contract not materially different from that under which the defendant entered into and held possession in this case. The court in that case said it would hardly be claimed that the plaintiff would be barred of the right to resume the possession upon payment or tender of the balance of the mortgage debt.

The possession of the defendant must be *adverse* for five years after the breach of some condition of the mortgage, in order to bar the plaintiff's right of action to redeem. We so held in *Cohen v. Mitchell*, 9 Pac. Rep. 649. Here the findings show that the possession was not adverse for any such period.

Judgment reversed and cause remanded for a new trial.

We concur: MCFARLAND, J.; THORNTON, J.

By THE COURT. In this cause we are of opinion that the judgment should be modified so as to read as follows: "The judgment is reversed, and the cause remanded to the court below, with directions to enter judgment on the findings for the plaintiff."

73 Cal. 320

MCCLAIN v. BUCK. (No. 11,671.)

(Supreme Court of California. August 31, 1887.)

FRAUDULENT CONVEYANCE—PERSONAL PROPERTY—CHANGE OF POSSESSION—RIGHTS OF CREDITORS.

By an agreement supplemental to an absolute sale of personal property by plaintiff to R., plaintiff was authorized by R., on default in payment, to retake the property. R. made default, and refused to deliver to plaintiff the property, which, since the sale, had been in the continuous possession of R. Defendant, with knowledge of these facts, caused the property to be sold under an execution against R. In an action for conversion, *held*, that under Civil Code Cal. § 3440, declaring void as to creditors certain transfers not accompanied by an actual and continued change of possession, the transfer was void, as to defendant.¹

Department 2. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

R. Clark and T. J. Mize, for appellant. A. J. Dobbins, for respondent.

THORNTON, J. This action was brought to recover damages for the conversion by defendant of certain personal property, described as "all that certain lot of printing material situated in the town of Vacaville, Solano county,

Respecting the change of possession sufficient to overcome the presumption of fraud, as against the creditors of the vendor, and when that is a question for the jury, see *Stull v. Weigle*, (Pa.) 8 Atl. Rep. 578; *Hogan v. Cowell*, (Cal.) *ante*, 780; *Dodge v. Jones*, (Mont.) *ante*, 707; *Young v. Poole*, (Cal.) 13 Pac. Rep. 492; *Cook v. Rochford*, (Cal.) 12 Pac. Rep. 568, and note.

Cal., and known and described as the 'Vacaville Reporter or Judicion newspaper material.' " At the trial it appeared that plaintiff sold the property in question, with other property, to one Raleigh Barcar, on the tenth day of October, 1884. The purchase price was \$1,250, of which \$500 was paid down, and for the balance Barcar executed to plaintiff two promissory notes, one for \$500, with interest, payable one year after date, and the other for \$250, with interest, payable 18 months after date. At the time of the sale, plaintiff executed and delivered to Barcar an absolute bill of sale, in which the consideration was recited and the property described. After the sale was made and plaintiff had gone away, but within two hours, as he testified, he "considered the thing was not safe enough," and went back and had Barcar execute a "supplementary agreement" in the following words: "It is hereby agreed that the party of the first part to the foregoing sale and agreement shall, upon default in the payment of either of the notes specified in said memorandum of sale and agreement between J. D. McClain and Raleigh Barcar, be authorized and permitted to enter upon and take possession of the printing presses, types, and stock and materials mentioned therein, to secure payment of said notes, said property being considered as pledged to secure payment of said notes." The possession of all the property sold was immediately delivered to Barcar, and he held it till the \$500 note matured. Then plaintiff demanded from him payment of the note, and not receiving the money, demanded that possession of the property be given back. This was refused. On the next day plaintiff read to defendant his contract and "explained to him its terms and asked him to assist Barcar to pay it or fix it up." Defendant said he would see about it the next day. On the next day defendant caused the property to be attached as the property of Barcar, and thereafter had it sold under execution. Plaintiff demanded the property from the officer who held it under execution, and sought by injunction and other means to prevent its sale, but failed in all his efforts.

Upon these facts plaintiff submitted his case, and thereupon, on motion of defendant, a judgment of nonsuit was entered against him. He then moved for a new trial, and now prosecutes this appeal from the order denying his motion.

The nonsuit was properly granted. If title revested in the plaintiff under his agreement with Barcar, there was no delivery of the property followed by an actual and continued change of possession. The same is true if plaintiff had, under the agreement mentioned, a right to take possession from Barcar, for the right to the possession of personal property is a thing in action, and is therefore personal property. Civil Code, § 14, sub. 3. In either view, the transfer was not valid under the statute, against defendant, a creditor, (Civil Code, § 3440,) unless accompanied by an actual and continued change of possession. The notice of plaintiff's claim which defendant had was immaterial. Buck was a creditor, while Barcar remained in possession, and, as against such creditor, the transfer was void. Civil Code, § 3440, *supra*.

The order must be affirmed. Ordered accordingly.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

73 Cal. 236

PRESCOTT v. MCNAMARA and others. (No. 12,104.)

(*Supreme Court of California.* August 27, 1887.)

1. LEVEE TAXES—PAYMENT—WARRANTS ON LEVEE FUND—COIN.

Under the California act of March 25, 1868, entitled "An act to provide for the protection of certain lands in the county of Sutter from overflow," levee taxes may be paid with either warrants drawn on the levee fund, or with money, but, when paid with money, the payment must be in gold or silver coin.

2. SAME—REGISTRY OF WARRANTS—ORDER OF PAYMENT.

Section 13 of the said act provides that the treasurer shall keep a register of warrants in the order of their presentation for payment, and, when no money is in the fund, to indorse on each warrant the date of its presentation, "and thereafter pay the same in the order of registry, as from time to time any money shall be paid over to him to the credit of the particular levee fund on which the same is drawn." *Held*, that the right to payment in order of time of presentation existed only when there was money in hand, and that the section did not qualify the right given by section 12 to use the warrants in payment of taxes without reference to the order of their registry.

Department 2. Appeal from superior court, Sutter county; PHIL. W. KEYSER, Judge.

On demurrer to complaint.

E. A. Davis and *J. H. Craddock*, for Prescott, appellant. *Stabler & Bayne* and *Sandborn & Phillips*, for McNamara and others, respondents.

McFARLAND, J. This action was brought to restrain the tax collector of levee district No. 6, of Sutter county, and the treasurer of said county, from receiving in payment of levee taxes any warrants drawn on the levee fund, except in the order of their registration. A demurrer to the complaint was sustained in the court below; and plaintiff, declining to amend, judgment went for defendant, and plaintiff appeals from the judgment.

Appellant is the holder of a number of warrants issued and registered in 1871, and he contends—*First*, that all levee taxes must be paid in gold or silver coin; and, *second*, that at least no later warrants can be received for taxes while older registered warrants remain unpaid.

The last clause of section 12 of the act under which the district was organized is as follows: "Warrants drawn on any levee district fund shall be paid out of any money in the county treasury belonging to such fund, or they may be received by the tax collector in payment of the tax authorized to be levied for the construction of levee, or other work of protection, of said district." Section 16 provides that "all taxes levied and collected by virtue of this act shall be paid in gold or silver coin of the United States." And appellant contends that, as these two sections are in conflict, section 16, being the last in numerical order, and the latest expression of the legislative will, must obtain. But that rule of construction can be resorted to only when the conflict between two laws, or two parts of laws, is so complete as to baffle all attempts to reconcile them. All parts of a statute are to be reconciled, and effect is to be given to each part, if it can be done; and here it can be easily done. The statute, *upon its face*, means that the taxes may be paid either with warrants or with money, but that *when* paid with money it must be with a particular kind of money. And this appears still more clearly when we consider the historical fact that a few years before the passage of the act in question the state adopted the policy of excluding paper money from her fiscal system.

Section 13 provides that the treasurer shall keep a register of warrants in the order of their presentation for payment, and, when there is no money in the fund, shall indorse on the warrants the date of their presentation, "and thereafter pay the same in the order of its registry, as from time to time any money shall be paid over to him to the credit of the particular levee fund on which the same is drawn." This provision deals only with the right of holders of warrants to have them paid in money, in the order of registry, when "from time to time any money" shall be in the fund. It in no way qualifies the right given by section 12 to use warrants in payment of taxes without reference to the order of their registry. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

73 Cal. 229

MOLERAN v. BENTON and another. (No. 9,220.)*(Supreme Court of California. August 31, 1887.)***1. MUNICIPAL ORDINANCE—VAN NESS ORDINANCE OF SAN FRANCISCO—CLAIMS TO REAL ESTATE—RELINQUISHMENT—POSSESSORS.**

Under the Van Ness ordinance of San Francisco, passed June 20, 1855, by which the city relinquished its claims to real estate within certain limits, to the possessors thereof on or before January 1, 1855, provided that such possession continued up to the time of the introduction of the ordinance, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process, *held*, that the proviso includes ousters before January 1, 1855, and one evicted before the ordinance took effect must recover possession by virtue of his prior possession, before his action thereon was barred by limitation, and not by virtue of any title vested in him by the ordinance.

2. LANDLORD AND TENANT—VOID LEASE—RELEASE BY TENANT—TENANTS IN COMMON—ADVERSE POSSESSION.

A lessee, holding under a void lease from a tenant in common, released to persons who had contracted to purchase the premises from the tenant in common, if they should obtain such release. *Held*, that the releasees were neither tenants at will nor on sufferance, and that a deed to them made thereafter by such tenant in common, with a *bona fide* intention to pass the title, vested in them all the grantor's right of possession, so as to constitute their possession adverse as against the other co-tenants, and give them the benefit of the Van Ness ordinance of San Francisco relinquishing the city's title in favor of possessors.

3. LIMITATION OF ACTIONS—ESTATES OF DECEDENTS—PERSONAL REPRESENTATIVES—HEIRS.

In California, the personal representatives having the exclusive right to bring suit on behalf of the estate, for the benefit of creditors, heirs, and devisees, an action barred by limitations against such representatives is also barred against the heirs, though they be under disability.

4. SAME—DISABILITY—ACCRUAL OF ACTION.

A right of action having accrued to one under no disability, who died without bringing suit, the disability of those claiming under her does not stop the running of the statute.

5. APPEAL—DECISION—SECOND AND THIRD TRIAL—LAW OF THE CASE.

Where, on the first and second trials of a cause, a lease has been introduced in evidence without objection, the decisions of such causes on appeal, where it was not questioned, do not make its validity the law of the case, so as to preclude the trial court to hold it invalid on the third trial, when it is merely introduced to show the nature of the lessee's possession.

In bank. Appeal from superior court, San Francisco; OLIVER P. EVANS, Judge.

The following is an epitome of the history of the case, and of the facts as found by the court: In 1849 Jacob Harmon and wife, Eleonora, entered into possession of a tract of land embracing the land in controversy, which consists of separate parcels lying in what is now a populous portion of the city of San Francisco, and generally known as "Woodward's Garden," "Benton's Church," and "Judson & Shepard's Acid Factory." The lands are within the boundaries of the territory described in the Van Ness ordinance. See St. 1858, p. 52 *et seq.* Harmon continued in the actual occupation thereof until the time of his death, November, 1850. Eleonora was divorced from Jacob in 1849, and by the decree was awarded an undivided half of the property. Jacob appealed from the judgment. Pending the appeal he died testate, and his executors were substituted as parties. To his son, Jacob, Jr., then five years of age, he bequeathed two undivided thirds of his property, and appointed the executors to be guardians of said Jacob, Jr. To his daughter (there were but two children) he gave the remaining one-third, when she arrived at the age of 18, if her conduct satisfied the executors, and with the proviso: "If it should so happen that her conduct should not be entirely unexceptionable, yet not lost to every sense of propriety, in that case it is my will and desire that my executors should relieve her urgent wants and necessities, but in no case to give her more than one-third of my entire property."

And if she should fail to comply with the conditions which I have imposed upon her, then and in that case I give the remaining one-third to my son, Jacob, Jr."

The decree referred to was affirmed by this court, (*Harman v. Harman*, 1 Cal. 215,) and by proceedings afterwards had in the court below the lands were sold at auction, by commissioners therefor appointed by the court, on March 28, 1851. At the sale Eleonora was the highest bidder, and upon payment to the commissioners they conveyed the land to her. The children were not made parties. Eleonora and her husband, Michael Foley,—to whom she was married November 20, 1852,—were put into possession under orders from the court, and the executors never afterwards occupied or claimed the property. An inventory, acknowledged by Foley and wife, was filed May 31, 1852, in which all of the lands in controversy are described as the separate property of Mrs. Foley. In September, 1851, Michael Comerford went into possession, under a parol agreement with Foley and wife, to cultivate the lands on shares, and remained in possession thereunder until August 16, 1852, when Foley and wife and Comerford executed an instrument in the form of a lease to said Comerford, from said sixteenth day of August, 1852, to the sixteenth day of January, 1856, at the monthly rental of \$83.75. This instrument was never acknowledged by any of the parties to it, but was recorded August 24, 1852. Comerford continued in possession under and by virtue of the lease until January 27, 1853. The court found as a fact that during this last-named period Comerford was a tenant at will of Foley and wife, both parties having treated it at the trial as void, and, if admissible at all, only to show the character of Comerford's holding. On the eighteenth day of June, 1853, Foley and wife entered into a written agreement with Brannan and others, whereby they agreed to sell to the latter all of the lands, and assigned the lease in consideration of \$6,000. Brannan & Co. paid Foley and wife \$100 in consideration of the agreement, but it was understood and agreed that the conveyance was to be only in the event that satisfactory arrangements should be made with Comerford to deliver the possession to Brannan & Co. Interviews were had with Comerford by Foley and wife and Brannan & Co., which resulted in an assignment by him of all interest which he held under the instrument which they all regarded as a valid lease; and on the termination of Comerford's tenancy, and his surrender of possession to Brannan & Co., in consideration of \$5,000, which they paid, Comerford was allowed to gather his crop then growing, which was done prior to December, 1853, and from that time until October, 1855, the court finds that said Comerford was a caretaker and bailiff in the employ of Brannan & Co.

As to those portions of the lands claimed by defendants Benton, Judson, and Woodward, however, said defendants were let into possession in 1854, under deeds from Brannan & Co. conveying them severally in fee-simple. On June 27, 1853, Brannan & Co. paid to Eleonora, personally, the balance of the \$6,000 purchase price, and in pursuance of their agreement with Brannan & Co., Foley and wife attempted to convey the lands to Brannan & Co. by deed, but the deed was not acknowledged so as to constitute it a valid conveyance by Mrs. Foley, and it is admitted that it is void. The court found that "said defendants Benton, Judson, and Woodward, ever since their entry into possession in 1854, have been severally and respectively in the actual, continuous, exclusive, and adverse possession, holding the same against all the world, of the several parcels described in their answer, claiming the same under said conveyances in good faith, and having paid a valuable consideration therefor, and as early as 1854 made and have since continued to make large and valuable improvements thereon. * * * That such possession was continued without interruption ever since, and that they held and continued during all of said time in possession of said premises without any trespass or intrusion by any person or persons whatsoever."

Kitty Foley, daughter and only surviving child of Eleonora and Michael, was born July 8, 1853. Jacob, Jr., died unmarried and intestate in October, 1859, and Eleonora, his mother, died intestate in November following. Prior to her death she married (in 1859) one James Holmes, who survived her. Mary Ann Harmon was married to Peter Roussel, and afterwards, to-wit, on May 21, 1861, said Mary Ann and Peter conveyed the lands in controversy to plaintiff in consideration of \$10, provided, however, that the undivided half of all lands which he, said plaintiff, might recover under said deed by virtue of proceedings he agreed to prosecute at his own expense, should be by him conveyed to said Mary Ann. In 1854 Eleonora and her children, Mary Ann, Jacob, and Kitty, removed to Santa Clara county, where Foley died the same year, and they did not have the actual possession any time thereafter. Plaintiff proved no other deraignment of title or right to the possession than his said deed from Mary Ann and Peter.

The court below found as conclusion of law that the defendants were the owners in fee, and gave judgment for them accordingly.

The Van Ness ordinance, herein referred to, was passed by the city council of San Francisco, June 20, 1855, and was approved and ratified by the legislature March 11, 1858. By it the city relinquished all claim to lands within certain limits, in favor of the possessors or lessors on or before January 1, 1855, excepting certain lots on the water front and others reserved for public purposes, "provided that such possession has been continued up to the time of the introduction of this ordinance in the city council, or if interrupted by an intruder or trespasser, has been or may be recovered by legal process." The ordinance further provided that its true intent was that leased property should be considered as in the possession of the landlord. Certain titles of Spanish origin, and others derived from grants prior to the incorporation of the city, were excepted from its operation.

A. L. Rhodes, for appellant. *Wilson & Wilson*, for respondents.

PATERSON, J. This action was commenced 25 years ago, and has been before this court several times on appeal. The tracts of land in controversy are of great value, and are popularly known as "Woodward's Garden," "Benton's Church," and "Judson & Shepard's Acid Factory." The property is within the exterior limits of the territory described in the Van Ness ordinance, and the principal questions involved relate to the title conferred by that ordinance, and to defendant's plea of the statute of limitations. After the second decision by this court, (43 Cal. 473,) the defendants filed in the court below an amended answer, setting up more fully the facts upon which they relied in their affirmative defense.

Inasmuch as the appellant places great reliance upon the decisions on the former appeals, it becomes necessary for us to review the matters adjudicated, and ascertain to what extent the law of the case has been established. It is said that because the lease was regarded and treated at the first and second trials, and on the former appeals, as valid by all the parties and by this court, the objection made at the last trial and on this appeal, that it is invalid because not acknowledged by Mrs. Foley, cannot be considered; that it must now be regarded as a valid lease. The fact is, as stated, that the lease was at the first and second trials regarded as valid, and creating a term for years, and was so treated by this court on appeal. 31 Cal. 30, and 43 Cal. 468. At the last trial, however, the lease was objected to, and held to be void as a lease for a term of years, but was introduced and considered in evidence, only "to show the character of Comerford's holding; to show a recognition of tenancy on the part of Comerford creating a tenancy at will, and to illustrate the possession that was taken subject to it." We do not think that the decisions upon this question on the former appeals have become the law of the case. The evidence and the purposes for which the pretended lease was introduced pre-

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sent a different question on this appeal. It is only where the evidence is the same that the doctrine contended for by appellant applies. It is doubtless true, as a general proposition, that a previous ruling of the appellate court upon a matter directly in issue, is, as to all subsequent proceedings, a final adjudication, and becomes the law of the case, from which the court ought not to depart, nor allow the parties to be relieved. But when such a ruling relates to a matter of fact, the principle can be invoked only when the fact appears again to the appellate court under the same circumstances in which it was originally considered. *Mitchell v. Davis*, 23 Cal. 881, *Trinity Co. v. McCammon*, 25 Cal. 121; *Leese v. Clark*, 20 Cal. 418; *Nieto v. Carpenter*, 21 Cal. 483. In our opinion, therefore, the court below was not bound to consider the lease as a valid lease for a term of years; and that it created simply a tenancy at will we have no doubt. *Tayl. Landl. & Ten.* §§ 19, 112.

It is further contended that the decree and sale, followed by a deed from the commissioners to Eleonora, executed March 28, 1851, were void as to the children of Jacob Harmon, deceased, because they had not been made parties to the action after the death of their father, and, therefore, that Eleonora and the children were tenants in common.

On the second appeal it was said: "The decision on the former appeal, and in *Ewald v. Corbett*, [32 Cal. 493,] would be destitute of all basis if the estate of Jacob Harmon would not descend, or could not be distributed, under the statute regulating common property;" and it was in effect decided that the commissioners' deed of March 28, 1851, was void, and the fact that the defendants and others effected their purchase from Mrs. Foley in good faith was immaterial, the papers which the parties executed having shown that the premises were a portion of the Harmon estate, in which the children of Mrs. Foley had an interest, which Mrs. Foley had not competent power to convey. Under that decision we must hold that "the undivided half of the premises, that is to say, the undivided half of the interest therein which Harmon and wife held immediately preceding his death, vested in Eleonora, either by virtue of the decree of divorce or the statute of this state providing for the distribution of the common property upon the dissolution of the community by the death of the husband, and the remaining half vested in their two children; that the right and interest in the premises, acquired or held by Harmon by virtue of his possession, conceding they were the lands of the pueblo or the city, would descend to his heirs, if not devised by him, and that the same might be distributed under the statute relating to common property." It would seem to follow, therefore, that Eleonora and the children were tenants in common at the time the lease to Comerford was delivered, (43 Cal. 476;) and that if they had been in possession of the property on January 1, 1855, and remained till June 20, 1855, they would have received the Van Ness ordinance title. The same result probably would have followed had Comerford remained in possession under the lease until June 20, 1855. If we assume this to be true, then, up to the time of the assignment by Comerford of his interest in the lease to Brannan and others, December, 1853, the rights of Mrs. Foley and the children in the premises would be fully preserved. This brings us to the inquiry—a most important one, so far as Mrs. Foley's interest is concerned, at least—as to the legal effect of Comerford's assignment to Brannan and others. By the terms of the instrument it was provided "that, whereas, T. O. Laram * * * and Samuel Brannan have become the owners, by purchase, of the within described premises; now, therefore, in consideration of the sum of five thousand dollars, to me paid, * * * I do by these presents assign, transfer, and surrender to said * * * and Brannan all my right, title, and interest in the said premises, under and by virtue of the within lease." What right, title, or interest did Comerford hold by virtue of the lease which could be transferred by him? He was a mere tenant at will, and could not assign the remainder of the term named in the lease. A ten-

ancy at will is not assignable. If a tenant at will attempt to underlet or surrender, he thereby determines his will and relinquishes the estate. *Cooper v. Adams*, 6 Cush. 90; Tayl. Landl. & Ten. §§ 62, 83. Without the consent of Mrs. Foley, Brannan and others would be merely tenants at sufferance, and liable to an action of trespass against them. *Reckhow v. Schanok*, 43 N. Y. 451.

The tenant at sufferance has merely a naked possession; stands in no privity to the landlord; is not liable for rents, unless expressly made so by statute; nor is he entitled to notice to quit. The landlord may put an end to the tenancy when he thinks proper, and may, under certain circumstances, treat the one in possession as an intruder or trespasser. *Hauchurst v. Lobree*, 38 Cal. 563; *Meirer v. Thiemann*, 15 Mo. App. 307; Tayl. Landl. & Ten. § 65. The relation of Brannan and others to the Foleys, therefore, depended upon the understanding and oral agreement of all the parties, and there is no question as to what that agreement was. The court found, and the finding is supported by evidence, that the preliminary agreement of sale under which Brannan and others were let into possession, was a mere temporary arrangement, with a view, before completion of the purchase, to securing from Comerford a termination of his tenancy; and it was not until after this was accomplished that the purchase price was paid by Brannan and others to the Foleys. There was no recognition by the Foleys of Brannan and others as tenants. The transaction was, as between the Foleys and Brannan and others, to be a sale of all right, title, and interest of the former, or the \$100 which had been paid was to be returned to the latter. The consent of Comerford was not necessary to terminate his interest in the property. The Foleys could have terminated it without his consent; and the sale by them to Brannan and others was itself a sufficient expression of their will to end the tenancy, and precludes the idea of a tenancy at will on the part of Brannan and others. *Pratt v. Farrar*, 10 Allen, 520.

If the Foleys had sold to strangers, instead of to Brannan and others, the latter would not have been entitled to a notice to quit, from the purchaser. The conveyance of the property, *ipso facto*, destroys all privity or relationship between the owners and the tenant at sufferance. *Esty v. Baker*, 50 Me. 325. The same result must follow when the sale is made to the tenant at sufferance himself, especially when, as in this case, it is expressly understood that the sale depends upon the result of negotiations on the part of the purchaser and seller to secure the surrender of all claim on the part of the tenant at will, so that the full title may vest in the purchaser. There was no relation of landlord and tenant between the Foleys and Brannan and others. Such relationship was never contemplated. The Foleys recognized Brannan and others as purchasers of the land. The parties all acted in good faith, believing that all the right, title, and possession of the Foleys had passed to their grantees. Comerford paid rent to no one after they all arrived at this understanding, but was permitted to remain on the place till the fall of that year, to gather his crop, at which time he surrendered possession to Brannan and others, who paid him \$5,000 therefor. After such surrender, the court finds that he acted as the bailiff, or care-taker, for the purchasers. The Foleys received \$6,000, the purchase price in full, from the purchasers, in June, 1853, left the premises, and never afterwards claimed any right to the same; nor has any one on their behalf ever offered to repay any money received by them. The fact that the writings which passed between the parties turned out to be void, cannot change the acts; nor can it alter the intention of the parties, verbally expressed, and that intention was that Brannan and others should have actual possession of the premises, to have and to hold the same in their own right, without interference or claim, trespass or intrusion. Such possession they took in 1854 and held until the commencement of this suit, eight years later; and, unless we are mistaken as to the effect of the attempted

assignment by Comerford to them, they received by virtue of the possession thus given to them the Van Ness ordinance title, to the extent, at least, of the interest held and controlled by Mrs. Foley, who voluntarily relinquished the premises.

The possession of Brannan and others was clearly adverse, and the statute began to run in their favor and against the executors from the time of their entry. *Packard v. Moss*, 68 Cal. 123, 8 Pac. Rep. 818; *Mulford v. Le Franc*, 26 Cal. 90; Ang. Lim. §§ 388-410.

Another and more difficult question relates to the interest which descended to the heirs of Harmon. The executors have never been discharged. When Harmon died, (in 1850,) Mary Ann and Jacob, Jr., were, respectively, seven and four years of age. Neither Mrs. Foley nor her children had possession of the premises after December 16, 1853, and this action was not commenced until June 4, 1862; and, upon the authorities construing the statutes then in force, and determining the rights of minors in property represented by executors, we must hold that there was during the period mentioned no saving of infancy. The will was duly probated. The executors took possession of the property, and retained the same until put out by the sheriff under order of the court, made in the action for divorce and division of the property. If the entry of the defendants was wrongful, the devisees of Harmon could not maintain an action, for that right existed exclusively in the executors, who in all suits for the benefit of the estate represented both the creditors and the heirs. *Cunningham v. Ashley*, 45 Cal. 493; *Halleck v. Mixer*, 16 Cal. 579. It would seem to follow, therefore, that when the executor is barred of his action, the heir is barred, although the heir or devisee be laboring under a disability. *Wilmerding v. Russ*, 33 Conn. 68. The general rule is that when a trustee is barred by the statute of limitations, the *cestui que trust* is likewise barred, even though an infant, (Hill, Trustees, 267, 403, 504,) and that the heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights with respect to the real property, but is not without a remedy by an action for damages against his executor and his sureties, or by a proper proceeding to compel him to bring suit. *Tyler v. Houghton*, 25 Cal. 29. This subject has been very carefully considered, and the decisions and statutes of this state elaborately reviewed by the circuit court and the supreme court of the United States, and the conclusion reached that, where the administrator in this state neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir be a minor at the time the action accrues to the administrator. *Meeks v. Vassault*, 3 Sawy. 214; *Meeks v. Olpherts*, 100 U. S. 564.

But it is claimed by the appellant that he is not seeking a recovery upon the title or right of possession held by Jacob Harmon in his life-time; that the only purpose of proving prior possession was to prove and identify the persons in whom the Van Ness ordinance title vested; that it is upon that title that this action is brought, and, as that title never was in Harmon or his estate, the executor could not maintain an action upon the title; and that the interruption by an intruder or trespasser, referred to in the ordinance, means an ouster between the first of January, 1855, and the twentieth of June, 1855; also that the statute did not commence to run against the Van Ness ordinance title until it vested in plaintiff's grantor, which was not until May 11, 1858. Unfortunately, however, for the appellant, all of these contentions have been disposed of adversely to him by the decisions of this court. There was no ouster during the interval referred to, and the proviso under which they claim title embraces persons evicted by intruders and trespassers, as well before the first of January, as those evicted afterwards and before the twentieth of June. The statute commenced running on the eleventh day of April, 1855, and one who was ousted by an intruder before the ordinance took effect, in order to

acquire the ordinance title, must recover possession from the intruder by virtue of his prior possession, in a suit commenced before his right of action on his prior possession is barred by the statute of limitations. He cannot recover from such intruder by virtue of any title vested in him by the ordinance. *Pickett v. Hastings*, 47 Cal. 269; *McLeran v. Benton*, 43 Cal. 467; *McManus v. O'Sullivan*, 48 Cal. 7. On the day that the statute of limitations commenced to run, April 11, 1855, Mrs. Foley was a widow, and could have maintained an action. She died in November, 1859; but, as the statute had commenced to run, it did not stop at her death because of the disability at that time of any person claiming under her. The disability must exist at the time the right of action first accrues. The statute commenced to run against the executors on the eleventh day of April, 1855. Their cause of action was, therefore, barred on the eleventh of April, 1860, and this bar operated equally against the devisees of Harmon. The finding of the court as to ownership is sufficient. *Murphy v. Bennett*, 68 Cal. 530, 9 Pac. Rep. 738.

We have examined the evidence and think that it supports the findings. There are some errors relied upon by appellant, but we find nothing prejudicial in any of them, and the judgment and order must be affirmed, except as to those parcels of land described in the stipulation of counsel, upon which an order of dismissal has been entered herein.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; MCKINSTRY, J.; TEMPLE, J.

SEARLS, C. J., not having been present at the argument, expressed no opinion.

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BROUGHTON v. VASQUEZ. (No. 11,617.)

(Supreme Court of California. September 1, 1887.)

FRAUDULENT CONVEYANCE—DEED IN CONTEMPLATION OF INSOLVENCY.

A deed of certain lots was executed and delivered as security for the payment of a note in pursuance of an oral agreement made more than four months previous. The grantor was subsequently shown to have been insolvent at the date of delivery, and was legally adjudged so within 30 days thereafter. *Held*, that the deed in question was a mortgage, and not a conveyance made in contemplation of insolvency; and, in the absence of fraud, would be treated as delivered at the time it was agreed to be made.

In bank. Appeal from superior court, Stanislaus county; C. H. MARKS, Judge of superior court, Merced county.

C. A. Stonesifer, for appellant. Schell & Bond and W. E. Turner, for respondent.

BY THE COURT. The judgment and order appealed from are affirmed, for the reasons given in the former opinion rendered by Department 2. 11 Pac. Rep. 806.

THORNTON and TEMPLE, JJ., dissenting.

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CROSS v. REID and another. (No. 12,086.)

(Supreme Court of California. August 31, 1887.)

1. PLEDGE—PLEDGE ESTOPPED TO CLAIM ADVERSELY TO PLEDGEOR.

So long as the pledgee of stock holds it as collateral security for a debt, and has a right to so hold it, he cannot assert that he holds it adversely to the pledgeor, and thus show title under the statute of limitations.

2. SAME—PLEDGE OF CORPORATE STOCK—TITLE OF PLEDGEE.

Under Civil Code Cal. § 2889, one to whom a certificate of shares of corporate stock is issued as security for a debt, does not, as against the pledgee, obtain the legal title to the stock.

3. APPEAL—RIGHT OF APPELLANT TO QUESTION JUDGMENT AS BETWEEN APPELLEES.

In an action against a corporation to recover a sum of money alleged to be due plaintiff as dividends, the company paid the amount into court to abide its decision, and two other persons, claimants of the fund, were substituted as defendants. The court rendered judgment in favor of one of the defendants, by consent of both, and ordered the money to be paid to him. *Held*, that the plaintiff, having no title himself, could not, on appeal, question the correctness of the judgment, as between the two defendants.

Commissioners' decision. Department 1.

Appeal from superior court, Nevada county; F. D. SOWARD, Judge.
Freeman, Bates & Rankin and *H. A. Reardon*, for appellant. *R. H. Taylor* and *E. H. Gaylord*, for respondent.

BELCHER, C. C. The plaintiff, as administrator of the estate of T. W. Sigourney, deceased, brought this action against the Eureka Lake & Yuba Canal Company, a corporation, to recover the sum of \$15,000 for dividends, alleged to have been declared by the company after December 1, 1878, upon 750 shares of its capital stock owned by the estate of Sigourney. The complaint was filed on the fourteenth of June, 1884, and thereafter, under the provisions of section 386 of the Code of Civil Procedure, the company paid the money into court, and James Reid and M. Zellerbach were substituted as defendants. Reid and Zellerbach filed an answer to the complaint in which they denied that on the first day of January, 1867, or at any other time, Sigourney was, or until his death continued to be, the owner of the stock; and they averred that in pursuance of a certain written agreement, made by and between Sigourney and Zellerbach, on the twenty-third day of August, 1865, the stock was deposited in the hands of John Parrott, who delivered it to Sigourney, and that Zellerbach became entitled to receive back the stock before Sigourney's death, and was thereafter entitled to receive the same from his estate, and from the plaintiff as the administrator of the estate; that subsequently, on or about the seventh day of January, 1881, Zellerbach sold, assigned, and transferred all his interest in the stock and the proceeds thereof, and all dividends accrued or to accrue thereon, to Reid, and that Reid then became and ever since has been the owner of the stock, and entitled to receive all dividends declared thereon. The plaintiff filed an answer to "that part and those allegations of the pleading filed herein by the said Reid and Zellerbach, the interpleaders, upon which they base their claim to affirmative relief, and to the funds and moneys sought to be recovered by plaintiff in this action," in which he denied each and all of the facts set up by the interpleaders.

The case was afterwards tried by the court, without a jury, and findings of fact were filed as follows: "(3) In 1866 Zellerbach deposited with one John Parrott 1,250 shares of the stock of said corporation, as security for the payment of two promissory notes made by him, Zellerbach, to said T. W. Sigourney, one note for \$40,000 and one for \$10,000. Afterwards Zellerbach deposited with said Parrott the 750 shares above mentioned, as additional security for said notes. (4) During the time said 1,250 shares and 750 shares were in the hands of Parrott, said Zellerbach voted them at the meetings of the corporation, and received to his own use all the dividends thereon. (5) On the twentieth day of April, A. D. 1881, plaintiff, as administrator of the estate of T. W. Sigourney, deceased, filed a supplemental complaint in the superior court of Nevada county, in the action commenced by said Sigourney, July 1, 1864, in the district court for said county. In said supplemental complaint the said \$40,000 and \$10,000 notes were sued on. In said action a judgment and decree was rendered, under which the 1,250 shares were sold, and realized a sum sufficient to satisfy said notes, together with all interest

thereon, and all costs of the action, and costs and expenses of sale, leaving the said 750 shares the property of Zellerbach, free and clear of any charge or incumbrance. The said Reid was not a party to said action. Zellerbach continued to be the owner of the stock until January 7, 1881. (6) On the seventh day of January, A. D. 1881, said Zellerbach assigned to said Reid the said 750 shares of stock, and also all and singular his claim and demand against the estate of T. W. Sigourney, deceased, for the said stock or the value thereof. At that date said Reid became and still is the owner of said 750 shares of stock. (7) There is no evidence to show when the dividends, amounting to said sum of \$15,000, were declared, except that they were declared since December 1, 1878. (8) The said \$15,000 is deposited and remains in this court to abide the decision of this action."

Upon these findings, judgment was entered in favor of Reid, "for the sum of \$15,000, the amount in controversy between him and the plaintiff," and directing that the said sum be paid to him out of the money deposited in court in the action. The plaintiff then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It is now claimed for the appellant that the clause, "afterwards Zellerbach deposited with Parrott the 750 shares above mentioned as additional security for said notes," found in finding 3, and the clauses, "leaving the said 750 shares, the property of Zellerbach, free and clear of any charge or incumbrance," and "Zellerbach continued to be the owner of the stock until January 7, 1881," found in finding 5, and the clause, "At that date said Reid became and still is the owner of said 750 shares of stock," found in finding 6, are not supported by, but are contrary to the evidence. This is said to be so, because—*First*, it appears from the evidence that the 750 shares were deposited to secure Sigourney for a balance due him upon a previous transaction in which Zellerbach had settled with him in greenbacks, and had agreed to pay the difference between greenbacks and gold, that difference being \$15,500; and, *second*, the plaintiff and his intestate had held the stock, claiming it adversely to Zellerbach, for a time more than sufficient to give them title to it under the statute of limitations.

As to the evidence, it is sufficient to say that there was a substantial conflict between that produced by plaintiff and defendants. The defendants' evidence fully supports the findings, and they cannot, therefore, be set aside for the reason urged. And as to the claim of title under the statute of limitations, the answer is that if the stock was in fact pledged, as the court found it to have been, then Sigourney had a right to retain it until the debt for which it was pledged was satisfied. But that debt was not fully satisfied until the judgment of this court, affirming the judgment of the lower court in *Cross, Administrator, v. Mark Zellerbach and Eureka Lake & Yuba Canal Company, Consolidated, No. 9,796*, was entered. The case is not reported, but the record here shows that the judgment of affirmance was entered on the thirtieth day of November, 1885. It is evident, therefore, that, while Sigourney held the stock as additional security for the \$40,000 and \$10,000 notes, and had a right to so hold it, he could not assert that he held it adversely, and thereby acquire a right to it under the statute.

It is also claimed that when the certificate for the 750 shares was issued to Sigourney, he became the owner of the legal title to the stock, and that that title must prevail here, this being a mere action at law. This claim cannot be maintained. Sigourney was only the pledgee of the stock, and as between him and the pledgeor the general property remained in the latter. Section 2889, Civil Code; *Dewey v. Bowman*, 8 Cal. 151; *Brewster v. Hartley*, 87 Cal. 25. And when the debt, to secure which the pledge was given, was paid, the lien was extinguished. Besides, this is not an action to recover the stock, but dividends declared upon the stock, in which the plaintiff has no interest.

The point is made that the assignment of the stock to Reid did not carry antecedently-accrued dividends, and that, as the court did not find that the dividends in question were declared subsequent to the time of that assignment, Reid was not entitled to them. There might be something in this point if Reid was seeking to recover the dividends from the plaintiff, or the estate of Sigourney. In that event the plaintiff could probably resist payment until a full and complete right to the money was established in the party claiming it. But that is not the case. Here the money is in court, and both parties are actors in seeking to obtain it. The plaintiff, as has been shown, has no interest in the money, and whether it should be paid over to Reid or Zellerbach is a matter that does not concern him. Zellerbach united with Reid in asking for the judgment rendered, and if it be conceded to be wrong, the plaintiff cannot be heard to complain of it.

Several other points are made, but they do not require special notice. The judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are confirmed.

78 Cal. 365

Ex parte MIRANDE. (No. 20,335.)

(*Supreme Court of California.* 1887.)

1. LICENSE TAX—ORDINANCE REQUIRING LICENSE FOR SHEEP RAISING—CONSTITUTIONALITY.

Under Const. Cal. art. 1, §§ 11, 12, relating to local municipal regulations and taxation, and section 25, subd. 27, of the county government act of California, passed in March, 1883, authorizing boards of supervisors, for purposes of revenue or regulation, to license all lawful businesses in the county, an ordinance of a board of supervisors of Mono county requiring every person engaged in raising, herding, grazing, or pasturing sheep in the county to procure a license, paying therefor certain sums proportioned at \$50 per thousand sheep, and providing that every person engaging in that business without a license shall be guilty of a misdemeanor punishable by fine, and if the fine is not paid, by imprisonment, is valid, whether passed for purposes of taxation or regulation.

2. SAME—SPECIAL PRIVILEGES AND IMMUNITIES.

Such ordinance, not imposing any other or greater burden on any person than on all others similarly situated, is not in violation of Const. U. S. amend. 14, or of Const. Cal. art. 1, § 21, prohibiting special privileges and immunities.

3. SAME—PROPERTY TAX AD VALOREM.

The constitutional provision in relation to uniform taxation does not prevent the imposition of a license tax upon a business, the property used in which is subject to and has paid a property tax *ad valorem*.

4. BOARD OF SUPERVISORS—PROCEEDINGS—RECESS.

There is no irregularity in the proceedings of the board of supervisors of a county, from the fact that the board took a recess as a board of supervisors from July 10th to July 19th, and, in the interim, acted as a board of equalization.

5. SAME—POWER OF ADJOURNMENT.

A board of supervisors of a county has power to adjourn from time to time until its business is completed, and the use of the word "recess" instead of "adjourn" by the clerk is unimportant.

6. HABEAS CORPUS—TO REVIEW ERRORS.

A writ of *habeas corpus* cannot be made the vehicle for determining mere errors where a conviction has been had, and the commitment thereon is in due form.

7. LICENSE TAX—COMPLAINT FOR NOT TAKING OUT LICENSE.

A complaint charging defendant with having committed a misdemeanor in the county of M. between June 25, 1887, and July 8, 1887, by willfully being engaged in, and carrying on, the business of grazing, herding, and pasturing sheep in said county, without taking out or providing a license therefor, in violation of ordinances of the board of supervisors of said county known as "Ordinance No. 18"

and "Ordinance No. 21," specifying the dates of passage and the substance of their provisions, is sufficient to give the court jurisdiction, and, the other proceedings being regular, to authorize the entry of judgment against defendant.

In bank. Application for discharge on writ of *habeas corpus* to justice's court, Bridgeport township, Mono county; FRANCIS HANSON, Justice.

Jas. E. Goodall and *W. O. Parker*, for petitioner. *Richard S. Miner*, for the People.

SEARLS, C. J. Petitioner was convicted on a charge of violating the provisions of an ordinance of the board of supervisors of the county of Mono, relating to the business of "raising, grazing, herding of sheep" in said county; which ordinance is in the following language:

"ORDINANCE NO. 18.

"The board of supervisors of the county of Mono, state of California, do ordain as follows:

"Section 1. Every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county of Mono, state of California, must annually procure a license therefor from the tax collector, and make therefor the following payment: (1) Those owning or having in their possession and under their control 5,000 sheep or more, shall constitute the first class, and must pay \$250 per annum for the first 5,000 sheep, and for every additional 1,000 sheep the sum of \$50. (2) Those owning or having in their possession and under their control 4,000 sheep, and less than 5,000, constitute the second class, and must pay \$200 per annum. (3) Those owning or having in their possession and under their control 3,000 sheep, and less than 4,000, constitute the third class, and must pay \$150 per annum. (4) Those owning or having in their possession and under their control 2,000 sheep, and less than 3,000, constitute the fourth class, and must pay \$100 per annum. (5) Those owning or having in their possession and under their control 1,500 sheep, or less than 2,000, constitute the fifth class, and must pay \$75 per annum. (6) Those owning and having in their possession and under their control 1,000 sheep, and less than 1,500, constitute the sixth class, and must pay \$50 per annum. (7) Those owning or having in their possession and under their control less than 1,000 sheep, constitute the seventh class, and must pay \$25 per annum.

"Sec. 2. Every person who shall engage in the business of raising, grazing, herding, or pasturing sheep, or be so engaged within the county of Mono, state of California, without first obtaining a license therefor, as prescribed by section 1 of this ordinance, is guilty of misdemeanor.

"Sec. 3. The tax collector shall have the collection of the license provided for by this ordinance, and it is hereby made his duty to collect the same, and he may enforce the collection, as provided by section 8360 of the Political Code of the state of California.

"Sec. 4. The county auditor shall prepare and have printed suitable blank licenses for the tax collector, to carry out the provisions of this ordinance, with blank receipts for the tax collector when sold.

"Sec. 5. The tax collector shall collect a fee of one dollar for each license sold, which shall be paid into the salary fund of the county.

"Sec. 6. All money collected for license under the provisions of this ordinance shall be paid over to the county treasurer as other moneys, and placed to the credit of the general fund of the county.

"Sec. 7. This ordinance shall take effect and be in force on and after fifteen days from its passage, and all ordinances or parts of ordinances in conflict herewith are hereby repealed."

"The above ordinance was passed by the board of supervisors of Mono county, state of California, at a regular meeting, July 19, 1886, by the fol-

lowing vote: Ayes—Geo. Watterson, H. Boone, William Davison, A. F. Hector. Nays—

GEO. WATTERSON,

"Chairman *pro tem.* of the Board of Supervisors of Mono County, State of California.

"Attest: BEN H. MILLER, Clerk."

Ordinance No. 18 was amended on the seventh day of April, 1887, as follows:

"ORDINANCE NO. 21.

"The board of supervisors of the county of Mono, state of California, do ordain as follows:

"1. Every person who commences or carries on, in the county of Mono, any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any ordinance of the board of supervisors of said county, without taking out or procuring the license prescribed by each ordinance, is guilty of a misdemeanor, and shall be punished by a fine not exceeding \$200, and unless said fine be paid shall be imprisoned in the county jail of said county until such fine be satisfied, such imprisonment not to exceed one day for each dollar of the fine. Such fines, when collected, to be paid into the county treasury for the use of the general fund of the county.

"2. This ordinance shall be published in the Bridgeport Chronicle Union, a newspaper published in said Mono county, at least two weeks, said publication to be made for the period of fifteen days after the adoption thereof, and said ordinance to take effect in fifteen days after its adoption.

"The above ordinance was passed by the board of supervisors of Mono county, state of California, at a regular meeting of said board, April 7, 1887, by the following vote: Ayes—H. Boone, L. Goodnow, William Davison, A. F. Hector, and J. A. Creaser. Noes—None.

"LLOYD GOODNOW, Chairman.

"Attest: O. H. KISTER, Clerk."

Indorsed: "Ordinance No. 21.

"Filed and recorded in Liber B, page 2, April 7, 1887.

"O. H. KISTER, Clerk."

It is objected by petitioners that ordinance No. 18 is void, because not passed at a regular meeting of the board. It appears that the board met on the sixth day of July, 1886, pursuant to its ordinance fixing the terms thereof; in accordance with the act of March 14, 1883, known as the "County Government Act." Not having finished the business pending before it, the board "took a recess" from time to time up to and including July 19th, on which last day the ordinance in question was passed. The board had power to adjourn from day to day, or from time to time, until its business was completed. *Ex parte Benninger*, 64 Cal. 291; *Ex parte Benjamin*, 65 Cal. 310, 4 Pac. Rep. 23. The fact that, in adjourning from time to time, the clerk used the term "recess" instead of "adjourn," we deem unimportant. The object of an adjournment to a given time, and of a record thereof, is to give to persons having business before the board notice of the time when they may have a hearing, as well as to retain the power of the board to act during the remainder of the term, by showing that jurisdiction so to do is still claimed. These objects are as well attained by the announcement that the board takes a recess until a specified hour or day, as by the use of the term "adjourn." Nor do we think there was any irregularity in the proceedings of the board, in the fact that when it took a recess, from, say July 10th to July 19th, as a board of supervisors, and in the interim acted as a board of equalization.

By the complaint defendant is charged with having committed a misdemeanor, in the county of Mono, between June 25, 1887, and July 8, 1887, by willfully being engaged in, and carrying on, the business of grazing, herding, and pasturing sheep in said county, without taking out or providing a

license therefor, in violation of ordinances of the board of supervisors of said county, known as "Ordinance No. 18" and "Ordinance No. 21," specifying the dates of passage and the substance of their provisions. This was sufficient to give the court jurisdiction of the subject-matter, and, upon the proceedings had in the cause, to authorize the entry of judgment as rendered against defendant, unless such ordinances are void. A writ of *habeas corpus* cannot be made the vehicle of determining mere errors, where a conviction has been had, and the commitment thereon is in due form. If the court below had no jurisdiction of the offense charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void, and the prisoner should be discharged. *Ex parte Kearney*, 55 Cal. 214.

The further contention of petitioner may be summarized as follows: Ordinances 18 and 21 are void because unreasonable, unjust, oppressive, partial, discriminating, unfair, special, in contravention of the general policy of state legislation, and violative of article 1, § 21, of the constitution of the state of California, and of the fourteenth amendment of the federal constitution.

Sections 11 and 12 of article 11 of our state constitution provide as follows:

"Sec. 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

"Sec. 12. The legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes,—but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

In *People v. Martin*, 60 Cal. 153, this court had occasion to pass upon section 12 of the present constitution, and in referring to taxes imposed for county purposes, used these words: "The power to impose such taxes for such purposes, in our opinion, no longer remains with the legislature; but the constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public municipal corporations, the power to assess and collect taxes for those purposes. The taking of the power to impose such taxes from the legislature, and vesting it in the local authorities, is but another of the many evidences, to be found in the new constitution, of the intention to bring matters of a local concern home to the people." This decision was rendered in March, 1882.

The county government act, above referred to, was enacted in March, 1883. Subdivision 27 of section 25 of said act, defining powers and duties of supervisors, reads as follows: "To license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted or carried on in such county, and all shows, exhibitions, and lawful games carried on therein; to fix the rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

In view of the judicial interpretation given to similar legislation by this court, and by the tribunals of sister states, we are unable to see wherein the ordinances under review are subject to the criticism of being unjust, excessive, oppressive, discriminating, special, unequal, and partial. Ordinance No. 18 is general, in the sense that it applies alike to every person engaged in the business of raising, grazing, herding, or pasturing sheep in the county of Mono, and the rate of the license is left entirely to the discretion and judgment of the board of supervisors. Upon this subject Judge Cooley says: "A license tax cannot be deemed unequal, because reaching one occupation only, if it is to reach all who follow that. Let it reach all of a class, either of persons or things; it matters not whether those included in it be one or many, or whether they reside in any particular locality, or are scattered all over the state." Cooley, *Tax'n*, 128. "If a revenue authority is what seems to be conferred,

the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purpose of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose." *Id.* 408. In the case of *Ex parte Frank*, 52 Cal., on page 610, this court, referring to similar objections which were made to an ordinance, said: "But an ordinance will not be pronounced invalid by the courts on either of these grounds, unless in a plain case," and adopted the rule applicable to this class of cases as stated in *St. Louis v. Weber*, 44 Mo. 547. In the case of *Cooper v. District*, 4 McArthur, 250, the same objections to a similar ordinance were discussed by the court. In that case the defendant was prosecuted for selling, as a produce dealer in the Washington market, without obtaining a license as required by an ordinance of the District of Columbia. In passing upon the objections that the ordinance was unequal, unjust, discriminating, and unreasonable, the court said: "It is not for the court to decide whether the act is wise, or whether the members of the court would have voted for it. The discretion on the subject has been committed to the district government. When power is given to a municipality to pass laws necessary or proper to carry the power into effect, the degree of their necessity or propriety should not be minutely scrutinized." *Glenn v. Baltimore*, 5 Gill. & J. 424. Also: "But by unreasonableness the courts do not simply mean that the tax must not be larger than the judges think was wise. It would be presumed to be reasonable, if laid by an authority endowed with discretion on the subject." "The objection that the license is in restraint of trade cannot avail when the power to impose it is granted." In this case the court refer to the *Railroad Cases*, 92 U. S. 612, and quote from the decision therein as follows: "Perfect equality and perfect uniformity of taxation, as regards individuals and corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system that most nearly attains this is best; but the most complete system that can be devised must be imperfect." *County v. Kennedy*, 11 Pac. Rep. 757.

We do not deem it necessary to discuss the question as to whether the license in question is imposed for revenue purposes or for the purposes of regulation, for the reason that the board possessed authority to impose it for either or for both. *Ex parte Mount*, 66 Cal. 448, 6 Pac. Rep. 78. Herding and grazing stock is, or may be, a business, and it is upon such business that the license is imposed. That the property used in any particular calling is subject to, and has paid, a property tax, *ad valorem*, as in this case, does not interdict the right to impose a license upon the business in which such property is used. The constitutional provision in relation to uniformity of taxation does not apply to prevent such license tax for such reasons. *St. Louis v. Green*, 6 Mo. App. 590; *Cooley, Tax'n*, 389, 390. We do not find that any other or greater burden is imposed upon the defendant by the ordinances in question than are imposed upon all others similarly situated, and fail to see wherein there is any violation of the fourteenth amendment to the constitution of the United States, or of section 21 of article 1 of our state constitution. The case of *County v. Cone*, *ante*, 100, is clearly distinguishable from the case at bar. There the ordinance sought to discriminate against non-residents of Lassen county, and therein was unequal and violative alike of the state and federal constitution.

Upon the whole case as presented by the record, we are of opinion that the writ should be dismissed, and the prisoner remanded.

We concur: THORNTON, J.; TEMPLE, J.; PATERSON, J.: MCFARLAND, J.; MCKINSTRY, J.

73 Cal. 376

PEOPLE v. BRYAN. (No. 11,891.)

(Supreme Court of California. September 14, 1887.)

1. PUBLIC LANDS—STATE SWAMP LANDS—DEFECTIVE APPLICATION—SUIT TO CANCEL PATENT.

The complaint in a suit to cancel a swamp-land patent, alleged that one Mack made application to purchase swamp land; that said application was approved, purchase money paid, and certificate of purchase issued to him; that he subsequently conveyed to one L. "the land described in said certificate of purchase," and that a patent was issued to L. This patent contained nothing to connect it with the application of Mack, nor was there any averment in the complaint connecting the patent with such application. *Held*, that the patent may have been issued to L. upon his own application, and the presumption was in favor of its regularity.

2. SAME—STATE MUST RETURN PURCHASE MONEY.

The state of California sought to have a land patent canceled for an innocent mistake in the procedure. *Held*, that she must offer to return the purchase money.

Commissioners' decision. Department 2.

Appeal from superior court, Shasta county; AARON BELL, Judge.

E. C. Marshall and *Jackson Hatch*, for appellants. *Edward Sweeney* and *Clay W. Taylor*, (*W. C. Belcher*, of counsel), for respondent.

HAYNE, C. This is a suit in equity to have a swamp-land patent canceled, on the ground of an alleged defect in the application filed in the surveyor general's office. Final judgment was entered for defendant upon demurrer to the complaint.

1. The complaint alleges that one Mack made an application to purchase; that said application was approved, and a certificate of location issued; that Mack paid the purchase money, and that a certificate of purchase was thereupon issued to him; that he subsequently conveyed to one Libby "the land described in said certificate of purchase," and that on September 5, 1883, a patent was issued to Libby. This patent, which is set forth in the complaint, contains nothing whatever to connect it with the application of Mack; nor is there any averment in the complaint connecting the patent with such application. For anything appearing in the complaint to the contrary, the patent may have been issued to Libby upon his own application, which may have been perfectly regular. There is a presumption in favor of the regularity of the patent, and the pleading is to be construed most strongly against the pleader. If Libby's patent was, in fact, issued on Mack's application, that fact should have been stated in the complaint.

2. It is expressly alleged that the land was open to purchase; and the good faith of the applicant is not questioned. This being the case, if the state can come into equity for the purpose of having her patent canceled for an innocent mistake in the procedure, (which is not entirely clear,) she must conform to equitable principles, and offer to return the purchase money. *U. S. v. White*, 9 Sawy. 131, 17 Fed. Rep. 561. The case of *U. S. v. Minor*, 114 U. S. 238, 5 Sup. Ct. Rep. 886, is not in conflict with this. In that case the patent was set aside for actual fraud, and the government was not required to return the purchase money, because it was forfeited under section 2662 of the Revised Statutes by the false oath of the applicant.

We think the demurrer was properly sustained, and that the judgment should be affirmed.

We concur: **BELCHER, C. C.; FOOTE, C.**

BY THE COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

73 Cal. 405

PEOPLE v. TIPTON. (No. 20,807.)

(Supreme Court of California. September 15, 1887.)

1. CRIMINAL PRACTICE—INSTRUCTION RELATING TO ANOTHER OFFENSE.

On the trial of an indictment for stealing a cow, where the prosecuting witness testified to having found on defendant's premises pieces of the hide of the missing cow and her horns and head which was skinned, the court instructed the jury that "all persons slaughtering cattle must keep the hides with the ears attached for 15 days; and all persons having such hides in their possession must exhibit the same for examination on demand being made by any person," such being the provision of Pol. Code Cal. § 3185. *Held*, that such instruction was in effect invoking against defendant the commission of another offense, and was therefore erroneous.

2. SAME—RECEIVING EVIDENCE OUT OF COURT.

Where, on the trial of an indictment for larceny in stealing a cow, horns, about which there was nothing peculiar, and which had been introduced in evidence on the general statement of a witness that they were the horns of the stolen cow, were handled and examined by one of the jurors during a recess in the court, such examination does not amount to receiving evidence out of court within the meaning of Pen. Code Cal. § 1181, subd. 2, providing that a new trial may be granted where the jury has received any evidence out of court.

3. SAME—APPEAL—ALLEGATION OF VENUE IN BILL OF EXCEPTIONS.

In a bill of exceptions, which commenced with a venue, and subsequently recited the bringing of an information against the defendants by the district attorney of S. county, (the county of the venue,) the testimony, the substance of which only was set out, was given as stating the offense to have been committed "in said county and state." *Held*, to furnish some proof of the county in which the offense was committed, and sufficient to sustain the verdict.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Z. G. Peck, H. C. Rolfe, Harris & Gregg, and Hight & Damron, for appellant. Geo. A. Johnson, Atty. Gen., for the People.

SEARLS, C. J. The defendant was charged, with one Atkins, with the crime of grand larceny, for the felonious taking and stealing of a cow, the property of one J. M. Corbett. Defendant was convicted, and appeals from the judgment and from an order denying a new trial.

It appears from the record that at the trial the prosecution offered in evidence the horns of an animal claimed by the witness to be the horns of the stolen cow, and that during a recess of the court, and in the absence of the judge and a portion of the jurors, J. V. Gilbert, one of the jurors, picked up and examined said horns, held them in his hands for some time, turned them over, and looked at them. This conduct is assigned as a cause for which a new trial should have been granted, under subdivision 2 of section 1181, Pen. Code, which provides that the court may grant a new trial "when the jury has received any evidence out of court other than that resulting from a view of the premises." The prosecuting witness had identified the horns as those of his cow, and they were in evidence as such, but there was nothing peculiar about them so far as appears, and their identification depended entirely upon the general statement by the witness that they were the horns of the cow he had lost. Under such circumstances, it is hard to discover how an examination of them by the juror amounted to evidence in the case. Evidence is that which tends to prove or disprove any matter in question, or influence the belief respecting it. Viewed by themselves, the horns proved nothing, except their existence as such, and that was not a material fact in the case. The evidence depended upon the credit to be attached to the statement of the witness that they were the horns of his cow, and that statement was not strengthened by an examination of the horns by the juror. Had the witness described the horns, and certain peculiarities possessed by them, and then presented them in support of his claim that they were the horns of his animal, it might at least be plausibly urged that comparing them with the testimony af-

forded evidence, but nothing of the kind was attempted, so far as appears from the record. We are of opinion the examination made by the juror did not amount to receiving "evidence out of court," within the meaning of the statute.

There was evidence tending to show that the larceny was committed in the county of San Bernardino. The bill of exceptions commences with the title of the cause, and proceeds as follows:

"State of California, County of San Bernardino.—ss. Be it remembered, that the above-named defendants were jointly informed against by the district attorney of San Bernardino county, state of California," etc. The bill of exceptions only purports to give the substance of the testimony of the witnesses. In detailing the testimony of J. M. Corbett, the complaining witness, the following language is used: "J. M. Corbett, the complaining witness, being first duly sworn, testified as follows: 'That on the second day of April, 1887, I was the owner and in the possession of a certain black milch cow, which on said day was stolen from Metcalf's field, where I had staked her out, in said county and state. I last saw her there about 6 o'clock in the evening of April 2d, when I milked her. I found the next morning at Tipton's slaughter-house, in said county and state, certain pieces of the cow's hide, and her horns and head which was skinned, which I identified,' " etc.

Were this a pleading, the allegation as to venue would be sufficient, and as evidence it furnishes some proof of the county in which the offense, if any, was committed. The verdict was not, therefore, for this reason contrary to evidence; and as upon other points there was ample evidence to sustain a conviction, the contention under this head needs no further consideration.

The giving of the following instruction is assigned as error: "All persons slaughtering cattle must keep the hides, with the ears attached, for fifteen days; and all persons having such hides in their possession must exhibit the same for examination, on demand being made by any person." The instruction is in the language of section 3185 of the Political Code. This section is assailed by the appellant as being in violation of section 19 of article 1 of our state constitution, which guaranties the rights of the people "in their persons, houses, papers, and effects against unreasonable seizures and searches." Treated as a police regulation, we are not prepared to say, without a more complete showing than is here presented, that the regulation is so unreasonable as to render it void. But as applied to the case at bar an equally serious question arises. There is no penalty whatever affixed to a violation of section 3185, and, if any liability can accrue from such violation, it must be established in a civil action in favor of a party injured thereby. A failure to comply with the requirements of the statute is not made a crime, or the evidence of a crime, and as it had no application to the case on trial, the instruction should not have been given. It may be claimed, however, that the instruction contained a mere enunciation of an existing law, from which the defendant was not injured. But is this true in the present case? Would not the jury be most likely to draw an inference of guilt from the fact that the hide in question was not preserved, coupled with the instruction given? The facts, so far as they appeared in reference to the disposition of the property alleged to be stolen, or any part thereof, were proper to be considered by the jury in determining the guilt or innocence of the defendant. They were evidence to be considered. The statute in question was not evidence on the point, and yet, as given, we think it was likely to be taken by the jury as an important factor in the problem of guilt or innocence.

It is a familiar doctrine of the common law that a defendant can only be convicted of the crime with which he is charged, or of a lesser crime included in such charge, and that evidence of his having committed another and distinct offense is not to be received for the purpose of rendering it probable that he is guilty of the offense charged. If he has violated every law of the

land except that involved in the charge against him, it cannot be shown to enhance the probabilities of his guilt. Yet in this case a violation of section 3185 is invoked against defendant to aid in establishing his guilt under an information for larceny. If he is guilty, it is because he committed grand larceny, and not because he violated section 3185. The judgment and order appealed from should for this cause be reversed.

There is a portion of the charge given by the court not entirely free from objection, viz., that wherein the jury are informed that circumstantial evidence is legal evidence: "Therefore, if you are satisfied beyond a reasonable doubt, by the reasoning of common sense, by which men of common sense are guided in forming their opinion as to the conduct of others, that the defendant committed the offense in manner and form," etc., "you are bound to convict," etc. Common sense is a valuable adjunct in reasoning, and in the deduction of facts from testimony, but the jury should be satisfied of the guilt of a defendant from the evidence, and the "reasoning of common sense" can never authorize a conviction in the absence of testimony. No doubt the court below intended to inform the jury, in substance, that in deducing facts from the testimony they should pursue the methods followed by men of common sense. The language used was probably a mere oversight, and, while perhaps not very material, may better be corrected.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: SHARPSTEIN, J.; McFARLAND, J.; TEMPLE, J; MCKINSTRY, J.; THORNTON, J.

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